Opinion issued November 20, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00985-CR

JASON EDWARD MCMASTER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1088336

MEMORANDUM OPINION

A jury found Jason Edward McMaster guilty of capital murder. Because the State chose not to seek the death penalty, the trial court imposed

a sentence of life imprisonment. McMaster appeals his capital murder conviction, contending that (1) the trial court erred in allowing the State to pose a hypothetical to its expert that varied from the facts actually proven in the case, (2) his trial counsel failed to preserve erroneous evidentiary rulings for appeal, and thus rendered ineffective assistance in violation of McMaster's rights under the Sixth Amendment to the United States Constitution, and (3) the evidence is not factually sufficient to sustain his conviction. Finding no error, no ineffectiveness, and no insufficiency, we affirm.

Background

One evening in December 2005, Kentrell Smith visited his cousin, Ricky Smith, at the La Quinta hotel where Smith was staying in southwest Houston, to play videogames. Kentrell Smith also expected a visit from another cousin, Corey Brown. Brown soon arrived at the hotel, accompanied by Jared Daniel, Joseph Kemp, and McMaster. The men smoked marijuana, and Daniel also had taken Ecstasy.

Both Daniel and McMaster carried handguns, a 9-millimeter, and a 10-millimeter, respectively. According to Pasadena Police Department Sergeant King, who investigated the case, a 10-millimeter handgun is an unusual weapon; he had spent nineteen years as a police officer before

encountering a crime scene where a 10-millimeter handgun was used or arresting someone in possession of one.

McMaster asked Brown to call a drug dealer so that McMaster could rob the dealer and then kill him. Brown refused to make the call. McMaster prodded Brown a few more times to make the call; each time, Brown refused. According to Smith, McMaster became increasingly aggravated during this exchange. McMaster then demanded that Brown call Ivory Harris, another one of Brown's cousins. Brown refused to make that call as well. After McMaster repeated his demand and Brown refused a second time, McMaster glared at Brown.

After about forty-five minutes, McMaster, Daniel, Brown, and Kemp left the hotel room together. Kentrell Smith and Ricky Smith stayed behind. By using cell phone company records showing the time and location of transmission towers used by McMaster's cell phone that night, the State established that McMaster left the motel at about 7:30, then moved in a southwesterly direction, eventually using a cell tower near Brown's apartment in Pasadena. McMaster reached that location about 8:30 and remained there for nearly twenty minutes, then quickly headed northward along I-45 to the Greenspoint area.

Also at 8:30, Alex Ramirez, who lived in an apartment in the same

Pasadena complex and directly across from Brown, was playing cards with some friends when he heard seven or eight gunshots coming from inside an apartment in or near Brown's apartment. Ramirez assumed that someone was shooting into the air for fun and kept playing cards.

Later that evening, Sergeant King, then a patrolman with the Pasadena Police Department, arrived at the apartment complex in response to a report of suspicious circumstances at apartment 70. King found the door to apartment 70 standing wide open. From the doorway, he could see a black male, later identified as Brown, unresponsive and lying face-down on the floor just inside the door. King called for another officer and waited for him to arrive before entering the apartment.

Once inside, the officers looked for other people in the apartment and found a black female, later identified as complainant Shelita Jones, also unresponsive, slumped against the bathroom vanity and bleeding from apparent gunshot wounds to the head. The officers confirmed that both individuals were dead and then secured the scene for the homicide investigators. Jones was 17 weeks pregnant.

Investigation of the scene revealed numerous bullet holes and ricochet marks throughout the apartment, as well as many bullets and spent shell casings, all from 9-millimeter and 10-millimeter rounds. The officers also

found a box of .38-caliber Winchester rounds in the apartment.

Autopsies of the complainants showed that Jones died from two gunshots fired within two feet of her head. Stippling on her arm indicated that she had raised it in an attempt to shield herself from the bullets. Brown also had two gunshot wounds to the head, as well as six more gunshot wounds on his lower torso, his legs, and his left hand.

Both of the bullets in Jones's head were shot from the same firearm and consistent with a .38-caliber round, as were some of the bullets recovered from Brown's body. The remaining bullets found in Brown's body and throughout the apartment, however, were from either 9-millimeter or 10-millimeter rounds. The variety of bullets at the scene indicated that the perpetrators of the murders used at least four different guns—a 9-millimeter, a 10-millimeter, and two different .38-caliber guns.

In an interview, Kentrell Smith told the police about the events leading up to the murders. Kentrell Smith also described the guns he saw McMaster and Daniel carrying in the motel before the murders.

DNA samples taken from the scene found McMaster's DNA on the outside knob to the door of the bathroom where detectives found Jones's body. The police also obtained DNA testing of several burnt marihuana cigar butts found in the apartment. Testing of most of the marihuana cigars

did not pinpoint a particular person's DNA, though neither McMaster nor Daniel could be excluded as contributors.

