Affirmed and Memorandum Opinion filed August 31, 2010

In The

Fourteenth Court of Appeals

NO. 14-09-00348-CR

VERNON MICHAEL SCOTT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1133007

M E M O R A N D U M O P I N I O N

Vernon Michael Scott appeals his conviction for capital murder. He contends (1) the evidence is factually insufficient to support a conviction for capital murder; and (2) the trial court abused its discretion in denying his motion to suppress evidence obtained pursuant to an allegedly unlawful arrest. We affirm.

I. Factual and Procedural Background

On September 7, 2007, two men entered complainant Jane Lemoine's residence and robbed and murdered her while Priscilla Thorne watched. Thorne met the complainant that morning for a job interview. The complainant worked at the Eastex

storage facility. As a residential manager, the complainant was required to live on site in a trailer that had both residential and office sections. The complainant conducted the interview in the residential area of the building.

During the interview, while Thorne sat in a chair near the residence door, a man walked in holding a gun. He demanded, "all your money," and the keys to Thorne's van. Thorne immediately gave the man the keys to her van. Thorne identified Charles Scott (hereinafter "Charles"), appellant's brother, as the gunman from a photo spread she viewed three days after the crime. Thorne identified Charles again in court. During the robbery, Thorne gave Charles the keys to her van, and was preparing to get on the floor as instructed when a second man entered the residence. The second man immediately turned and locked the dead bolt on the door locking them in the residence. As the second man entered, Thorne laid down on the floor. The second man was much shorter than Charles and wore a "reddish-orange baseball shirt." Thorne later identified appellant in a live line-up as the man in the orange shirt, and she identified him in court as the second man to enter the room.

Charles appeared concerned when appellant locked the door. In response, appellant said, "Chill out, we're going out the front." Charles continued to point the gun at the complainant while he demanded that she tell him where she kept the safe. The complainant gave the men cash from a purple folder in which she kept petty cash, and told them they already had all the money. Thorne testified that appellant appeared more familiar with the area and more in control than Charles. Appellant directed the robbery and reassured Charles when he locked the door, which led Thorne to believe he was "in charge." Thorne believed the men were workers at the facility based on their appearances. Thorne testified that, immediately prior to the shooting, the room became very quiet, and she believed the intruders intended to shoot someone. She heard a gunshot, and the intruders left, but she did not see who fired the gun. She testified that although Charles walked in the room holding the gun, she could not be certain that he fired the gun. Thorne based this belief on the men's demeanor. She stated that Charles

was never forceful or aggressive with her. At trial, however, Thorne identified Charles as the "gunman."

Appellant and Charles appeared to act according to an organized plan, and they left the building together through the office door. After the men left in her van, Thorne went into the office to call for help, but the telephone had been removed. She went outside and used a bystander's mobile phone to call police and paramedics.

When the police arrived to investigate, Thorne told them that the intruders left in her van. She provided them with the make, model, and license plate number. Investigators realized that Thorne's description of the intruders matched the storage facility employees' descriptions of two employees who had not returned to work that morning.

Jeffrey Bottoms worked as a regional manager for the Eastex storage facility and knew the complainant. At the time of the murder, the company employed numerous day laborers to clean up after a recent fire at the facility. The complainant hired some day laborers as permanent employees in which case she had them file tax information, but others filled out timecards and were paid from petty cash. The complainant hired appellant to help clean up and refurbish the burned building. At the scene, police recovered a W-4 tax form and two timecards for appellant showing he worked at the facility as an employee. Around the middle of August 2007, after appellant appeared to be under the influence of alcohol or drugs at work, Bottoms told the complainant to dismiss appellant. Charles had earlier been terminated for a similar reason.

After appellant was terminated, the complainant permitted him to remain on the premises doing odd jobs. He occasionally washed dishes and prepared food in the complainant's residence. Appellant had open access to the residence where the complainant lived. Marcel James, who also worked at the storage facility, testified that he knew that appellant took the gun from the complainant's home because only James, appellant, and the complainant had open access to the residence. Appellant's girlfriend testified that approximately two weeks before the shooting she had seen appellant in

possession of a weapon similar to the one used in the shooting.

After his arrest, appellant participated in a live line-up for purposes of identification. Thorne immediately identified appellant as the shorter man at the scene of the robbery and murder. Prior to the line-up appellant asked the officer conducting the line-up to tell him the results. After Thorne identified appellant, the officer informed appellant that he had been identified by the witness. Appellant responded, "Not as the shooter, was I?" A crime lab investigator obtained DNA from a glove found at the scene of the shooting and was able to determine that appellant was a possible contributor of the DNA inside the glove.

