Affirmed; Opinion Filed May 30, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00817-CR

ALBERT R. MARTINEZ, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court 1
Tarrant County, Texas
Trial Court Cause No. 1454860D

MEMORANDUM OPINION

Before Justices Francis, Evans, and Boatright
Opinion by Justice Evans

Albert R. Martinez, Sr. was charged by indictment with the offense of tampering with or fabricating physical evidence with intent to impair a human corpse. A jury convicted appellant of the offense as alleged in the indictment. The trial court assessed punishment at five years' imprisonment. On appeal, appellant contends the evidence is insufficient to support the conviction, the trial court abused its discretion by barring appellant's pro bono attorney from continuing to represent him, and the trial court abused its discretion in admitting prejudicial crime scene and autopsy photos into evidence. We affirm the trial court's judgment.

BACKGROUND

On September 28, 2015, Brittany Chappell's dead body was dumped and set on fire in a field near a residential area close to Lake Arlington. Because appellant challenges the sufficiency

of the evidence, we focus on the evidence at trial that pertains to appellant's involvement in the murder and disposition of the body.

Alexandria Flores and Albert Martinez, Jr., known as "Junior," lived together with Flores's daughter in a small apartment in East Fort Worth. Appellant, who was Junior's father, also lived in the apartment but did not have a room and slept on the couch downstairs. Sometime around September 28, 2015, appellant was at the apartment when Flores and Junior returned together with an unidentified man who dropped off Chappell. Junior instructed appellant that if the man returned for Chappell, he should tell him that she had left and had gotten a ride to Irving. At some point during the events when the man did return and ask for Chappell, appellant told him she had left and gotten a ride back home to Plano.

While appellant remained downstairs, Junior, Flores, and Chappell went upstairs and got high on methamphetamine and GHB. Later, Junior killed Chappell by suffocating her. Jeremy, a friend who had come to the apartment, assisted Junior by holding Chappell down. Junior announced they would have to move the body. When Brian Thompson, a friend and neighbor, came to the apartment, Junior showed Thompson a body wrapped up in the closet and told him that he needed Thompson to help "get rid of this body," threatening to hurt Thompson's family if he refused to help. Appellant was present in the room at the time. Thompson agreed to come back that evening with his fiancée's Suburban.

Later that day, Junior and Flores wrapped Chappell's body in a rug. During the day, Junior also informed appellant that they had killed the girl they had taken upstairs. Appellant responded, "You did what you had to do." Flores's infant daughter was also dropped off at the house sometime during the day. Junior instructed appellant to take the child upstairs while they moved Chappell's body downstairs, and appellant did so.

Thompson came back that night with the Suburban around 11:30 or 12:00 and pulled it up to the back door of the apartment where the body was loaded into the vehicle. Appellant held the back door open as others carried the body out. Appellant stayed in the apartment watching the child while Junior, Jeremy, and Flores joined Thompson in the vehicle. Thompson drove to Lake Arlington and acted as lookout while Jeremy and Junior carried the corpse away from the vehicle, poured gas over it, and set it on fire. Thompson then drove everyone back to Flores's apartment where appellant was waiting.

After the burning corpse was discovered by two officers, police investigators developed Flores, Junior and Thompson as suspects in the crime. Police interviewed Flores twice. During the second interview, she told them everything that had happened and identified those involved. Appellant was also interviewed twice. He told investigators that he had seen Chappell come in with a man who had dropped her off, and admitted that when the man returned to pick her up he told him that she had left and had gotten a ride as Junior and Flores had instructed him to do. Appellant claimed to have stayed downstairs the entire time Chappell was present, and had no idea of what had occurred upstairs until Junior came down and told him that they had killed the girl because she was going to go to the police. Appellant admitted he had taken Flores's child upstairs so she and Junior could move the body, and admitted that he had stayed behind to watch the little girl after they left with the body.

Junior pleaded guilty to capital murder and received a life sentence. Flores pleaded guilty to murder and received a thirty-five year sentence. Thompson pleaded guilty to the offense of tampering with evidence and received a seven year sentence. Both Thompson and Flores testified for the State during appellant's trial.

