AFFIRM; and Opinion Filed July 11, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00612-CR

NYKERION NEALON, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F15-75310-R

MEMORANDUM OPINION

Before Justices Fillmore, Whitehill, and Boatright
Opinion by Justice Boatright

Nykerion Nealon appeals the trial court's judgment convicting him of felony murder. A jury found Nealon guilty and sentenced him to thirty-eight years in prison. On appeal, Nealon challenges the sufficiency of the evidence to support his conviction. He also asserts the trial court erred by (1) admitting evidence concerning a tip received by the police, (2) excluding a statement made by one of Nealon's companions during his custodial interview, and (3) including law-of-parties instructions in the jury charge. We affirm the trial court's judgment.

BACKGROUND

Nealon and three friends—Quantarius Collins, Darrion "Black" Scott, and Desmond Onery—were in the parking lot of the Walnut Bend Apartments to "shoot a gun." An AK-47 was fired multiple times, hitting a pickup truck, the car next to the truck, a nearby fence, and a

box sitting by a dumpster.[1] One of the rounds hit a Walnut Bend resident, Al-Jumaili, in the chest, and he died shortly thereafter.

Nealon was arrested and charged with the felony murder of Al-Jumaili. At trial, Nealon claimed his friend Black was the person who shot the AK-47 at the pickup truck. The jury rejected Nealon's defense and found him guilty as charged. Nealon appeals the judgment.

SUFFICIENCY OF THE EVIDENCE

Nealon first argues that the evidence presented at trial was insufficient to prove he was the primary actor or a party to the murder of Al-Jumaili. We review the sufficiency of the evidence under the standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016). We examine 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. *Jackson*, 443 U.S. at 319. We defer to the jury's credibility and weight determinations because the jury is the exclusive judge of the witnesses' credibility and the weight to be given to their testimony. *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014). Circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt, and circumstantial evidence alone is sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Every fact and circumstance need not point directly and independently to the defendant's guilt, so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Temple v. State*, 390 S.W.3d 341, 359 (Tex. Crim. App. 2013). If the record supports conflicting, reasonable inferences, we presume the jury resolved such conflicts in favor of the

[1] The record refers to the murder weapon in several ways, including AK-type rifle, AK rifle, AK-47 rifle, AK-47, and AK. In this opinion, we refer to the gun as an AK-47.

verdict, and we defer to that determination. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016).

When reviewing the sufficiency of the evidence, the essential elements of the offense are those of a hypothetically correct jury charge: "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 v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). When the charge authorizes the jury to convict the defendant on more than one theory, as it did in this case, the verdict of guilt will be upheld if the evidence is sufficient on any theory authorized by the jury charge. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

A person commits felony murder if he commits or attempts to commit a felony other than manslaughter, and in the course of and in furtherance of the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2011). In this case, the indictment alleged two alternative predicate felonies underlying the felony murder charge: deadly conduct and criminal mischief.

A person commits felony deadly conduct if he knowingly discharges a firearm at or in the direction of one or more individuals, or at or in the direction of a habitation, building, or vehicle and is reckless as to whether the habitation, building, or vehicle is occupied. *Id*. § 22.05(b). A person commits criminal mischief if he intentionally or knowingly damages the tangible property of an owner without the owner's consent. TEX. PENAL CODE ANN. § 28.03(a)(1) (West Supp. 2016). The amount of pecuniary loss to the owner determines the degree of the offense. *Campbell v. State*, 426 S.W.3d 780, 784 (Tex. Crim. App. 2014). The offense is a state jail felony if the amount of pecuniary loss is $1,500 or more but less than $20,000. TEX. PENAL

CODE ANN. § 28.03(b)(4)(A) (West 2011). The indictment alleged that Nealon committed an act clearly dangerous to human life by shooting Al-Jumaili with a firearm, a deadly weapon, causing his death.

A person is criminally responsible as a party to an offense if it is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both. *Id*. § 7.01(a). The Texas Penal Code provides two theories of party liability. First, a person is criminally responsible as a party to an offense if "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." *Id*. § 7.02(a)(2). Second, under the conspiracy theory of party liability, 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. *Id*. § 7.02(b).

