Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00420-CR

AMALINH PHUTHAVONG, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Case No. 1471872

MEMORANDUM OPINION

A jury convicted Amalinh Phuthavong of capital murder and the trial court sentenced him to life in prison. Phuthavong appeals, arguing that his counsel was ineffective, the trial court abused its discretion in admitting evidence, and the trial court erred in denying a jury instruction.

We affirm.

Background

This case concerns the murder of Kris "Jimmy" Maneerut and the kidnapping or attempted kidnapping of his girlfriend, Sarah "Cassie" Nelson.

The facts began with a drug deal; they culminated with a murder and kidnapping or attempted kidnapping on May 7, 2015. In the weeks leading up to May 7, 2015, Nelson helped arrange a drug deal for two groups of drug dealers. As part of the deal, Nelson and her acquaintance, Enrique "Lucky" Clark, agreed to supply marijuana to Lindapone "Linda" Paranphrasa for $70,000. Instead of delivering the drugs, Lucky stole $70,000 from Linda and left with the money and drugs. Linda and others blamed Nelson and demanded that she settle the $70,000 debt with them.

While Linda and her associates searched for the money and drugs, they held Nelson at Linda's house. Ryan Overton, Nelson's landlord (Nelson lived in his garage apartment), testified that he received text messages from Nelson, beginning on May 2, 2015, stating that she was "being held hostage" over a "huge deal gone bad." Syla "Monk" Sengchareum testified that he saw Nelson and Phuthavong at the same address that Nelson provided her landlord.

Eventually, Nelson agreed to turn over a boat belonging to her father to settle the debt. She told her landlord that she would be free to leave after she gave up her boat. Consistent with that assertion, on May 5, 2015, Overton saw Nelson and her

boyfriend Maneerut back in the garage apartment. Monk also testified that Linda released Nelson.

Soon thereafter, Linda began looking for Nelson because there was a problem with the boat. In particular, an issue with the paperwork (and title) for the boat prevented the group from selling it.

Several people testified that Phuthavong, Linda, and her associates were looking for Nelson in the days before Maneerut was shot. Nelson's landlord testified that he encountered a group looking for Nelson on May 6, 2015. He woke up from an afternoon nap because his dog was barking. He went outside and saw three people near the stairs to the garage apartment. He spoke with them, and they asked where Nelson was and said she owed them money. They took Nelson and Maneerut's plasma TV.[1]

Maneerut's mother also testified that Phuthavong had been looking for Nelson. She testified that on the day before her son was killed, three men and a woman came to her house looking for Nelson and Maneerut. In court, Maneerut's mother identified Phuthavong as one of those individuals.

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[1] The landlord admitted on cross-examination that he did not disclose this information to the detective who interviewed him on the night that Maneerut died. But he explained that one of the three men had a gun, and when the detective told him that Maneerut had been killed, he was scared for his own life.

While Linda and her associates looked for Nelson, Nelson and Maneerut went to stay with Frank Garza. According to Garza, on the day before Maneerut was killed, Monk asked him about Nelson's whereabouts. Monk asked him again on the morning of the shooting. That morning, Monk phoned Garza and discussed selling Garza drugs. Monk asked if Nelson was at his house, and Garza confirmed that she was.

On May 7, 2015, Monk arrived at Garza's house, and Garza walked to Monk's car, while Maneerut and Nelson remained inside. Monk offered Garza marijuana. While Garza smoked the marijuana in the car, a Lexus SUV arrived. Linda drove it and two men accompanied her.

Both Garza and Monk testified that two men got out of the SUV, went to the back hatch of the vehicle, and then moved toward Garza's house. Monk testified that the two men were Phuthavong and Santhy Inthalangsy and that they gestured toward their waistbands and entered the front gate. The front door was obstructed by bushes so neither Monk nor Garza could see the two men after they passed the gate.

Garza testified that he did not know the men who got out of the SUV. But he trusted Monk, who said they just wanted to talk to Nelson.

Garza and Monk heard a loud noise and saw the two men return to the car with Nelson in between them. Nelson was not wearing shoes. Garza testified that Nelson seemed nonchalant or in shock. Monk testified that Nelson looked "a little

bit shaken up." The SUV left with Nelson in the middle of the back seat between the two men. As the car drove away, it stopped by Monk's car, and Garza saw Nelson, who did not look upset. Garza got out of Monk's car, and Monk left.

