In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00079-CR

SILAS UDOLPH McCALL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 09-05324

MEMORANDUM OPINION

Silas Udolph McCall appeals from his conviction by a jury for aggravated robbery. Punishment was assessed at fifty years of confinement, and a $5,000 fine. McCall argues the evidence is insufficient to support the jury's finding of theft, and he asserts claims of jury charge error, jury misconduct, and constitutional violations.

A review of the record reveals the evidence supports the jury's verdict. We find no requirement for a reversal of the trial court's judgment on any of the twelve issues presented. The judgment is affirmed.

BAD ACTS

McCall argues the trial court should have instructed the jury during the punishment phase that extraneous offenses or bad acts had to be proven beyond a reasonable doubt. Section 3(a)(1) of Article 37.07 of the Texas Code of Criminal Procedure states, in part:

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act.

Tex. Code Crim. Proc. Ann. art. 37.07, § 3(a)(1) (West Supp. 2010). Relevant evidence of extraneous crimes or bad acts shown beyond a reasonable doubt to have been committed by the defendant may be admitted in evidence during the punishment phase of the trial. *Fields v. State*, 1 S.W.3d 687, 688 (Tex. Crim. App. 1999). The trial judge must instruct the jury that the State must prove any extraneous offenses or bad acts beyond a reasonable doubt. *Delgado v. State*, 235 S.W.3d 244, 252 (Tex. Crim. App. 2007); *Huizar v. State*, 12 S.W.3d 479, 484 (Tex. Crim. App. 2000). Several prison witnesses testified regarding McCall's infractions while incarcerated. The State concedes that the trial court erred in failing to properly instruct the jury. *See* Tex. Code Crim. Proc. Ann. art. 37.07, §

3(a)(1); *Huizar*, 12 S.W.3d at 484. Because McCall did not timely object to the absence of the instruction, however, we may overturn the trial court's judgment only if the error is so egregious as to have denied McCall a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Egregiousness is determined by examining the entire jury charge, the state of the evidence, the parties' arguments, and any other information revealed by the record. *Id.*

The sentence is within the range authorized by statute, and is not excessive considering the circumstances of the offense. McCall contends the jury's notes to the trial court during deliberations demonstrate the impact of the testimony, but nothing in the jury notes relates specifically to the extraneous offense evidence. The jury charge for the guilt/innocence phase of the trial included an extraneous offense limiting instruction. The record does not support a conclusion that McCall was denied a fair and impartial trial. Under the circumstances, the error does not require reversal of the judgment. Issues one and two are overruled.

SUFFICIENCY OF THE EVIDENCE

In issues three and four, McCall challenges the sufficiency of the evidence supporting the jury's finding that McCall committed theft. A person commits aggravated robbery if, in the course of committing theft and with the intent to obtain or maintain control of the property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death and uses or exhibits a deadly weapon. Tex. Penal

Code Ann. §§ 29.02(a)(2), 29.03(a)(2) (West 2003). The Texas Penal Code defines "[i]n the course of committing theft" as conduct that occurs in an attempt to commit theft, during the commission of theft, or in immediate flight after the attempt or commission of theft. *Id.* § 29.01(1). A person commits theft if he unlawfully appropriates property with intent to deprive the owner of the property. *Id.* § 31.03(a) (West Supp. 2010). An appropriation of property is unlawful if it is without the owner's effective consent. *Id.* § 31.03(b)(1).

The Texas Court of Criminal Appeals has explained that the standard in *Jackson v. Virginia* is "the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010); *see also Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We review all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Ross v. State*, 133 S.W.3d 618, 620 (Tex. Crim. App. 2004). The *Jackson* standard "gives full play to the jury's responsibility to fairly resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences from the evidence." *Williams v. State*, 301 S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, 130 S.Ct. 3411, 177 L.Ed.2d 326 (2010).