Appellant was convicted of capital murder and sentenced to life in prison without the possibility of parole.

II. Analysis and Discussion

A. Is the evidence factually sufficient to support the conviction?

In his first issue appellant admits he participated as a party to the robbery, but asserts the evidence is factually insufficient to show that he either encouraged, directed, aided, or attempted to aid the shooter in the murder, or that he participated in a conspiracy to commit murder. In a factual-sufficiency review, we examine the evidence in a neutral light. *Grotti v. State*, 273 S.W.3d 273, 283 (Tex. Crim. App. 2008). Only one question is to be answered in a factual-sufficiency review: Considering all of the evidence in a neutral light, was a jury rationally justified in finding guilt beyond a reasonable doubt? *See id*. Evidence can be factually insufficient in one of two ways: (1) when the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust; and (2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *See id*. A reversal for factual insufficiency cannot occur when the greater weight and preponderance of the evidence actually favors conviction. *See id*. Although an appellate court has the ability to second-guess the jury to a limited

degree, the factual-sufficiency review should still be deferential to the jury's role as the sole judge of the weight and credibility given to any witness's testimony, with a high level of skepticism about the jury's verdict required before a reversal can occur. *See id.*

A person commits capital murder if he intentionally or knowingly commits murder in the course of committing or attempting to commit robbery. Tex. Pen. Code §19.03(a)(2). Under the law of the parties, the State is able to enlarge a defendant's criminal responsibility to acts in which he may not be the principal actor. *Goff v. State*, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996). Section 7.02 of the Texas Penal Code, entitled "Criminal Responsibility for Conduct of Another," provides with respect to law of the parties, in relevant part:

> (a) A person is criminally responsible for an offense committed by the conduct of another if:
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> . . .
>
> (2) 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.

Tex. Pen. Code Ann. § 7.02(a)(2).

Thus, to prove that the accused acted as a party to an offense, the State must prove that the accused acted with the intent to promote or assist in the commission of the offense by soliciting, encouraging, directing, aiding, or attempting to aid the other person in its commission. *Martin v. State*, 753 S.W.2d 384, 386 (Tex. Crim. App. 1988). 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 do the prohibited act. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). Party status may be proved by circumstantial evidence. *Id.* Mere presence at the scene of the offense does not establish guilt as a party to the offense. *Porter v. State*, 634 S.W.2d 846, 849 (Tex. Crim. App. 1982). Presence at the scene, however, is a circumstance tending to prove guilt which, when combined with other facts, may suffice to show that the accused was a

participant. *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. 1979).

The record reflects that appellant was in possession of a handgun similar to that owned by the complainant at least two weeks before the shooting. He was one of three people (including the complainant) who had access to the residence where the gun was kept. The complainant's gun disappeared from her residence approximately two weeks prior to the shooting. The eyewitness, Thorne, testified that appellant directed the robbery and appeared to be "in charge." At the time of the robbery, Charles pointed the gun at the complainant while appellant took the money from the purple folder. After the murder both appellant and Charles fled the scene in Thorne's van.

Appellant did not present evidence, but relied on his cross-examination of State's witnesses. Appellant's cross-examination focused on the witness's identification of him and whether appellant actually participated in the offense. Under the applicable standard of review, we conclude that the evidence is factually sufficient evidence to support appellant's conviction for capital murder. Accordingly, we overrule appellant's first issue.

B. Did the trial court err in denying appellant's motion to suppress?

In his second issue appellant complains the trial court abused its discretion in denying his motion to suppress evidence obtained pursuant to an allegedly unlawful arrest. We review a trial court's ruling on a motion to suppress evidence under an abuse-of-discretion standard. *Guzman v. State*, 955 S.W.2d 85, 88–89 (Tex. Crim. App. 1997). We view the evidence adduced at a suppression hearing in the light most favorable to the trial court's ruling. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007). At a suppression hearing, the trial court is the sole finder of fact and is free to believe or disbelieve any or all of the evidence presented. *Id.* at 24–25. We give almost total deference to the trial court's determination of historical facts that depend on credibility and demeanor, but review de novo the trial court's application of the law to the facts if resolution of those ultimate questions does not turn on the evaluation of credibility and demeanor. *See Guzman v. State*, 955 S.W.2d at 89.

