Opinion issued December 1, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00709-CR

ALONZO JOSEPH JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Case No. 1139843

MEMORANDUM OPINION

A jury convicted appellant, Alonzo Joseph Johnson, of the first degree felony offense of murder and assessed punishment at confinement for life.[1] In one

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[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 2011).

issue on appeal, appellant contends that the trial court violated the Sixth Amendment and his right to be heard by counsel when it limited closing arguments to twenty minutes.

We affirm.

Background

Around 5:30 p.m. on October 29, 2007, Misty Woods, who lived at the Beckford Place Apartments in southwest Harris County with her boyfriend Gerard Gordon, the complainant, had a conversation with appellant, whom she knew as "Zo." During this conversation, appellant told Misty to inform Gordon that "[appellant] was not playing with [Gordon]" and that "[Gordon] knows [appellant] walks around with his heater on him," referring to his gun. Appellant also said that he wanted $100 that Gordon allegedly owed to him. When Misty offered to pay him the $100, appellant informed her that her money "was no good." According to Misty, appellant then stated, "I gave him the dope; so, I want my money from him." Misty returned to her apartment and told Gordon about this conversation. Misty then left the complex to go visit her mother, but she returned several hours later at Gordon's request.

After Misty returned, someone knocked on the apartment door, and Gordon, who regularly washed cars for the residents of the complex, took his cleaning supplies downstairs. Misty testified that it was unusual for someone to ask him to

wash a car so late at night. Misty then walked downstairs to a neighbor's apartment. As she was walking back to her apartment, she heard four gunshots followed by a pause and then a fifth gunshot. Misty ran back to her apartment, looked out of her bedroom window, and saw appellant's car, a Lexus, driving slowly out of the complex followed by another Lexus. Misty recognized appellant's car by the distinctive "504" stickers on the sides and a "For Sale" sign on the back window.[2]

Misty testified that she ran downstairs to find Gordon. She first stated that the complex's security guard had already called 911, but she then stated that she arrived at the scene before anyone else. She testified that Gordon was still alive when she reached him and she asked, "Who did this to you?" Gordon weakly responded and said, "Zo."[3] Misty further testified that while she was sitting in a police car at the scene, she saw appellant return to the complex and immediately leave when he saw the police still present. She stated that she banged on the window to get the officers' attention, but they ignored her.

Rose Davis, who lived in the apartment below Gordon, also identified appellant as "Zo." Rose stated that around 10:00 p.m., she was standing in the

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[2] All of the fact witnesses testified that appellant drove a black Lexus with "504" stickers on the fenders.

[3] On cross examination, Misty acknowledged that she did not tell anyone about this statement of Gordon's until July 2008 during an interview with the district attorney's office before a prior trial setting.

stairwell of her building with Gordon and two other men when appellant drove past. Appellant walked over to the stairwell while two other men got out of his car and walked over to other buildings in the complex. Rose testified that she greeted appellant as he walked up the stairs, but he did not respond, which was unusual. Appellant looked at Gordon, whistled over the railing to the other men with him, and then walked back to his car and talked with the other men. Rose testified that she observed that appellant had a gun with him. Rose then went into her apartment, and while she was inside she heard four gunshots, a pause, and one more gunshot. Through her window, she saw appellant get into his car and drive out of the complex. According to Rose, appellant drove at a "creeping" speed, without his headlights on, and no other cars followed him.

On cross-examination, Rose admitted that the low light in the stairwell made it difficult for her to see clearly, so appellant might not have been carrying a weapon. She also testified that one of the men speaking with Gordon in the stairwell was a known drug dealer, and she did not see him after the shooting. She further stated that she was unable to identify the two other men with appellant and that a dark four-door Lexus was usually parked at the complex.

Robert Rigby, the courtesy officer at the Beckford Place Apartments, testified that he received a call from a tenant around 10:30 p.m. regarding an incident at the complex. After he verified the complaint by calling another tenant,

Rigby walked through the apartment parking lot and found Gordon lying on the ground. Rigby did not see any cars leaving the complex as he left his apartment and walked to the scene. At trial, Rigby identified appellant as "Larry Haynes," a resident of the complex.[4]

On cross-examination, Rigby testified that appellant had never introduced himself as "Larry Haynes." He also recalled seeing a dark green Lexus at the complex on occasion, in addition to appellant's black Lexus.