When Garza went back inside his home, he found Maneerut shot in the head and bleeding. Distraught, Garza called 911 for help. Maneerut died later that day. The next day, Nelson was found dead with multiple gunshot wounds.

In addition to hearing this information, the jury heard from the detectives who investigated the case, the medical examiner, DNA analyst, and Nelson's father. Phuthavong's counsel called its own DNA consultant, the detective, and Enrique "Lucky" Clark.

Ultimately, the jury found Phuthavong guilty of capital murder—of shooting and killing Maneerut while kidnapping or attempting to kidnap Nelson. This appeal followed.

Analysis

On appeal, Phuthavong raises three arguments: (A) his counsel was ineffective, (B) the trial court abused its discretion in admitting evidence, and (C) the trial court erred in denying a jury instruction. We address each in turn.

A. Ineffective Assistance

In his first three issues, Phuthavong argues that his trial counsel was ineffective because counsel failed to object to (1) a written statement on a photo

array; (2) questions to Detective M. Jones about the shooter; and (3) text messages between Sarah Nelson and her landlord Ryan Overton.

1. Standard of Review

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 205, 2064, 2068 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011).

We indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *Ex parte White*, 160 S.W.3d 46, 51 (Tex. Crim. App. 2004). Absent contrary evidence, we will not second guess counsel's strategy through hindsight. *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001) ("[I]n the absence of evidence of counsel's reasons for the challenged conduct, an appellate court commonly will assume a strategic motivation if any can possibly be imagined. . . .") (internal quotation omitted); *see also Blott v. State*, 588, S.W.2d 588, 592 (Tex. Crim. App. 1979).

An appellant must provide a record that affirmatively demonstrates that counsel's performance was not based on sound trial strategy. *Mallett v. State*, 65

S.W.3d 59, 63 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). The reasonableness of trial counsel's choices often involves facts that do not appear in the appellate record; thus, trial counsel should ordinarily be given an opportunity to explain his actions before a court reviews the record and determines that counsel was ineffective. *See Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005) (citing *Thompson*, 9 S.W.3d at 813–14)*; Mitchell v. State*, 68 S.W.3d 640, 642 (Tex. Crim. App. 2002); *Rylander v. State*, 101 S.W.3d 107, 110–11 (Tex. Crim. App. 2003).

As the Court of Criminal Appeals has instructed us, where, as here, trial counsel is not given an opportunity to explain his actions, "the appellate court should not find deficient performance unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012) (quoting *Goodspeed*, 187 S.W.3d at 392).

To show ineffective assistance, appellant also must prove that he was prejudiced by counsel's actions. *Thompson*, 9 S.W.3d at 812. This requires appellant to demonstrate a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

2. Analysis

(1) Photo array

Phuthavong contends that his counsel was ineffective for failing to object to a note written on a photo array. Phuthavong argues that the note was hearsay. The note appears on the side of a photo of Phuthavong and reads, "July 1, 2015, ID'd as being one of males that went in [Garza's] house. Saw w/ a gun." Detective M. Jones said he wrote the note when Monk identified Phuthavong on the photo array. The exhibit was introduced and admitted during Detective Jones's testimony, and Jones read his note out loud while testifying.[2]

To establish deficient performance based on a failure to object, an appellant must demonstrate that the trial court would have committed error in overruling the objection if trial counsel had objected. *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (per curiam); *Toledo v. State*, 519 S.W.3d 273, 287 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Moreover, where (as here), the record is silent as to why trial counsel did not object, we presume that counsel was acting pursuant to a sound trial strategy. *See Thompson*, 9 S.W.3d at 812; *Rylander*, 101 S.W.3d at 111. Because counsel never had an opportunity to explain, the question becomes

[2] It was not published to the jury, and the jury did not ask for the exhibit during deliberations.

whether the failure to object was so outrageous that no competent attorney would have engaged in it. *Menefield*, 366 S.W.3d at 593.