ANALYSIS

I. Sufficiency of Evidence.

In appellant's first issue, he contends the evidence is insufficient to support the conviction. Appellant concedes that the State tried the case under the theory that appellant was a party to the tampering offense but claims that because appellant did not assist the conspirators in burning the body, he did not assist in the altering, destruction or concealing of the corpse. Appellant also claims that even if watching Flores's child and holding the door open as the conspirators carried the body out of the apartment constituted aid, there was no proof that it was done with the intent to impair its verity or availability as evidence. We disagree.

In reviewing the sufficiency of the evidence, we view all the evidence in the light most favorable to the verdict, and determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Brooks v. State,* 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). We assume the fact finder resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the trier of fact's determinations of witness credibility and the weight to be given their testimony. *Brooks,* 323 S.W.3d at 899.

Under the law of parties, a person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both. TEX. PENAL CODE ANN. § 7.01(a) (West 2011). Under section 7.02(a), a person is criminally responsible as a party 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). In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely

on actions of the defendant which show an understanding and common design to commit the offense. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994); *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986).

Under Section 37.09(d)(1) of the penal code, a person commits an offense, if, knowing that an offense has been committed, the person alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation or official proceeding related to the offense. TEX. PENAL CODE ANN. § 37.09(d)(1) (West 2016). Appellant was charged with altering, destroying or concealing a human corpse knowing that a murder had been committed.

There is no dispute that appellant knew that a murder had been committed or that the victim was dead before the body was moved and burned. There is also no dispute that appellant took Flores's child upstairs and watched her while the conspirators removed the victim's body from the apartment and then dumped it in the field and burned it. Appellant admitted that Junior specifically asked appellant to take the child upstairs because they were getting ready to take the body out. Thompson testified that he saw appellant holding open the screen door for Junior and Flores as they carried the body, hidden in a carpet, out of the house to the vehicle. Appellant also admitted that sometime afterwards, they told him that they had dumped the body and had used gasoline to burn it.

For purposes of the statute, evidence is "altered" when its location or physical state is changed. In *Carnley v. State*, the court decided that there was sufficient evidence of tampering because appellant altered the evidence by moving the car. *Carnley v. State*, 366 S.W.3d 830, 835 (Tex. App.—Fort Worth 2012, pet. ref'd). In *Ramos v. State*, the court concluded that the appellant had altered the corpse by dragging the victim around his apartment before law enforcement officers arrived. *Ramos v. State*, 351 S.W.3d 913, 914–15 (Tex. App.—Amarillo 2011, pet. ref'd). And

in *Burks v. State*, the court of criminal appeals specifically agreed with the reasoning in *Carnley* and *Ramos*, when it determined that pushing or dragging a corpse out of a car onto the street causing skin abrasions and ripped underwear was sufficient evidence to affirm a conviction under section 37.09(d)(1) of the penal code. *Burks v. State*, No. PD-0992-15, 2016 WL 6519139, at *7 (Tex. Crim. App. November 2, 2016), *rehearing granted, remand withdrawn*, 2017 WL3443982, at *1 (Tex. Crim. App. June 28, 2017) (not designated for publication).

That appellant did not know that the conspirators would ultimately burn the body is irrelevant. The evidence shows that appellant clearly knew that the victim's body was being moved from the location where Chappell had been murdered and appellant aided the conspirators by initially removing the child from the scene, holding the door open while the body, hidden in a carpet, was taken out of the house to a vehicle, and watching the child while the conspirators transported the body to another location.

Regarding evidence of appellant's intent to impair the body's availability as evidence, intent is almost always proven by circumstantial evidence and may be inferred from appellant's words and actions. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004); *Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). As noted by the State, in addition to appellant's admission that Junior told him that they intended to remove the body and asked him to take the child upstairs, and Thompson's testimony that appellant held open the screen door as the body was carried out of the house hidden in a carpet, when appellant was told by Junior that they had killed the girl, appellant responded "You did what you had to do." Further, appellant was present when Junior told Thompson that they had to move the body and threatened to hurt his family if he did not help "to get rid of the body." Appellant's intent may be inferred from the evidence of his express approval of the murder to Junior; his awareness of the conspirators' intent to move the body; his willingness to hold a door open to make it easier for them to transfer the

corpse from the apartment to the vehicle; and his willingness to stay with the young child of one of the conspirators so she could join the others in disposing the body, unencumbered with a small child. Appellant's intent can also be inferred from his statement to the investigating detective: when asked why he did not come forward and report the murder, appellant told the detective that he did it because he was trying to protect his son.