Nealon argues the evidence was insufficient to prove that he shot the gun that killed Al-Jumaili. He contends that none of the testifying witnesses identified him as the shooter, and his testimony that Black was the shooter was uncontroverted. He also argues there was no forensic evidence connecting him to the offense.

Zahraa Altaie and Omar Altaie testified that on the night in question, they were in the parking lot of the Walnut Bend Apartments with Zahraa's husband Ahmed Al-Jumaili, making a video of the snow. Omar testified that he and Al-Jumaili were standing under a tree near a pickup truck. Shortly after eleven o'clock at night, Nealon and three friends—Quantarius Collins, Darrion "Black" Scott, and Desmond Onery—walked to the Walnut Bend Apartments. Collins testified that Nealon and Black were carrying guns. Nealon had the AK-47, and Black

had a handgun. As soon as he saw Nealon hand his phone to Black and pull out his gun, Collins turned and started running toward the mailboxes. He did not see Nealon fire his gun, but within five seconds after Collins started running, he heard continuous gunshots behind him. Collins stated the shooting seemed to go on for fifteen seconds. When the shooting finally stopped, Collins looked back and saw Nealon holding his gun. Black was still holding Nealon's phone and his own handgun. Nealon, Black, Collins, and Onery ran to the back of the complex, through the gate, across a school yard, through another apartment complex, and ultimately to a friend's apartment.

Zahraa and Omar heard gunshots but did not immediately realize what they were hearing. Omar stated that he and Al-Jumaili were trying to hide behind a pickup truck when Al-Jumaili began screaming that he had been shot. The Altaies helped Al-Jumaili upstairs to their apartment and called 911. Resuscitation efforts by paramedics and doctors at the hospital were unsuccessful. Al-Jumaili died as a result of a gunshot wound to the chest.

Dallas Police Sergeant Steve Hough testified that he found a 7.62x39-caliber shell casing which is the caliber with which an AK-47 is typically chambered, under the tree where Al-Jumaili had been standing when he was shot. A nearby pickup truck was riddled with bullet holes, and its windows were blown out. A car next to the pickup truck also had bullet holes. Officers found bullet damage on a nearby fence and a box sitting by the dumpster. Crime Scene Investigator Sean Kearny testified that in searching the area, thirteen casings were recovered by cars parked near the leasing office. He was able to determine that twelve of the casings were for a 7.62x39-caliber round—nine were manufactured by HNC, and three were manufactured by Tulammo. Kearney testified that in his experience, an AK-47 fired this type of ammunition. Homicide Detective Esteban Montenegro testified that when he met with apartment personnel, a maintenance worker gave him a 7.62-caliber casing and a .40-caliber casing that he found by the

apartment fitness room. In addition, during Al-Jumaili's autopsy, a .30-caliber bullet was recovered from his left lung. The forensic examiner testified that a .30-caliber bullet is consistent with a 7.62-caliber cartridge, and both are fired by an AK-47. Laura Fleming, a Dallas Police Department firearms examiner, examined the fired 7.62x39-caliber casings recovered at the scene and testified that based on the breach face marks and firing pin impressions, all the casings had been fired from the same AK-47.

The police obtained video footage from a surveillance camera at a neighboring school, showing four individuals running from the scene. This video was released to the media in an effort to generate leads in the case. During his testimony, Collins identified the people in the video, stating that the video showed Nealon in front, followed by Black, then followed by Collins and Onery. The video showed Nealon wearing a bucket hat and carrying a rifle; Black carried a handgun.

About a week after the media aired the school surveillance video, Detective Montenegro received a tip that an individual with the nickname of "Kaca" was responsible for the shooting. With the assistance of metro-unit detectives, Montenegro learned that "Kaca" was Nealon. Montenegro recognized Nealon's name from a deadly-conduct offense report made on the same night as the Walnut Bend shooting. Nealon's girlfriend, Dequandra Nelson, called 911 at 11:48 p.m. to report shots fired. Nealon was listed on the police report as a victim because he was at Nelson's apartment, in close proximity to the Walnut Bend Apartments, when the officers arrived. Montenegro testified that Nelson's 911 call raised a red flag; he believed it was a cover call to alibi Nealon's story that he was in Nelson's apartment at the time of the shooting at Walnut Bend Apartments.