We cannot conclude, on this record, that counsel's failure to object was so outrageous that no competent attorney would have engaged in it. Counsel could have thought, for instance, that objecting may have risked drawing further attention to the evidence, and that similar evidence came in otherwise. *See Young v. State*, 10 S.W.3d 705, 712 (Tex. App.—Texarkana 1999, pet. ref'd) (trial counsel's failure to object to hearsay could have been a strategic decision "so as not to call attention to damaging evidence" that was merely cumulative). This record does not show ineffective assistance of counsel. *See Thompson*, 9 S.W.3d at 812, 814 (declining to speculate on counsel's failure to object to hearsay in light of silent record); *Ortiz v. State*, 93 S.W.3d 79, 95 (Tex. Crim. App. 2002) (suggesting strategic reasons for failure to object); *see also Strickland*, 466 U.S. at 687–88, 694, 104 S. Ct. at 2064, 2068 (appellant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

(2) Detective Jones

In his second issue, Phuthavong argues that his counsel was ineffective to the extent that counsel failed to preserve error concerning Detective Jones's testimony

about who he suspected shot Maneerut. This record again does not show ineffective assistance.

When the State initially questioned Detective Jones on this topic, Phuthavong's counsel objected to the testimony as inadmissible hearsay (in particular, as testimony based on what Linda told him) and prejudicial under Rule 403. Counsel did not obtain a ruling on the objection, however, because the State elected to withdraw the question and rephrase it.

Rephrased, the testimony was follows:

> State: Let me rephrase my question. After you conducted that interview with Linda, and based on your entire investigation, did you form an opinion about who the shooter was at Frank Garza's house?
>
> Jones: Yes.
>
> State: What was that opinion?
>
> Jones: That Amalinh Phuthavong was the shooter.

Counsel did not object and preserve error on the rephrased question—the only question the detective answered. *See* TEX. R. APP. P. 33.1(a). On a silent record like this one, appellant must show that counsel's decision not to object and obtain a ruling was "so outrageous that no competent attorney would have engaged in it. *Menefield*, 363 S.W.3d at 593.

Phuthavong has not demonstrated that counsel's performance was so outrageous that no competent attorney would have engaged in it. Once again, we do

not know counsel's motivations. "Counsel's failure to object could have been based on a strategic decision to avoid drawing attention to the testimony and potentially having his objection overruled." *James v. State*, No. 03-15-00241-CR, 2016 WL 3577404, at *3 (Tex. App.—Austin June 24, 2016, no pet.) (mem. op, not designated for publication); *see also Donald v. State*, 543 S.W.3d 466, 478–79 (Tex. App.—Houston [1st Dist.] 2018, no pet.) (op. on reh'g) (It may be strategic to not object if, for example, trial counsel "at that moment may have reasonably decided that the testimony was not inadmissible.") (quotation omitted). Texas courts have found certain statements by an investigating officer, offered not for the truth of the matter asserted but to explain how the officer came to suspect the appellant, to not be objectionable as hearsay. *See Jones v. State*, 843 S.W.2d 487, 499 (Tex. Crim. App. 1992) (holding that officer's testimony regarding statements made by a different suspect were not hearsay because they were offered to show why the officer secured an arrest warrant and searched the defendant), *overruled in part and on different grounds by Maxwell v. State*, 48 S.W.3d 196, 200 (Tex. Crim. App. 2001); *see also Hernandez v. State*, No. 01-15-00492-CR, 2016 WL 5920768, at *6–7 (Tex. App.—Houston [1st Dist.] Oct. 11, 2016, pet. ref'd) (mem. op., not designated for publication) ("Officer Vela's testimony is relevant, not to show the truth of the statements made by those he interviewed at the scene, but to show why Officer Vela arrested appellant, i.e., because the statements given by the witnesses were

consistent."). Because there is no affirmative indication in the record that counsel failed to object due to a deficiency in his performance, as opposed to following a sound legal strategy, we cannot conclude that counsel's performance fell outside the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 687–88, 694, 104 S. Ct. at 2064, 2068.

(3) Text messages

Phuthavong also argues that trial counsel was ineffective for failing to challenge the admissibility of text messages between Sarah Nelson and her landlord Overton. Phuthavong contends that the text messages were inadmissible hearsay because the State offered them to show that, before Nelson's kidnapping or attempting kidnapping at issue here, Nelson was held hostage over a drug debt.

Phuthavong again failed to meet his burden under *Strickland*. 466 U.S. at 690, 104 S. Ct. 2052. The record is silent as to counsel's trial strategy. It is possible that counsel strategically chose not to object because he believed that the text messages were admissible under a hearsay exception, such as present sense impression or excited utterance. *See* TEX. R. EVID. 803; *Donald*, 543 S.W.3d at 478–79; *James*, 2016 WL 3577404, at *3. It is also possible that trial counsel strategically chose not to object because the text messages helped the defense highlight contradictions

between Overton's and Monk's testimony.[3] On this record, we cannot conclude that counsel's failure to object was "so outrageous that no competent attorney would have engaged in it." *Menefield*, 363 S.W.3d at 593 (quoting *Goodspeed*, 187 S.W.3d at 392). This record presents no ineffective assistance. *See Strickland*, 466 U.S. at 687–88, 694, 104 S. Ct. at 2064, 2068.