Viewing the evidence in the light most favorable to the verdict, we conclude that there is sufficient evidence that a rational jury could find beyond a reasonable doubt that appellant aided the conspirators in altering the corpse with the intent to impair its availability as evidence. We overrule appellant's first issue.

II. Removal of Pro Bono Counsel.

In appellant's second issue, he contends that the trial court abused its discretion in barring his second chair counsel, who appeared before the court pro bono, from participating in his trial. Appellant argues that removal of his pro bono counsel violated his constitutional right to counsel of choice. The State argues that an indigent defendant does not have the right to counsel of his own choosing and that pursuant to *Whitney v. State,* 396 S.W.3d 696 (Tex. App.—Fort Worth 2013, pet. ref'd) and *Trammell v. State,* 287 S.W.3d 336 (Tex. App.—Fort Worth 2009, no pet.), appellant did not have a Sixth Amendment right to simultaneous representation by both appointed and pro bono counsel. We agree with the State.

The facts pertinent to appellant's claim show that on June 21, 2016, Pia Lederman, from the County Approved Attorney Wheel was appointed to represent appellant. On April 17, 2017, the day before the jury trial began, attorney Leon Haley requested permission from the trial court to sit with attorney Lederman. The trial court granted Haley's request. When the trial commenced, Haley participated in jury selection, presented appellant's opening statement, cross-examined the State's first witness, and was present at counsel table during the direct examination of the State's

second witness, Brian Thompson, a co-conspirator in the disposal of the victim's body. Before starting her cross-examination of Thompson, Lederman notified the court that in going through the witness's prior convictions, she noticed that Haley had represented Thompson in a misdemeanor case in 2005. She noted that since 2005, Thompson had been represented by seven other attorneys in criminal cases and that she did not believe that Thompson and Haley had had any contact since 2005. Lederman also told the court that she had discussed the matter with appellant several weeks ago, and that appellant did not "have a problem" with Haley sitting with her as second chair.[1] The State argued that Haley's continued representation of appellant was a conflict of interest which could not be waived by appellant and noted that Thompson's character was at issue in the case.[2] Without further questioning or argument, the court ruled that Haley had a conflict of interest and barred him from representing appellant for the remainder of the trial. Neither Lederman nor Haley objected to the court's ruling, nor did they object to the court's statement that Lederman was the only attorney of record in the case.

The United States Supreme Court decided that the Sixth Amendment right to counsel of choice does not extend to defendants who require counsel to be appointed for them. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). Texas courts have similarly determined that an indigent defendant does not have a right to counsel of his own choosing. *See Dunn v. State,* 819 S.W.2 510, 520 (Tex. Crim. App. 1991); *Stearnes v. Clinton,* 780 S.W.2d 216, 221 (Tex. Crim. App. 1989); *Long v. State,* 137 S.W.3d 726, 735 (Tex. App.—Waco 2004, pet. ref'd); *Garner v. State,* 864 S.W.2d 92, 98 (Tex. App.—Houston [1st. Dist.] pet. ref'd). Neither the Supreme Court

[1] After the State rested, appellant was questioned by his attorney regarding his decision not to testify, and the attorney's representation and defense strategy. During that questioning, appellant stated that he wanted Haley to sit second chair and assist Lederman during the trial.