Derrell Davis, whose close friend Victor Uhunmwangho lived at the Beckford Place Apartments, met appellant through Victor and also knew him as "Zo." Derrell testified that he bought a gun at a pawnshop with appellant and Victor in September 2007. Derrell acknowledged that he had previously been diagnosed with "simple psychosis," and as a result he needed appellant's help in answering the questions on the firearm application that he did not understand. Derrell testified that appellant gave him the money for the gun and told him to purchase the gun in Derrell's own name. Derrell, who stated that he would receive "use immunity" for his role in this transaction if he testified truthfully at trial, admitted that he lied on the paperwork when he answered, at appellant's direction, that he was purchasing the gun for himself. Derrell testified that appellant told him

[4] Vilma Chavez, a former leasing agent at the complex, testified that Apartment 1016 was rented by a man named Larry Haynes, and she identified appellant as the man she knew as Larry Haynes.

to purchase a "fat type of Glock," and that this gun was small and had a chrome stripe.

Derrell testified that, on October 29, he was at Victor's apartment when appellant arrived between 5:30 and 6:30 p.m. Although Victor eventually left to go to his girlfriend's house, Derrell and appellant stayed at Victor's apartment. Around 8:00 p.m., Derrell borrowed appellant's car to go to the mall, and he returned to the apartment complex around 9:00 p.m. When Derrell arrived, he saw appellant speaking to a man in front of Victor's apartment. Appellant came into the apartment and told Derrell that he had been robbed and that he thought that the person to whom he had just been speaking was involved. Derrell and appellant then walked outside, and appellant said that he was going to shoot the man who robbed him. Appellant walked over to an unidentified man's apartment in the complex, and Derrell walked over to a nearby corner store. When Derrell returned, appellant was sitting on a curb and they spoke again about the robbery.

As they walked back to Victor's apartment, Derrell noticed that appellant had a pistol with him. He recognized this pistol as the one he had purchased for appellant. Appellant then told Derrell that he wanted to speak with "Curly," referring to Gordon. Appellant asked Derrell to go to Gordon's apartment and tell him that appellant and Victor both wanted their cars washed. Derrell testified that he tried to dissuade appellant from shooting Gordon because "the gun [appellant

had] was in [Derrell's] name." After Derrell knocked on Gordon's door and Gordon came downstairs, he walked about five to ten feet away as appellant talked to Gordon. Approximately six or seven minutes later, Derrell heard at least two gunshots. He testified that he looked over and saw appellant shoot Gordon.

Derrell testified that he then got into appellant's car because he was "spooked" and he wanted to get away from the scene so he would not get "framed" for the shooting. He asked appellant to take him home when appellant tried to hand him the gun. Once at home, he called Victor, and, after Victor arrived at his home with his girlfriend, he told Victor the details of the shooting. When they returned to Victor's girlfriend's apartment, Derrell decided that he wanted to go back to the scene to determine if Gordon had died and to cooperate with police. Eventually, he spoke with police officers, who put bags around his hands for a gunpowder residue test.[5] Derrell testified that he did not immediately tell the officers what he knew because they were acting rough with him.[6]

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[5] Harris County Sheriff's Department Deputy R. Gonzales, a crime scene investigator, testified that he performed the gunpowder residue tests on Derrell and Victor at approximately 3:30 a.m. William Davis, the trace evidence manager at the Harris County Medical Examiner's Office, testified that neither test indicated the presence of gunpowder residue. He also testified that the residue transfers to other surfaces easily, that any activity with the hands can transfer the residue, and that the likelihood of discovering the residue decreases significantly with the passage of time after the discharge of the weapon.

[6] Harris County Sheriff's Department Sergeant D. Holtke testified that he spoke with Derrell at the scene, and he was acting very nervous. At first, Derrell denied knowledge of the shooting and denied knowing an individual named "Zo."

On cross-examination, Derrell admitted that he had previously been in trouble for evading arrest, although he denied that he was the same person as listed on an evading arrest judgment and sentence shown to him by defense counsel. He further testified that, although he had held a gun before, he was scared of guns and it would not be true if someone at the apartment complex said that they had previously seen him with a gun. When defense counsel introduced two pictures of appellant and Derrell in which Derrell was holding a gun, Derrell testified that he was holding appellant's old gun and that he was holding it "just for the picture."

Victor Uhunmwangho admitted that he had two prior felony drug convictions. He testified that he was present for the purchase of the gun and that Derrell did not buy the gun for himself.[7] Victor stated that he could not remember what time he left to go to his girlfriend's apartment, but he testified that, although appellant and Derrell had been at his apartment earlier, they were not present when he left. He testified that he was at his girlfriend's apartment for about thirty to forty-five minutes before he received a call from Derrell. After Victor and his girlfriend picked Derrell up, they talked about the shooting. Victor testified that

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Derrell became more forthcoming after Sergeant Holtke showed him pictures recovered from Victor's apartment that displayed Derrell with Victor and appellant. Sergeant Holtke further testified that he was never rough or intimidating with Derrell.