Once Nealon was identified as a suspect, Montenegro went to Nealon's home to meet with Nealon and his mother. He also met Collins who was living with Nealon and his mother.

With consent from Nealon and his mother, officers searched the home and found 7.62-caliber cartridges in Nealon's bedroom closet. Montenegro interviewed Nealon who denied any knowledge of the shooting and claimed he did not even know how to shoot a rifle. Detective Shinn interviewed Collins. Montenegro testified that he relied heavily on Collins's statements in obtaining an arrest warrant for Nealon. Nealon was arrested and charged with the felony murder of Al-Jumaili. The murder weapon was never recovered. Collins testified that as they ran from the scene, Nealon first tried to hide his gun but later gave it to someone. Nealon told Collins he got rid of the rifle because he might get into trouble for having shot the truck.

Nealon testified in his own defense. He admitted bringing an AK-47 to the Walnut Bend Apartments that evening. He admitted he intended to shoot it. And he admitted attempting to shoot the gun while standing in the parking lot of the apartment complex, surrounded by apartment buildings and tenants' vehicles. However, he claims that when he tried to shoot the gun into the air, it would not fire. According to Nealon, Black grabbed the gun away from him, stating he would show Nealon how it was done. Nealon testified that Black fired the AK-47 at the pickup truck and other vehicles. Nealon conceded that he initially lied to Montenegro because he did not want to get himself or his friends in trouble. He stated that he told the truth during his second interrogation when he told Montenegro that Black shot the rifle. Nealon acknowledged that the police found the same brand and type of ammunition in his bedroom closet. Nealon also admitted disposing of the AK-47 while fleeing from the scene of the shooting. "Attempts to conceal incriminating evidence, inconsistent statements, and implausible explanations to the police are probative of wrongful conduct and are also circumstances of guilt." *Guevara*, 152 S.W.3d at 50.

After Nealon's arrest, Detective Montenegro seized Nealon's phone and obtained a search warrant for its contents. A special agent from the Secret Service testified that he

conducted a full physical extraction of all the data from the device and was able to extract everything that had previously been deleted from the phone. At trial, Nealon admitted that after the shooting he used his phone to conduct internet research on numerous topics related to murder, including searches on how to kill someone without getting caught, how to commit the perfect crime, how to survive in prison, and how to reset a phone so all data would be deleted.

Viewing the evidence in the light most favorable to the verdict and assuming that the jury resolved the conflicts in the evidence in favor of the verdict, we conclude that a rational jury could have found beyond a reasonable doubt that Nealon fired the AK-47 in the direction of the pickup truck and was reckless as to whether the vehicle was occupied. Nealon suggests that his intended actions—carrying the gun and firing it into the air—were only misdemeanors and could not be predicates for felony murder. But according to the evidence, Nealon's AK-47 was not fired into the air; it was fired at a pickup truck and other vehicles parked in front of inhabited apartment buildings. Walnut Bend Apartments is a large apartment complex with people going in and out at all hours. There was no evidence that Nealon or his friends checked to see if any of the vehicles were occupied before firing his weapon. Dallas Police Sergeant Cynthia Arispe testified that if someone had been in the pickup truck at the time of the shooting, he would have been struck. The jury could have reasonably concluded Nealon fired his weapon at a vehicle and was reckless as to whether the vehicle was occupied. TEX. PENAL CODE ANN. § 22.05(b). Alternatively, there was sufficient evidence for the jury to find felony criminal mischief. Jose Ortiz, the owner of the pickup truck, testified that that the repair costs for the gunfire damage to his truck exceeded $5,500. *Id.* § 28.03(b)(4)(A).

We conclude the evidence was legally sufficient to support the jury's guilty verdict for the offense of felony murder against Nealon as a principal actor and do not address the evidence to support his conviction as a party for this offense. *See Anderson v. State*, 416 S.W.3d 884, 889

(Tex. Crim. App. 2013) ("When the charge authorizes the jury to convict the defendant on more than one theory, as it did in this case, the verdict of guilt will be upheld if the evidence is sufficient on any theory authorized by the jury charge."). We overrule Nealon's first issue.