B. Admissibility and relevance of evidence

Phuthavong also argues that "the trial court abused its discretion by admitting evidence of Sarah Nelson's murder over trial counsel's objection."[4] It did not.

Phuthavong concedes that evidence of Nelson's kidnapping is relevant—and central—to this case. Indeed, he was charged with *kidnapping* (or attempting to kidnap) Nelson and murdering Maneerut. Phuthavong argues, however, that evidence related to the fact that Nelson was ultimately murdered—a crime that he was not charged with and that no one argued he committed—is inadmissible extraneous offense evidence that was more prejudicial than probative.

Phuthavong waived his challenge to the admission of evidence of Nelson's murder because he failed to object the first time (or the next time) evidence concerning Nelson's death was admitted. His own attorney even discussed Nelson's

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[3] Overton and Monk offered differing accounts of Nelson's time at Linda's.

[4] We review the trial court's determination of admissibility under an abuse of discretion standard. *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009).

death in his opening statement. To preserve an issue for appellate review, a party must timely object, stating the specific legal basis for the objection. TEX. R. APP. P. 33.1(a)(1). The objection must be made at the earliest possible opportunity. *Wilson*, 311 S.W.3d at 349. Further, with two exceptions that do not apply here, a party must continue to object each time the objectionable evidence is offered.[5] *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003).

In his own opening statement, Phuthavong's counsel told the jury that Nelson was murdered.[6] Phuthavong's counsel then did not object, for days, to testimony that Nelson was murdered. Phuthavong's counsel did not object when the State asked its first witness, Nelson's landlord Overton, whether he knew "that ultimately [Nelson] was killed[.]"And counsel did not object when the State discussed details of Nelson's death, such as the date of death, with Overton. Counsel likewise did not object when Monk testified that Nelson had been murdered.

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5 The two exceptions require counsel to either (1) make a running objection, or (2) request a hearing outside the presence of the jury. *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003).

6 Both sides mentioned the murder in their opening statements. The State said, "May 8th of 2015 Cassie's body is found dumped next to the San Jacinto River, tortured, shot multiple times." The defense said, "And the evidence will show that the next day, on May the 8th, Cassie's body is found shot multiple times, ruled a homicide, on Wallace Road near a river."

Defense counsel first objected to evidence of Nelson's murder on the third day of trial, after the above-described evidence was admitted, when evidence of Nelson's murder was presented by Deputy R. Glover, who responded to the scene where Nelson's body was found. Phuthavong's counsel objected again when Merrill Hines, an assistant medical examiner, later testified.[7]

Because Phuthavong failed to object when evidence of the murder was first introduced, he did not preserve his complaint for our review. *See Wilson v. State*, 311 S.W.3d 452, 473–74 (Tex. Crim. App. 2010) (reviewing court should not address the merits of an issue that has not been preserved).

C. Failure to Instruct on Accomplice as a Matter of Fact

Finally, Phuthavong argues that the trial court erred by failing to instruct the jury to consider whether Garza was an accomplice as a matter of fact. Because no evidence showed that Garza was an accomplice, the trial court did not err in declining to offer the instruction.

A person who is complicit in a crime and who testifies against another is an accomplice witness. TEX. PENAL CODE § 7.02(a) (the law of parties); TEX. CODE CRIM. PROC. art. 38.14 ("the accomplice-witness rule"). Texas law requires the testimony of an accomplice to be corroborated. In particular, "[a] conviction cannot

[7] Phuthavong makes no argument concerning the specific testimony offered by these individuals. He instead complains that evidence of the murder was admitted.

be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of an offense." TEX. CODE CRIM. PROC. art. 38.14.