The investigation culminated in McMaster's arrest. Following his trial and conviction, McMaster pursues this appeal.

Discussion

Review of Evidentiary Rulings

In his first issue, McMaster contends that the trial court abused its discretion in overruling his objection to the State's hypothetical question to its DNA expert concerning the presence of McMaster's DNA on the outer doorknob of the bathroom in the complainants' apartment. We review a trial court's evidentiary rulings under an abuse-of-discretion standard. *Montgomery v. State*, 810 S.W.2d 372, 379 (Tex. Crim. App. 1990); *Roberts v. State*, 29 S.W.3d 596, 600 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd). An abuse of discretion occurs only if the trial court's ruling is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Montgomery*, 810 S.W.2d at 391; *Roberts*, 29 S.W.3d at 600.

The State asked its DNA expert,

> Q. Hypothetically Shelita Jones is hiding in the bathroom with the bathroom door closed and she's standing up by the door, trying to hold it closed. And Jason McMaster's on the other side of the door—it's a hypothetical—having done

> something to get his heart rate up, like shooting and killing somebody in the other room, just real juiced up, and he's trying to open that door, trying to get in and grinding his DNA on that doorknob when he finally forces it open . . . .

At that point, defense counsel objected "to the prosecutor's prolonged hypothetical question" on the basis that it had "gone far beyond the bounds of a hypothetical question." On appeal, McMaster complains that, in posing the hypothetical, the State assumed facts not in evidence and misled the jury into considering those erroneous assumptions as substantive evidence, adversely influencing its verdict.

In eliciting expert testimony, counsel may pose a question that calls on the expert to assume (1) facts supported by the evidence, (2) facts within the personal knowledge of the witness, (3) facts assumed from common or judicial knowledge, or (4) facts in accordance with his theory of the case. *See Pyles v. State*, 755 S.W.2d 98, 118 (Tex. Crim. App. 1988); *Barefoot v. State*, 596 S.W.2d 875, 887–88 (Tex. Crim. App. 1980), *cert. denied*, 453 U.S. 913, 101 S. Ct. 3146 (1981). Counsel may not, however, posit a question based on facts not in evidence. *Pyles*, 755 S.W.2d at 118.

After instructing the State to get to the point, the trial court overruled the objection. Heeding the court's instruction, the State rephrased its question, asking its expert,

> Q. Would you expect, under that scenario, that Jason McMaster's DNA would be the major contributor on that exterior knob to the bathroom door?
>
> A. Yes. That could account for those results.

Giving McMaster the benefit of the doubt concerning whether his objection preserved the issue he raises on appeal, we nevertheless hold that the trial court did not abuse its discretion in overruling it, particularly as rephrased. The investigators found some of Jones's hair and blood on the bathroom wall, and Jones was found dead on the bathroom floor. These facts indicate that a struggle ensued at the bathroom door before Jones was shot. McMaster asserts that the evidence does not support an inference that he was "juiced up," but rather, that Daniel was the only person who took Ecstasy that night.[1] The term "juiced up," however, may not refer to the mental condition of individuals who have ingested Ecstasy, but could also include intoxication or even just excitement. The State's hypothetical scenario in which McMaster, having killed Brown, was in an excited state

[1] McMaster also suggests that the State's hypothetical is flawed because the inner bathroom door handle did not contain Jones's fingerprints, and because, while the evidence supported a finding that McMaster had a 10-millimeter pistol that evening, none of the shell casings found at the apartment bore his fingerprints or DNA. The lack of proof of these specific points, however, does not require the conclusion that Jones did not resist her assailant's entry into the bathroom by some other means, such as by throwing her weight against the door, or that the 10-millimeter shell casings found in the apartment could not have come from McMaster's gun.

when he approached the bathroom door to kill Jones, reflects its theory of the case, and comports with reasonable inferences from the evidence.

Ineffective assistance of counsel claims

McMaster next claims that he was denied his Sixth Amendment right to counsel, contending that his counsel's failure to interpose timely and specific objections to (1) the State's hypothetical question, should we deem that issue waived, and (2) extraneous character evidence suggesting the fact McMaster was from New Orleans made him duplicitous, less sympathetic to human life, and more likely to kill if he perceived a lack of respect. Because we affirm the trial court's ruling concerning the State's hypothetical question on its merits, we necessarily reject McMaster's claim that his counsel's failure to preserve his objection to the State's hypothetical question deprived him of his Sixth Amendment rights. *See* U.S. CONST. amend. VI. We consider McMaster's second complaint of ineffective assistance under the analysis prescribed by the Supreme Court in *Strickland v. Washington*. 466 U.S. 668, 687–90, 104 S. Ct. 2052, 2063–64 (1984).