[2] *See Brink v. State*, 78 S.W.3d 478, 486 (Tex. App.—–Houston [14th Dist.] 2001, pet. ref'd) (citing Tex. Disciplinary R. Prof'l Conduct 1.05(b)(3), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 1998) (Tex. State Bar R. art. X, § 9).

nor the court of criminal appeals has, however, addressed the specific issue of whether the Sixth Amendment guarantees any right for an indigent defendant to choose co-counsel to assist counsel that has been appointed by the trial court. But, as acknowledged by appellant, the issue has been resolved adversely to appellant in both *Whitney* and *Trammell.* Both cases involved circumstances similar to that of the instant case, i.e., an indigent defendant with appointed counsel who requested that pro bono co-counsel be allowed to participate in the trial. In both cases, the court relied on the authority cited above, as well as authority holding that a defendant's Sixth Amendment rights are protected when he has effective assistance from either retained or appointed counsel. The court concluded that an appellant's Sixth Amendment rights were not violated when the trial court excluded his pro bono co-counsel from its proceedings. *Whitney,* 396 S.W.3d at 701; *Trammell,* 287 S.W.3d at 343.

Appellant argues that the Sixth Amendment right to the assistance of counsel includes the right to counsel of choice, and that once counsel is retained or appointed, the court may not arbitrarily remove the attorney over the objections of the defendant and his counsel. But appellant's authorities do not address the issue raised in this case that was resolved adversely to appellant in *Whitney* and *Trammell*. We overrule appellant's second issue.

III. Crime scene and autopsy photographs.

In appellant's third issue, appellant contends that the trial court abused its discretion in admitting photographs depicting the victim's burned body at the site where it had been dumped, autopsy photographs, and a police body cam video of the fire. Appellant argues that the probative value of the evidence was substantially outweighed by a danger of unfair prejudice because of the gruesome nature of what was depicted in the exhibits, the fact that appellant had nothing to do with the killing of the victim or the burning of the body, and the fact that there was no dispute that the victim was dead when the body was removed from house. The State argues that the issue at

trial was not simply whether the victim was dead, but whether she had been murdered and whether her corpse was altered or destroyed to impair its verity or availability was evidence in a subsequent investigation or an official proceeding related to the offense; thus, the probative weight of the evidence was not substantially outweighed by its prejudicial effect. We agree.

The admissibility of a photograph is within the sound discretion of the trial judge. *Paredes v. State,* 129 S.W.3d 530, 539 (Tex. Crim. App. 2004). Rule 403 requires that a photograph have some probative value and that its probative value not be substantially outweighed by its inflammatory nature. TEX. R. EVID. 403; *Long v. State,* 823 S.W.2d 259, 272 (Tex. Crim. App. 1991). When performing a Rule 403 analysis, the trial court must consider "the host of factors affecting probativeness . . . and balance those factors against the tendency, if any, that the photographs have to encourage resolution of material issues on an inappropriate emotional basis." *Salazar v. State*, 38 S.W.3d 141, 152 (Tex. Crim. App. 2001) (quoting *Ladd v. State*, 3 S.W.3d 548, 568 (Tex. Crim. App. 1999). These factors include: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or black-and-white, whether they are close-up, whether the body depicted is clothed or naked, the availability of other means of proof, and other circumstances unique to the individual case. *Long,* 823 S.W.2d at 272.

We review a trial judge's Rule 403 decision for an abuse of discretion and will reverse it only if the decision is outside the zone of reasonable disagreement. A photograph is generally admissible if verbal testimony about the matters depicted in the photograph is also admissible. *Paredes,* 129 S.W.3d at 539. Gruesome crime scene photographs are generally admissible under Rule 403 because they depict nothing more than the reality of the brutal crime committed. *Sonnier v. State,* 913 S.W.2d 511, 519 (Tex. Crim. App. 1995). Autopsy photographs are generally admissible unless they depict mutilation of the victim caused by the autopsy itself. *Williams v. State,* 301 S.W.3d 675, 690 (Tex. Crim. App. 2009).