McCall was indicted for the aggravated robbery of Norman Berry. Berry testified that he decided to buy cocaine for a friend. In a known drug area, Berry pulled "folded over" cash bills out of his pocket and paid a dealer twenty dollars in exchange for a rock of cocaine. He had over three hundred dollars in his possession.

He delivered the cocaine to his friend, and then noticed that a vehicle was following him. He pulled into a friend's driveway. The car that had been following him pulled up. Berry heard a shot. He did not realize at the time he had been shot in the leg, and he ran behind the house. After he rounded the corner, he fell.

Berry identified McCall as one of two people who ran after him. Berry testified McCall stood over him with a gun and screamed at him to give up the money. Berry threw $333 and the car keys on the sidewalk. He had his hands up and begged the man not to shoot. As McCall was leaving he began shooting Berry. McCall fired the gun multiple times. Berry suffered "[t]wo broken femurs, lacerated liver, collapsed lung, intestinal damage, broken ribs, [and a] gunshot [wound] to [his] arm." He did not notice if the individuals took the items he threw on the sidewalk.

The owner of the house testified she heard gunshots and ran to open the back door. She saw Berry on the ground with two individuals standing over him, and "gunshots [were] still being fired." She heard something about "jacking[.]" She began screaming. She called 911. She did not see Berry pull anything out of his pocket, or throw any money or keys.

Also at the house was Christopher Thomas, a friend of Berry's who had loaned Berry his car that night. Thomas heard a gunshot. He ran to the backdoor. He saw McCall with a gun standing over Berry. Another man was with McCall. McCall saw Thomas in the doorway. McCall and the other man yelled, "Give me the money. Give me the keys." McCall then shot Berry "[p]robably about three or four times." Thomas started backing up and closed the door. He heard four or five more gunshots. A truck and a car sped off. He did not see Berry give the men money or keys. The car keys were found under the house that night.

The next day, Thomas saw McCall and another man. Thomas approached them and asked about the shooting. McCall told Thomas the shooting had nothing to do with Thomas, but the reason he shot Berry was because Berry "jacked one of [McCall's] partners for his dope." McCall told Berry he did not take Thomas's vehicle because when he saw Thomas, he realized the vehicle was Thomas's. McCall said to tell Berry that he would pay him $700 not to go to the police.

The jury resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from the evidence. *Young v. State*, 283 S.W.3d 854, 861 (Tex. Crim. App. 2009). A rational juror could conclude beyond a reasonable doubt from the evidence that McCall's conduct was "in the course of committing theft." A rational juror could find beyond a reasonable doubt that McCall committed aggravated robbery. Issues three and four are overruled.

CONSIDERATION OF PAROLE ELIGIBILITY

In issue five, McCall argues that a second note from the jury revealed the jurors were factoring in parole eligibility as a basis for a harsher sentence, and the trial court provided no curative instruction. In issues six and seven, McCall maintains the jury's consideration of his parole eligibility violated his rights to a fair and impartial jury trial and his right to confront and cross-examine witnesses. McCall argues in his eighth issue that the trial court abused its discretion in denying McCall's motion for new trial based on jury misconduct, because the jury considered his parole eligibility.

The jury was provided the following instructions in accordance with section 4(a) of article 37.07 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 37.07, § 4(a).

> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

Id. The trial court further instructed the jury that, "It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities."

During deliberation, the jury sent a note to the trial court asking, "In an event where an inmate is awarded 'good conduct time', assuming it would earn time off the

period of incarceration, at what point is it applied? Example: parole eligibility is not an option until the halfway point of the prison sentence." The court responded, "[i]n response to your question, please refer to the jury instructions and continue your deliberations."

The response directed the jury to the jury instructions, which included the instruction required by section 4(a). An appellate court presumes a jury follows the trial judge's instructions. *See Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998). To show that a jury's discussion of the parole law constitutes reversible error, it must be shown that there was a misstatement of law asserted as fact by someone professing to know the law, and the misstatement was relied on by the jury to change their vote to a harsher punishment. *See Sneed v. State*, 670 S.W.2d 262, 266 (Tex. Crim. App. 1984).