The trial court is required to instruct the jury on the law applicable to the case. *Id.* at art. 36.14. A witness may be an accomplice either as a matter of law or as a matter of fact, and the evidence determines what jury instruction, if any, should be given. *Cocke v. State*, 201 S.W.3d 744, 747 (Tex. Crim. App. 2006), *cert. denied*, 549 U.S. 1287, 127 S. Ct. 1832 (2007). If the evidence is clear that the witness is an accomplice as a matter of law, then the trial court must instruct the jury on the law of accomplice-witness testimony and corroboration. *Id.* at 747–48; *see also Ash v. State*, 533 S.W. 3d 878, 886 (Tex. Crim. App. 2017). If the parties present conflicting or unclear evidence as to whether a witness is an accomplice, then the court instructs the jury to first determine whether the witness is an accomplice as a matter of fact and, if so, to apply the corroboration requirement. *Druery v. State*, 225 S.W.3d 491, 498–99 (Tex. Crim. App. 2007); *see also Lewis v. State*, 448 S.W.3d 138, 142 n.2 (Tex. App.—Houston [14th Dist.] 2014, no pet.). If there is no evidence that the witness is an accomplice, the trial court is not obligated to provide an accomplice-witness instruction. *Cocke*, 201 S.W.3d at 748.

A person is not an accomplice unless he affirmatively assists in the commission of the offense. *Paredes v. State*, 129 S.W.3d 530, 536 (Tex. Crim. App. 2004). A witness who has knowledge of an offense is not an accomplice merely because he did not disclose it or even because he concealed it. *Druery*, 225 S.W.3d at 498. And mere presence at the scene does not render a witness an accomplice. *Id.* In determining whether a person is an accomplice, either as matter of fact or of law, courts may look to events occurring before, during, and after the commission of the offense. *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986).

Here, the trial court offered an accomplice as a matter of fact instruction as to Monk but not Garza. Because no evidence showed that Garza was an accomplice, we find no error.

No evidence suggests that Garza participated in Phuthavong's kidnapping (or attempted kidnapping) of Nelson or murder of Maneerut or that he committed a crime in furtherance of a conspiracy. Instead, the evidence shows that Garza spoke with Monk on May 6 and May 7, 2015 (the day before and day of Maneerut's murder). In those phone calls, Monk agreed to sell Garza drugs and asked if Nelson was at Garza's house. Garza responded that Nelson was at his house.

On May 7, 2015, Monk drove separately from Linda to Garza's house. When Monk arrived, Garza left his house and got in Monk's car. Monk handed him rolling paper and marijuana. While Garza was in Monk's car, Phuthavong arrived as a

passenger in a Lexus SUV. Garza saw him get out of the SUV with another man and walk toward his house. He heard a loud noise, and less than a minute later, the men reappeared with Nelson between them. The men and Nelson got in the SUV and drove away. Garza testified that he was "a little weirded out" when the strangers went in his house, but he trusted Monk. He got out of Monk's car when Monk said that he would call after he obtained Xanax. Garza testified that he knew that people wanted to talk to Nelson, but he did not know that those people were associated with Monk until they arrived at his house.

This evidence is insufficient under Texas law to justify an accomplice instruction. Confirming Nelson's location to Monk does not demonstrate complicity or knowledge of a plan to commit murder or kidnapping. *See Cocke*, 201 S.W.3d at 748 (evidence must connect the alleged accomplice as a "blameworthy participant").

An individual is not an accomplice "merely because he has knowledge about a crime and fails to disclose that knowledge." *Druery*, 225 S.W.3d at 498. *See Paredes*, 129 S.W.3d at 536 (holding no instruction required "[a]lthough [Priscilla] may have suspected that foul play would occur when Torres arrived at her house, there is no evidence suggesting that she assisted in the preparation for or planning of the murders."); *see also Delacerda v. State*, 425 S.W.3d 367, 395–96 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (finding no evidence of accomplice as a matter of fact even though "Emily may have told her friend to lie and say that

appellant was with her, and although Carlos, in his first statement to the police, lied and said that David was the shooter, these are not affirmative acts assisting in the commission of the murder") (internal quotation removed). Furthermore, although Phuthavong's counsel questioned Garza at length regarding differences in his various statements to the police, any lack of candor by Garza in this record does not demonstrate complicity in a kidnapping or murder. *See McCallum v. State*, 311 S.W.3d 9, 14 (Tex. App.—San Antonio 2010, no pet.) ("Any false reports given [to police] were completely disconnected from actual participation with McCallum before, during, or after the commission of the crime."); *Delacerda*, 425 S.W.3d at 395–96.

On this record, the trial court did not err in failing to provide an accomplice instruction concerning Garza.

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Chief Justice Radack and Justices Brown and Caughey.

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