Before trial, appellant filed a motion to suppress evidence he claimed was illegally obtained. Appellant alleged he was arrested without a valid warrant or probable cause. The trial court held a hearing outside the presence of the jury on the admissibility of Thorne's identification of appellant. At the hearing, appellant's attorney questioned Thorne about a television news report of appellant's arrest. After the warrant was issued for appellant's arrest, appellant voluntarily surrendered to law enforcement authorities. Appellant's voluntary surrender, with the aid of Quanell X, a local activist, was broadcast on the local news stations in Houston. Appellant alleged that Thorne's identification was based on observing appellant on television, not on any observation on the day of the robbery and murder. After appellant's arrest, Thorne positively identified appellant as the second man who entered the residence. Thorne testified that her identification at the live line-up and at trial was based on seeing appellant on the day of the robbery and murder, not from seeing him on television.

Officer Roy Swainson of the Houston Police Department testified that he showed Thorne a photospread on the night of the robbery and murder. The photospread included a four-year-old photo of appellant because that was the most recent photograph the police department had of appellant. Officer Swainson testified that Thorne did not identify anyone when she viewed the photospread. When questioned about her inability to identify anyone on the night of the offense, Thorne admitted she was traumatized that day and did not feel in the proper frame of mind to view a photospread.

Officer Carless Elliot testified that he conducted the live line-up following appellant's arrest. Appellant asked to be in a line-up, and waived his right to have his attorney present. During the line-up, each member of the line-up was asked to repeat the phrase, "Chill out, we're going out this door." Officer Elliot testified that Thorne positively identified appellant.

At the conclusion of the hearing, appellant's attorney requested that the trial court take judicial notice of the probable cause complaint. He then argued, "there's no probable cause as to [appellant] that would have allowed for a warrant to be issued

appropriately based on those facts." Appellant then argued that the line-up was improper, which tainted the in-court identification, because the witness's identification was affected by viewing the television news accounts of appellant's surrender. The court held that the line-up was not suggestive. The court further held that, given Thorne's testimony, her identification of appellant in court was based on her recollection of the events of September 7, 2007, and not suggested by law enforcement or by any news coverage of appellant on television. On those grounds appellant's motion to suppress was denied.

On appeal, appellant argues that the line-up identification and the DNA evidence should have been suppressed because the affidavit on which the arrest warrant was based is conclusory.[1] An arrest-warrant affidavit must provide the magistrate with sufficient information to support an independent determination that probable cause exists to believe the accused has committed a crime. *Ware v. State*, 724 S.W.2d 38, 39–40 (Tex. Crim. App. 1986). In assessing the sufficiency of an affidavit for an arrest or a search warrant, we are limited to the four corners of the affidavit and are to interpret the affidavit in a common sense and realistic manner, recognizing the magistrate is permitted to draw reasonable inferences. *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004). We give the issuing magistrate's determination great deference and sustain it so long as there was a substantial basis for issuing the warrant. *See Illinois v. Gates*, 462 U.S. 213, 236, (1983).

Examining the four corners of the affidavit and interpreting the affidavit in a common sense and realistic manner, we conclude there was a substantial factual basis for issuing the warrant. From this affidavit, the magistrate received information that:

- Thorne witnessed the robbery/murder and described the assailants as a tall black male and a shorter black male wearing an orange shirt.
- Marcel James described two employees who had not returned to work after

[1] At trial, appellant appears to have objected not only to the affidavit attached to the arrest warrant, but the witness's identification of him at the line-up. On appeal, appellant attacks only the affidavit in support of the warrant. Therefore, we will address appellant's issue with regard to whether the four corners of the affidavit provided the magistrate with sufficient information to believe probable cause existed for issuance of an arrest warrant.

the shooting. One of the missing employees was named "Mike" and had been wearing an orange shirt when James last saw him. James's descriptions of the missing employees comported with Thorne's descriptions of the assailants.

- James identified appellant as the employee named "Mike."
- Appellant's brother Charles was positively identified by Thorne as the person who shot the complainant.

Following a comprehensive review of the affidavit, we conclude that the trial did not err in determining that the magistrate had a substantial basis to believe there was probable cause to arrest appellant. The affidavit provided the magistrate with sufficient information to support an independent determination that probable cause existed to believe that appellant had committed a crime. Appellant has failed to show the trial court abused its discretion in denying his motion to suppress. Accordingly, we overrule appellant's second issue.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Seymore.

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