ADMISSION OR EXCLUSION OF EVIDENCE

Nealon raises two evidentiary issues. In his second issue, Nealon contends the trial court abused its discretion by overruling his hearsay objection to Detective Montenegro's testimony about a non-testifying tipster who identified Nealon as the shooter. In his supplemental brief, Nealon raises a fourth issue, arguing that the trial court's erroneous exclusion of Black's recorded statement violated his constitutional due process right to present a defense.

We examine a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id*. at 83. We may not reverse the trial court's decision unless we find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree. *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008).

Admission of Hearsay Evidence

During direct examination, Detective Montenegro was questioned about his investigation of the case. He testified that about a week after the school surveillance video was released to the media, he received a tip identifying someone responsible for the shooting. Defense counsel interrupted with a hearsay objection and in response, the prosecutor argued the tipster's statement was not offered for the truth of the matter asserted but to explain the detective's state of mind and actions. The trial court overruled the hearsay objection, and Montenegro testified that the tipster told him that an individual nicknamed "Kaca" was responsible for the shooting.

The Texas Rules of Evidence prohibit the admission of hearsay evidence except as provided by statute or other rules prescribed pursuant to statutory authority. TEX. R. EVID. 802. Hearsay is a statement, other than one made by the declarant while testifying, that is offered in evidence to prove the truth of the matter asserted in the statement. TEX. R. EVID. 801(d). An extrajudicial statement is not hearsay, however, if it is offered to show *what* was said rather than for the *truth* of the matter stated. *Dinkins v. State*, 894 S.W.2d 330, 347 (Tex. Crim. App. 1995). Thus, statements offered to explain how a defendant came to be a suspect and not for the truth of the matter asserted are not hearsay. *See id.* (holding appointment book and patient application form listing appellant's name were not inadmissible hearsay because they were offered to show how the appellant became a suspect and not for the truth of the matter asserted); *see also Jones v. State*, 843 S.W.2d 487, 499 (Tex. Crim. App. 1992) (holding testimony of officer explaining how he came to suspect appellant was not objectionable as hearsay because it was offered to show why the officer got an arrest warrant for and arrested appellant). An officer may testify about anonymous or confidential tips received for the purpose of showing why the investigation focused on a particular defendant. *Davis v. State*, 169 S.W.3d 673, 676 (Tex. App.—Fort Worth 2005, no pet.).

The record shows Montenegro testified about the tip he received for the purpose of showing how the investigation came to be focused on Nealon. Montenegro explained how he determined that "Kaca" was Nealon's nickname. He also described how Nealon became the primary suspect after officers searched his home and interviewed the individuals who accompanied Nealon to the Willow Bend Apartments on the night of the shooting. We conclude the trial court did not abuse its discretion in admitting Montenegro's testimony about the tip because it was not inadmissible hearsay. We overrule Nealon's second issue.

Exclusion of Hearsay Evidence

Nealon complains that the trial court violated his constitutional due process right to present a defense by excluding a statement made by Black at the end of his custodial interview. During his investigation, Detective Montenegro conducted a video interview of Black and, as an interview tactic, told Black that Nealon had identified him as the shooter. After Montenegro concluded the interview and left the room, Black exclaimed he could not believe Nealon tried to snitch on him.[2] Nealon argues this statement was Black's admission that he was the shooter.

Black did not testify at trial; therefore, the video of his custodial interview was hearsay. At trial, the defense made an offer of proof, arguing that Black's statement was admissible for the following reasons: (1) to impeach Montenegro's testimony about the tip he received that "Kaca" was responsible for the shooting under evidence rule 806; (2) to confront Montenegro about his hearsay testimony about the tip under the Confrontation Clause of the Sixth Amendment; (3) to correct the false impression created by the tipster's statement under the Due Process Clause of the Sixth Amendment; and (4) because it was relevant to the shooter's true identity. The trial court refused to admit Black's statement.

On appeal, Nealon argues Black's statement is admissible as a statement against interest exception to the hearsay rule under evidence rule 803(24). Because Nealon did not first raise this argument with the trial court, it is not preserved for our review. *See* TEX. R. APP. P. 33.1(a) (To preserve a complaint for appellate review, a party must present it to the trial court by timely request, motion, or objection, stating the specific grounds, and obtain a ruling.).