[7] On cross-examination, Victor testified, contrary to Derrell's testimony, that he stayed outside during the purchase of the gun and, therefore, he did not help Derrell complete the application.

they went back to his girlfriend's apartment to pick up her vacuum cleaner so she could go over to his apartment and clean it, which is why they returned to the Beckford Place Apartments.

Kandis Jones, appellant's girlfriend, testified that she called appellant around 9:00 p.m. on October 29 to ask him what he wanted to eat for dinner. Later, appellant called Kandis from a different phone to ask her to unlock her apartment door. She testified that he arrived at her apartment around 10:00 p.m., and they ate dinner and watched television together. Appellant mentioned that he thought he had lost his phone, so Kandis called his number twice after 11:00 p.m. to see if he could locate his phone in his car. Kandis did not remember telling Harris County Sheriff's Department Sergeant W. Kuhlman that when she woke up on October 30, the morning after the shooting, appellant was in her bed and this was the first time she had seen him since October 27.

Harris County Sheriff's Department Deputy R. Gonzales testified that he recovered four .380 caliber automatic shell casings at the crime scene. He later searched a silver Lexus belonging to Victor and discovered no weapons, bullets, or shell casings. He also searched appellant's car and Kandis's apartment. He did not find any evidence in the vehicle. When he searched Kandis's apartment, he found a shoebox with documents in the name of Larry Haynes and documents in appellant's name stating an address at the Beckford Place Apartments. Deputy

Gonzales also found a box of Winchester .380 rounds that was missing five bullets. He testified that, although these bullets were the same caliber as the shell casings found at the crime scene, they were made by a different manufacturer.

Jill Dupre, from the Harris County Sheriff's Department firearms lab, testified that all four shell casings recovered at the scene were fired from the same weapon. After comparing and analyzing both the bullets and the shell casings, she determined that a firearm manufactured by Hi Point fired the projectiles.[8] She also testified that the shell casings recovered at the scene were copper and the Winchester rounds recovered from Kandis's apartment were brass, but she further testified that bullets made by different manufacturers can be fired from the same caliber weapon.

U.S. Marshal S. Lowenstein testified regarding appellant's cell phone records. Inspector Lowenstein stated that, although the records were in the name of "Lorenzo King," the records displayed a billing address corresponding with Kandis's apartment and matched the phone number that Kandis provided for appellant.[9] He testified that the records, by logging the particular cell tower

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[8] The trial court admitted Derrell Davis's application to purchase a firearm. This application reflects that Derrell purchased a .380 caliber pistol manufactured by Hi Point.

[9] Kandis Jones testified that she calls appellant "King," and Deputy Gonzales testified that he observed a stuffed teddy bear displaying "King" when he searched Kandis's apartment.

activated during a call, could provide a "general location" of where the phone was located when a call was made or received. Inspector Lowenstein analyzed the call activity from, and the cell towers activated by, appellant's phone number for several hours surrounding the approximate time of the shooting, and he concluded that the activated towers were consistent with appellant's being in the area of the Beckford Place Apartments at the time of the shooting. The phone records also corroborated Kandis's testimony that she called appellant around 9:00 p.m. and then twice after 11:00 p.m.

Before closing arguments began, the trial court informed the parties that they would each have twenty minutes to present their arguments. Defense counsel and the trial court then had the following exchange:

> [Defense counsel]: Twenty minutes? Is it possible that we might have a little bit longer, Your Honor?
>
> The Court: Based on the length of the testimony, remember we didn't start this till Tuesday at 10:00 o'clock and it's now 11:48. They went out at 11:35 on Thursday.

Defense counsel did not object to this limitation or request a specific amount of additional time for argument.

During her argument, defense counsel focused on attacking the credibility of the State's witnesses, particularly Derrell Davis and Misty Woods. Defense counsel also addressed the effect of the passage of time on the ability to detect

gunpowder residue and the fact that multiple witnesses testified that they saw more than one Lexus leave the apartment complex but all of them "elected not to identify" the driver of the second Lexus.

After the trial court interrupted with a three minute warning, defense counsel noted that "time is short" and reminded the jury that, although the shell casings recovered from the crime scene and the bullets found in Kandis's apartment were both .380 caliber, the former were copper and the latter were brass. Counsel urged the jury not to make the "leap" the State was suggesting—that because appellant possessed the brass bullets at Kandis's apartment, he necessarily possessed the copper bullets used to kill Gordon.

Defense counsel briefly argued that the burden of proof never shifted to the defense, and she implored the jury to hold the State to its burden. Finally, "because [she] fe[lt] like [she was] rushing," counsel briefly mentioned the cell phone records and Inspector Lowenstein's testimony that he could only provide a general range of locations for where appellant could have been when he made or received calls and that he could not pinpoint a specific location.