The record shows that Officer Ramsel testified regarding the discovery of the body. The officer described the fire as covering an area about four-and-a-half feet by two feet and decided to stop and take care of the fire so it would not spread to the surrounding residential area. Officer Ramsel testified that the fire continued to grow in size as they approached it and that when they walked up to it, they discovered it was a burning body. Officer Ramsel described in detail the position of the body and its condition, as well as the fire around the body and on top of it. Officer Ramsel testified that while waiting for the fire department, MedStar, and other units, he took video footage of the fire and surrounding area. Exhibit 1 is the video footage of the burning body and depicts how the fire appeared to the officers. Exhibits 5 through 8 depict the victims's body after the fire had been put out at the location where it had been dumped and burned by the conspirators. Each of these crime scene photographs depict the position of the charred body from various angles in the field in which it was dumped. These exhibits show the lengths the conspirators took to remove the body from the murder scene to an area where it might not be discovered for a long time. They also show the extreme steps taken by the conspirators to dispose of the body in a way that clearly hinders any investigation into the victim's identity or cause of death. The video illustrates how the police were able to discover the body shortly after it was abandoned.

As for the autopsy photographs, Dr. Krouse, the medical examiner, testified that a victim's body being burned can make it more difficult to identify the person and more difficult to establish certain types of causes of death. He also testified regarding the steps a medical examiner takes to determine whether the person was alive at the time of burning or already deceased which included an internal exam in which they look for products of combustion in their airways where they breathe in soot, smoke and other debris. Exhibits 9 through 13 are the autopsy photographs admitted into evidence during Dr. Krouse's testimony. Exhibit 9 depicts unburnt portions of the victim's back and buttocks. Dr. Krouse testified that this showed sparing of the skin where parts of the victim's

back and buttocks touched the ground and the fire could not get to them. Exhibits 10, 12 and 13 depict tattoos on the victim's foot and ankle. Dr. Krouse testified that these tattoos gave them a start in identifying the victim by enabling them to narrow down the possibilities and then use other means such as x-rays and DNA matching to confirm identification. And lastly, Exhibit 11 depicts the charred remains of the victim's head and face. Dr. Krouse testified that while this photograph was disturbing, it showed that the victim's dentition was not well-maintained so that they would probably not be able to get dental records to use for identification. Further, he testified that the photograph also showed the oral cavity open which revealed the fact that there was nothing in the mouth or airways constituting more evidence that the victim was deceased at the time she was burned.

All the exhibits were relevant to establishing that the victim was murdered and that her corpse was altered or destroyed to impair its verity or availability as evidence in a subsequent investigation or an official proceeding related to the offense. Officer Ramsel testified about what he saw when the body was discovered. The photographs and video are nothing more than a visual depiction of that testimony. Further, in addition to the testimony from the medical examiner and investigating detective indicating how difficult identification and cause of death becomes when a body is burned, the investigating detective testified that burning a body causes investigative problems regarding the destruction of physical evidence. He also testified that moving a body away from where the person had been killed causes investigative problems in determining who the suspects are. The exhibits reinforced the testimony from the medical examiner and the investigating detective because they demonstrated how difficult it was to identify the victim, how establishing the cause of death was hindered, and the extreme steps taken to "get rid" of the victim's body. Finally, the evidence showed that appellant was present when Junior told Thompson that he intended to "get rid of" the body, and that appellant held open the back door as

others carried the body outside to the vehicle. Thus, evidence that Junior and his co-conspirators attempted to get rid of the body so as to impair its verity or availability as evidence was relevant to the issue of whether appellant aided or encouraged the offense.

The court of criminal appeals has held that Rule 403 applies only when a clear disparity exists between the degree of prejudice of the offered evidence and its probative value. *See Davis v. State,* 329 S.W.3d 798, 806 (Tex. Crim. App. 2010). While the photographs are somewhat gruesome, primarily due to the depiction of a charred body, they are no more gruesome than the facts of the circumstances surrounding the offense itself. *Sonnier,* 913 S.W.2d at 519. We conclude that the exhibits were not so prejudicial that there was a clear disparity between the degree of prejudice and their probative value. Thus, the trial court did not abuse its discretion in admitting this evidence. We overrule appellant's third issue.

CONCLUSION

We affirm the trial court's judgment.

/David Evans/
DAVID EVANS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ALBERT R. MARTINEZ, Appellant	On Appeal from the Crim. Dist. Ct 1, Tarrant County, Texas
No. 05-17-00817-CR V.	Trial Court Cause No. 1454860D.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Evans, Justices Francis and Boatright participating.

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

Judgment entered this 30th day of May, 2018.