Nealon also argues the trial court's erroneous exclusion of Black's statement violated his constitutional due process right to present a defense. The record shows that although the defense made various constitutional arguments why Black's statement should be admitted, it did not

[2] Defense counsel recited this portion of the video into the record for record purposes.

argue that exclusion of Black's statement would violate Nealon's constitutional right to present a complete defense. A complaint on appeal must comport with the complaint made at trial. *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012). Even claims of constitutional error may be waived if not properly brought to the attention of the trial court. *Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). Therefore, because Nealon did not argue at trial that the exclusion of evidence would violate his constitutional right to present a defense, he has failed to preserve this constitutional complaint for appellate review. *See Anderson v. State*, 301 S.W.3d 276, 280 (Tex. Crim. App. 2009) (right to present complete defense subject to forfeiture if not specifically urged at trial). We overrule Nealon's fourth issue.

JURY CHARGE ERROR

In his third issue, Nealon claims the trial court erred in overruling his objection to the inclusion of an instruction on the law of parties in the jury charge. The jury charge included an instruction on regular party liability and conspiracy party liability.

When addressing an allegation of jury charge error, we first determine whether error exists in the charge. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015); *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). If error exists, we then conduct a harm analysis, with the standard of review for harm being dependent on whether error was preserved for appeal. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012); *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). If error was preserved by objection, any error that is not harmless will constitute reversible error. *Ngo*, 175 S.W.3d at 743 (citing *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g)).

A trial court has a duty and responsibility to instruct the jury on the law applicable to the case. TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007). An instruction on law of the parties "may be given to the jury whenever there is sufficient evidence to support a jury verdict that the

defendant is criminally responsible under the law of parties." *Ladd v. State*, 3 S.W.3d 547, 564 (Tex. Crim. App. 1999). In determining whether the defendant participated as a party, the trial court may consider events occurring before, during, and after the commission of the offense. *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). Further, circumstantial evidence may be used to prove a defendant is a party to an offense. *Cary*, 507 S.W.3d at 758. "When the evidence is sufficient to support both primary and party theories of liability, the trial court does not err in submitting an instruction on the law of parties." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994).

We have previously discussed the evidence of Nealon's direct participation in the felony murder of Al-Jumaili and our conclusion that such evidence was sufficient to support his conviction for felony murder. We also conclude the evidence was sufficient to support Nealon's guilt under the conspiracy theory of party liability. Nealon testified he and his companions walked to the Walnut Bend Apartments intending to shoot a gun that night. Two of them were armed—Nealon carried an AK-47 and Black had a handgun. Collins's testimony placed the murder weapon in Nealon's hands immediately before and after it was fired. The AK-47 was fired, and bullets struck a pickup truck, a second vehicle, and the fence. Nealon was not merely present; he actively participated in the predicate felony that ultimately resulted in the felony murder of Al-Jumaili. TEX. PENAL CODE ANN. § 7.02(b). We conclude the trial court did not err in submitting an instruction on the conspiracy theory of law of parties.

The evidence is not sufficient to support party liability under penal code section 7.02(a). Under this theory of party liability, the State was required to show that Nealon intended to promote or assist in the commission of felony murder, not merely the predicate felonies of deadly conduct and criminal mischief. *See Nava v. State*, 415 S.W.3d 289, 299 (Tex. Crim. App. 2013) ("Combining the language of § 7.02(a)(2) with the felony murder statute, then, requires an

intent to promote or assist, not only the commission of the underlying felony and the unreasonably dangerous act, but also the result of the offense of felony murder—the death of an individual."). Because the record does not contain any evidence that Nealon or his companions intended the result of the offense of felony murder, the jury should not have been instructed on the law of parties under penal code section 7.02(a).

However, any error caused by including the instruction on the law of parties under section 7.02(a) was harmless because the evidence supported Nealon's guilt as a principal actor. *Ladd*, 3 S.W.3d at 564–65. We overrule his third issue.

CONCLUSION

Having overruled all of Nealon's issues, we affirm the trial court's judgment.

/Jason Boatright/
JASON BOATRIGHT
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

NYKERION NEALON, Appellant	On Appeal from the 265th Judicial District Court, Dallas County, Texas
No. 05-16-00612-CR V.	Trial Court Cause No. F15-75310-R.
	Opinion delivered by Justice Boatright.
THE STATE OF TEXAS, Appellee	Justices Fillmore and Whitehill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 11th day of July, 2017.