To prevail on a claim of ineffective assistance of counsel, the defendant must show that (1) his counsel's performance was deficient and (2) a reasonable probability exists that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. The

first prong of *Strickland* requires the defendant to show that counsel's performance fell below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Thus, the defendant must prove objectively, by a preponderance of the evidence, that his counsel's representation fell below professional standards. *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002). The second prong requires the defendant to show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *see also Thompson*, 9 S.W.3d at 812. "A [reviewing] court [should] indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must [also] overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. "Any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson*, 9 S.W.3d at 813 (citing *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996)). "Under normal circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and lacking in tactical or strategic

decision making as to overcome the presumption that counsel's conduct was reasonable and professional." *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Here, nothing in the record affirmatively demonstrates that defense counsel rendered ineffective assistance by failing to object to the opinion of McMaster's codefendant concerning people from New Orleans. Absent such an affirmative showing, we presume, as we must, that defense counsel, in the exercise of her reasonable professional judgment, had valid strategic reasons for deciding not to object to the testimony at issue. We therefore reject McMaster's ineffective assistance claim.

Factual sufficiency challenge

In his final issue, McMasters contends that the evidence is factually insufficient to support his capital murder conviction. In evaluating factual sufficiency, we consider all the evidence in a neutral light to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We will set the verdict aside only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot

conclude that a verdict is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson*, 204 S.W.3d at 417. Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id.* Before finding that evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.* We must also discuss the evidence that, according to the appellant, most undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

The fact-finder alone determines the weight to place on contradictory testimonial evidence because that determination depends on the fact-finder's evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). As the determiner of the credibility of the witnesses, the fact-finder may choose to believe all, some, or none of the testimony presented. *Id.* at 407 n.5. As an appellate court, we must avoid re-weighing the evidence and substituting our judgment for that of the fact-finder. *Johnson v. State*, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998); *see*

also King v. State, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000); *Wilson v. State*, 863 S.W.2d 59, 65 (Tex. Crim. App. 1993).

The trial court instructed the jurors that to find McMasters guilty of capital murder, they must find that the evidence shows beyond a reasonable doubt that McMasters intentionally or knowingly caused the deaths of Jones and Brown in the same criminal transaction by shooting them with a firearm. *See* TEX. PENAL CODE ANN. § 19.03(a)(7) (Vernon 2005). Alternatively, the trial court instructed, the jurors could find McMasters guilty of capital murder under the law of parties if they believed that McMasters intended to promote or assist in the offense and solicited, encouraged, aided, directed, or attempted to aid another person in the commission of the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 2005).

McMaster takes issue with the factual sufficiency of the evidence that (1) Detective Powell testified that he found McMaster's DNA in the apartment on the exterior doorknob of the bathroom and on a cigar butt, because no evidence indicates when it was placed there, and thus nothing places him in the apartment at the time of the murders; (2) McMaster's cell phone records place him with or near Brown after leaving the motel, and then indicate that he moved in a northerly direction to the 1960 area, but standing alone, prove no more than McMaster's physical proximity to the

complainants after he left the motel; (3) Kentrell Smith testified that he had never been to the complainants' apartment, which indicates that, despite his family connection with Brown, he was unfamiliar with the complainants' lives.

McMaster implies—incorrectly—that because neither the DNA evidence nor the cell phone records independently amount to factually sufficient evidence to support the jury's verdict, the evidence is not factually sufficient to support his conviction. Factual sufficiency does not require that each fact point directly and independently to the defendant's guilt; rather, the verdict will withstand a factual sufficiency challenge as long as the combined and cumulative force of all the circumstances permits the conclusion that the jury was rationally justified in finding the defendant guilty of each element of the crime beyond a reasonable doubt. *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993). Here, the DNA evidence, coupled with the cell phone records, provides factually sufficient support for a jury to reasonably infer that McMaster was in Brown's apartment at the time of the murders, and that McMaster used his own rare, 10-millimeter handgun as the murder weapon. *See Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App.1986) (holding circumstantial evidence sufficient for jury to infer defendant was perpetrator). Finally, we reject

McMaster's complaints about flaws and inconsistencies in Kentrell Smith's testimony because they involve his credibility and the weight to be given to his testimony, issues entrusted to the fact-finder alone. *See Cain*, 958 S.W.2d at 408–09. Consequently, we hold that the evidence is factually sufficient to support McMaster's capital murder conviction.

Conclusion

We hold that the trial did not abuse its discretion in overruling defense counsel's objection to the State's hypothetical question to its expert, and counsel's representation of McMaster in the trial court complied with constitutional safeguards. We further hold that the evidence is factually sufficient to support the jury's finding that McMaster is guilty of capital murder. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Judges Jennings, Hanks, and Bland.

Do not publish. TEX. R. APP. P. 47.2(b).