In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-16-00031-CR

JOSEPH RAZIEL GUTIERREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 221st District Court
Montgomery County, Texas
Trial Cause No. 15-09-09280-CR

MEMORANDUM OPINION

Appellant Joseph Raziel Gutierrez appeals his conviction for capital murder. Gutierrez challenges his sentence on the ground that a mandatory punishment of life imprisonment is cruel and unusual in violation of the Eighth Amendment to the United States Constitution. Gutierrez also challenges his conviction, contending that the trial court erred by overruling his motion for continuance and his objections to the State's allegedly improper jury argument. Finding no error, we affirm the trial court's judgment.

BACKGROUND

A grand jury indicted Gutierrez for capital murder. *See* Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2016). The indictment alleged that Gutierrez intentionally caused the death of Shamsuddin Sadruddin by shooting Sadruddin with a firearm while Gutierrez was in the course of committing or attempting to commit the offense of aggravated robbery of Sadruddin. Gutierrez pleaded not guilty and a jury trial ensued. After hearing the evidence, a jury found Gutierrez guilty of capital murder as charged in the indictment. The trial court assessed Gutierrez's punishment at mandatory life in prison without parole, and Gutierrez appealed.

ANALYSIS

In issue one, Gutierrez argues that an automatic life sentence under these circumstances violates the Eighth Amendment of the United States Constitution, and that the trial court erred in overruling his motion to preclude the sentence. *See* U.S. Const. amend. VIII. Gutierrez's counsel filed a motion to preclude an automatic sentence of life without parole, arguing that the jury should have been allowed to consider mitigating evidence concerning Gutierrez's past to determine whether the Eighth Amendment allowed a life sentence in Gutierrez's case. Gutierrez's counsel argued that it was cruel and unusual punishment to sentence a nineteen year old to life without parole when the Supreme Court prohibits such a punishment for juvenile

offenders who possess the same vulnerabilities and limitations as Gutierrez. *See Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 2469 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders"). According to Gutierrez's counsel, Gutierrez is subject to a sentencing scheme that is excessive, disproportional, and without discretion.

When a defendant is found guilty of a capital felony in a case in which the State has not sought the death penalty, the defendant shall be punished by imprisonment for life without parole, if the defendant committed the offense when he was eighteen years of age or older. Tex. Penal Code Ann. § 12.31(a)(2) (West Supp. 2016). In this case, the record shows that the jury found Gutierrez guilty of a capital felony, the State did not seek the death penalty, and Gutierrez was nineteen years old when he murdered Sadruddin. Because Gutierrez is an adult offender convicted of capital murder, the holding in *Miller* does not apply. *See Sloan v. State*, 418 S.W.3d 884, 891-92 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *see also Miller*, 132 S.Ct. at 2469.

While Gutierrez argues on appeal that the jury should have been able to consider mitigating evidence concerning his past, the Eighth Amendment does not require the jury to consider mitigating circumstances in a punishment hearing for an

adult defendant who is given a mandatory life sentence. *See Lopez v. State*, 493 S.W.3d 126, 139 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (stating that unlike juvenile offenders, adult defendants are not guaranteed to receive a mitigation hearing when given a sentence of life without parole); *see also Rivera v. State*, 381 S.W.3d 710, 714 (Tex. App.—Beaumont 2012, pet. ref'd). Thus, the Eighth Amendment does not support Gutierrez's claim that the imposition of a mandatory sentence of life in prison without the possibility of parole is unconstitutional because it does not allow the consideration of mitigating factors. *See Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (concluding that a claim that a sentence is unconstitutional because it is mandatory in nature, allowing the sentencer no opportunity to consider mitigating circumstances, has no support in the Eighth Amendment's text and history); *Lopez*, 493 S.W.3d at 139. We conclude that the trial court did not err by overruling Gutierrez's motion to preclude an automatic life sentence. We overrule issue one.

In issue two, Gutierrez complains that the trial court erred by overruling his motion for continuance to investigate new *Brad*y information that the State provided a week before trial. *See Brady v. Maryland*, 373 U.S. 83 (1963). According to Gutierrez's motion, the *Brady* information concerned key witnesses and included twenty-seven jail calls with over thirty hours of Spanish conversation, and Gutierrez

complained that there was not enough time remaining before trial to allow the defense's investigator to locate and interview the witnesses. On appeal, Gutierrez argues that he was prejudiced by the trial court's denial of his motion for continuance because his defense counsel was unable to effectively cross-examine the State's witnesses.

"A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown[.]" Tex. Code Crim. Proc. Ann. art. 29.03 (West 2006). We review a trial court's decision denying a motion for continuance under an abuse of discretion standard. *Renteria v. State*, 206 S.W.3d 689, 699 (Tex. Crim. App. 2006). The defendant must show that he was actually prejudiced by the denial of his motion. *Gallo v State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). "To find an abuse of discretion in refusing to grant a motion for continuance, there must be a showing that the defendant was prejudiced by his counsel's inadequate preparation time." *Heiselbetz v. State*, 906 S.W.2d 500, 511 (Tex. Crim. App. 1995). A defendant's bare assertion that his defense counsel did not have adequate time to interview witnesses does not alone establish prejudice. *Id.* at 512.

Ordinarily, a defendant develops the evidence showing how he was harmed by the trial court's denial of a requested continuance during a hearing on his motion

for new trial. *Gonzales v. State*, 304 S.W.3d 838, 842-43 (Tex. Crim. App. 2010). However, Gutierrez did not file a motion for new trial; thus, we do not have a record that shows how Gutierrez was actually prejudiced by his counsel's allegedly inadequate preparation time. During the pre-trial hearing, Gutierrez's counsel complained that he did not have enough time prior to trial to investigate the contents of the additional jail calls that the State provided in its amended *Brady* notices. Gutierrez's counsel requested that the trial court preclude the State from offering any jail calls into evidence because the defense's translator did not have enough time to translate the jail calls. The trial court denied Gutierrez's counsel's motion for continuance.