McCall argued in his motion for new trial that individual jurors who claimed to be knowledgeable of Texas parole laws and their effect on McCall's service of his sentence "offered one or more misstatements of said parole laws, which they asserted as facts to other jurors, and which said pronouncements were relied upon by other jurors, who . . . , for these reasons, then calculated what they believed would be the parole eligibility threshold for different terms of years[.]" McCall argued that because of these misstatements, the jurors decided on harsher punishment, resulting in a fifty year sentence. Attached to the motion for new trial was a sworn affidavit from one of the jurors regarding jury discussion of parole eligibility.

Rule 606(b) of the Texas Rules of Evidence provides that, upon an inquiry into the validity of a jury's verdict, a juror may not testify as to any matter or statement occurring during the jury's deliberations or to the effect of anything on any juror's mind or emotions or mental processes as influencing any juror's assent to or dissent from the jury's verdict. Tex. R. Evid. 606(b). The rule provides that a juror may testify to "whether any outside influence was improperly brought to bear upon any juror[.]" *Id.; see also White v. State*, 225 S.W.3d 571, 574-75 (Tex. Crim. App. 2007); *Sanders v. State*, 1 S.W.3d 885, 887 (Tex. App.—Austin 1999, no pet.). An outside influence is an influence from a source other than the jurors. *White*, 225 S.W.3d at 574. A juror's discussion of parole law does not constitute an outside influence. *Richardson v. State*, 83 S.W.3d 332, 361-62 (Tex. App.—Corpus Christi 2002, pet. ref'd) (citing *Hines v. State*, 3 S.W.3d 618, 623 (Tex. App.—Texarkana 1999, pet. ref'd)); *see also Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 370 (Tex. 2000) (outside influence must originate "from sources other than the jurors themselves"). McCall does not argue that any outside influence was improperly brought to bear upon a juror. *See Davis v. State*, 119 S.W.3d 359, 365 (Tex. App.—Waco 2003, pet. ref'd); *see also* Tex. R. Evid. 606(b). Rule 606(b) precluded the trial court's consideration of the juror's affidavit. McCall presented no other proof to the trial court. The trial court did not abuse its discretion in denying the motion for new trial on the record presented. Issues five, six, seven, and eight are overruled.

PARTY LIABILITY JURY INSTRUCTION

The jury charge included an abstract definition of "parties to an offense" but the application paragraph did not apply the law of the parties to the case. McCall objected to the inclusion of the law-of-the-parties instruction, but he did not object to the exclusion of the language from the application paragraph.

In the ninth and tenth issues, McCall argues the trial court committed charge error by submitting an abstract party-liability instruction to the jury without instructing the jury on party-liability in the application paragraph. In his eleventh issue, McCall states this error could have resulted in the jury convicting him without unanimity as to his role as the primary actor on each element of the offense. McCall contends in his twelfth issue that cumulative error in the jury charge requires a reversal of the judgment.

An appellate court begins with a presumption that the jury followed the trial court's instructions as presented. *Colburn*, 966 S.W.2d at 520. The application paragraph of a jury charge authorizes conviction, and an abstract charge on a theory of law which is not applied to the facts generally is insufficient to bring that theory before the jury. *Campbell v. State*, 910 S.W.2d 475, 477 (Tex. Crim. App. 1995) (citing *Jones v. State*, 815 S.W.2d 667, 669 (Tex. Crim. App. 1991)). The inclusion of the application language on law of the parties would have provided an alternative theory of criminal responsibility upon which the jury could have convicted McCall. *See Campbell*, 910 S.W.2d at 477. All the evidence in this case demonstrates McCall was the primary actor. On this record, we

cannot conclude the inclusion of the abstract instruction without an application paragraph harmed McCall; the issue presented does not justify reversal of the judgment in this case. Issues nine, ten, eleven, and twelve are overruled. The trial court's judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on November 18, 2010
Opinion Delivered May 25, 2011
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.