At the end of her argument, defense counsel did not object to the time limitation, specifically request more time, or explain why she needed more time to properly argue the case. After the jury retired for deliberations, counsel made a proffer in the presence of the court reporter of what she would have argued had she

been given more time. The record reflects that neither the trial court judge nor the prosecutors were present for this proffer. The record does not indicate whether the trial court was ever made aware of this proffer.

The jury ultimately found appellant guilty of murder and assessed his punishment at confinement for life. This appeal followed.

Improper Limitation of Closing Argument

In his sole issue, appellant contends that the trial court violated his Sixth Amendment right to effective assistance of counsel and his right to be heard by counsel under Article 1, Section 10 of the Texas Constitution when it erroneously limited defense counsel's closing argument to twenty minutes. The State contends that appellant failed to preserve this issue for appellate review because defense counsel did not object to the time limitation or request a specific amount of additional time for argument and because counsel failed to present a timely proffer to the trial court. We agree with the State.

To preserve a complaint for appellate review, the appellant must make his complaint to the trial court by a "timely request, objection, or motion that state[s] the grounds for the ruling that the complaining party [seeks] from the trial court with sufficient specificity to make the trial court aware of the complaint . . . ." TEX. R. APP. P. 33.1(a)(1)(A); *see Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009) ("To avoid forfeiting a complaint on appeal, the party must 'let the trial

judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the judge is in the proper position to do something about it.' This gives the trial judge and the opposing party an opportunity to correct the error.") (quoting *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992) and citing *Reyna v. State*, 168 S.W.3d 173, 179 (Tex. Crim. App. 2005)).

In *Barajas v. State*, the Corpus Christi Court of Appeals addressed whether the appellant properly preserved his complaint that the trial court had abused its discretion in imposing a twenty minute time limit on closing argument. 732 S.W.2d 727, 729 (Tex. App.—Corpus Christi 1987, pet. ref'd). After the State had opened, defense counsel requested thirty minutes for his argument, which the trial court denied. *Id.* Defense counsel "did not protest the time limit at the end of his argument." *Id.* Counsel made a bill of exceptions, apparently setting out the topics that he would have discussed if he had received more time to argue, but this bill was "not presented to the court at trial." *Id.* The Corpus Christi court thus concluded that Barajas had "failed to preserve any error in connection with the time limitation for closing argument." *Id.*; *see also Dang v. State*, 154 S.W.3d 616, 621 (Tex. Crim. App. 2005) (noting that some courts had considered whether defense counsel objected and "listed the issues that would be covered if given more time" as factors in determining whether trial court abused its discretion in limiting

argument and then stating that "some [factors] may be more appropriate to considering whether a defendant has preserved the complaint for review"); *Madry v. State*, 200 S.W.3d 766, 773 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (holding, even though defense counsel specifically objected to five-minute argument limitation and requested ten minutes, that appellant failed to preserve complaint regarding time limit for appellate review because defense counsel never informed trial court of what topics he would have addressed if given more time).

Here, before the State began its argument, the trial court informed the parties that they would each have twenty minutes for argument. Defense counsel then asked, "Is it possible that we might have a little bit longer, Your Honor?" Counsel did not propose a specific length of time for argument as an alternative. The trial court responded, "Based on the length of the testimony, remember we didn't start this till Tuesday at 10:00 o'clock and it's now 11:48 [on Thursday]. They went out at 11:35 on Thursday." Appellant's counsel did not make any further comment and did not specifically object to the time limitation.

After the trial court interrupted her argument with a three-minute warning, defense counsel noted that her "time is short." She also prefaced her brief remarks about Inspector Lowenstein's testimony, which was the last topic that she discussed, with the statement, "One other sidebar note, because I feel like I'm rushing . . . ." At the end of her argument, counsel did not object to the time

limitation; she did not request additional time; she did not explain to the trial court why she needed additional time; and she did not immediately inform the trial court of the topics that she was unable to discuss due to the time limitation. After the jury had already retired for deliberations, defense counsel made a proffer to the court reporter concerning the topics that she would have discussed had she been given more time to argue; however, the record explicitly states that this proffer was made outside of the presence of the trial court judge. The record does not indicate that the trial court was ever made aware of the contents of this proffer.

Because defense counsel failed to specifically object to the time limitation imposed by the trial court, to request a specific amount of time needed for argument, to explain why counsel needed additional time for argument, and to make a timely proffer before the trial court, we conclude that appellant failed to preserve for appellate review his complaint that the trial court abused its discretion by limiting closing arguments to twenty minutes. *See Barajas*, 732 S.W.2d at 729; *see also Pena*, 285 S.W.3d at 464 (noting that, to preserve error, appellant must let trial court know specifically what he wants at time when trial court "is in the proper position to do something about" complaint).

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do Not Publish. TEX. R. APP. P. 47.2(b).