During the trial, Gutierrez's counsel represented to the trial judge that the State had given him notice that it planned on offering into evidence a four-minute audio recording of a jail call made on April 22, 2014. The record shows that the State planned to obtain a translation of the jail call prior to offering it into evidence. The State represented that it only planned to offer that one jail call into evidence. Gutierrez's counsel explained to the trial judge that the defense only wanted time to prepare for the jail call if the State was going to offer it. The trial court noted that since the State had provided the date and time of the jail call, Gutierrez's counsel

should be able to focus on that one call. Our review of the record shows that, despite the State's representation, the State never introduced any jail calls into evidence.

We hold that the record does not support Gutierrez's complaint that he was prejudiced by his counsel's inadequate preparation time because his counsel was unable to fully investigate the State's evidence and effectively cross-examine witnesses concerning the contents of the jail calls. *See Heiselbetz*, 906 S.W.2d at 511-12. We conclude that Gutierrez has failed to demonstrate that he was actually prejudiced by the trial court's decision to deny his motion for continuance. *See Gallo*, 239 S.W.3d at 764; *Heiselbetz*, 906 S.W.2d at 511-12. We overrule issue two.

In his third issue, Gutierrez complains that the trial court abused its discretion by overruling his objection to the State's alleged improper jury argument. According to Gutierrez, the prosecutor sought to undermine his defensive theory that an alleged alternate perpetrator committed the murder by arguing that Gutierrez could have called the alternate perpetrator as a witness, but failed to do so. Gutierrez complains that the prosecutor's argument was improper because the witness was never available to testify because he had been a target of the criminal investigation and had a Fifth Amendment right not to testify. Gutierrez contends that he was harmed by the prosecutor's improper argument because it undermined his defensive theory and contributed to his conviction.

The State argues that Gutierrez wrongfully equates a witness's potential assertion of a Fifth Amendment privilege to unavailability and asserts that a witness does not become unavailable until he actually invokes his Fifth Amendment privilege against self-incrimination. The State maintains that the witness was present outside the courtroom under the State's subpoena and that there was nothing in the record suggesting that either party knew whether the witness would have invoked the Fifth Amendment privilege had he been called to testify. According to the State, Gutierrez did not establish that the witness was unavailable and the prosecutor was free to comment on the witness's absence. We review the trial court's ruling on an objection to allegedly improper jury argument for an abuse of discretion. *See Garcia v. State*, 126 S.W.3d 921, 924 (Tex. Crim. App. 2004). "[P]roper jury argument generally falls within one of four general areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement." *Brown v. State*, 270 S.W.3d 564, 570 (Tex. Crim. App. 2008). Thus, an appropriate category of argument includes responding to the argument of opposing counsel or invited argument. *Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987). "To constitute reversible error, the argument must be manifestly improper or inject new, harmful facts into the case." *Jackson v. State*, 17 S.W.3d 664, 673 (Tex. Crim. App. 2000).

"[A] prosecuting attorney may comment in his final argument on the failure of a defendant to call a competent and material witness, when it is shown that such witness was available to testify on behalf of the defendant, but was not called by the defendant to testify." *Albiar*, 739 S.W.2d at 363. This includes the failure to call a witness whose existence is reflected in the record and who could support or buttress a defensive theory. *Id.* The mere fact that the witness was under subpoena from the State does not make the witness unavailable to the defense. *Id.* A prosecutor may comment on the defendant's failure to produce witnesses and evidence so long as the remark does not fault the defendant for exercising his right not to testify. *Jackson*, 17 S.W.3d at 674.

The record shows that during closing argument, defense counsel argued that M.H., who testified for the State during trial, was the person who shot Sadruddin and that M.H. had admitted that he pleaded guilty to the murder of Sadruddin. Defense counsel further argued that M.H. committed the murder with F.M. Defense counsel stated that on the eve of trial, M.H. disclosed that F.M. drove M.H. to the murder scene, but that F.M. was not a witness in the case. Defense counsel further argued that M.H. and F.M. were in the same gang, that this case was about M.H. doing work for the gang to obtain a higher rank, and that M.H. set up Gutierrez to take the fall for the murder.

During the State's rebuttal, the prosecutor argued that M.H. did not give up F.M. because he was scared, and the prosecutor argued that Gutierrez did not give up F.M. because they were best friends. The prosecutor argued that "[i]f they thought that [F.M.] could give you some evidence that would support their theory - - which they don't have a burden of proof - - but if they put out a theory, they have got to present evidence to show it. They could have called [F.M.], but they didn't." At that point, defense counsel objected to the prosecutor's argument, stating that "[F.M.] is now a target and he has a Fifth Amendment right, and she is misleading the jury as to this man's availability." The trial court overruled defense counsel's objection to the prosecutor's argument.

Our review of the record shows that the prosecutor's argument was a response to the defense's argument. *See Albiar*, 739 S.W.2d at 362. We hold that the prosecutor properly commented on the defense's failure to call F.M. as a witness in support of its defensive theory that M.H. and F.M. committed the murder. *See id.* at 362-63. We further hold that the prosecutor's comment on the defense's failure to call F.M. as a witness did not fault Gutierrez for exercising his right not to testify. *See Jackson*, 17 S.W.3d at 674. Because the prosecutor's argument falls within a permissible area of jury argument, we conclude the trial court did not abuse its

discretion by overruling Gutierrez's objection. We overrule issue three. Having overruled all of Gutierrez's issues, we affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on March 8, 2017
Opinion Delivered May 10, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.