In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-14-00039-CR

CLARENCE HOOKER, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 364th District Court
Lubbock County, Texas
Trial Court No. 2011-432,718, Honorable Bradley S. Underwood, Presiding

February 25, 2016

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and HANCOCK, JJ.

Presenting three issues, appellant Clarence Hooker appeals from his jury conviction of the offense of murder[1] and the resulting sentence of life imprisonment. We will affirm.

[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2013).

Background

In 2011, appellant was indicted for intentionally or knowingly causing the death of Mary Davis in January 2004, by stabbing her with a knife.

Davis's body was found on January 7, 2004 in her small house in Lubbock. Officers and paramedics responding to a 911 call from a neighbor found Davis's back door unlocked and her body on the floor of her bedroom with a towel over her face. She had twenty-three stab wounds, mostly to the chest area. A "bloody butcher knife" lay next to her head and a partially-smoked cigarette butt was at the foot of the bed.

Police spoke with several people the night Davis's body was found, including the neighbor and Davis's boyfriend, Edward "Sonny" Osby. Police also spoke with other potential suspects, Kelly McDowell and Kenneth McGee. Police eventually concluded none of them was the murderer.

Police also collected the knife and the cigarette butt, along with other items, and took samples and swabs from several areas of the home. Later DNA analysis revealed DNA attributable to more than one male contributor. The DNA on the cigarette butt matched that of Kelly McDowell.

Several other individuals were investigated as suspects over the following years. Appellant first came to the attention of investigating officers in February 2011 when, after they received an unspecified "investigative lead," they took note of calls from his mother's telephone number appearing in a "call log" on Davis's phone. Two phone calls were made from appellant's mother's home late at night four days before Davis's murder. Appellant was living with his mother at the time.

When police spoke to appellant, he acknowledged he had a sexual relationship with Davis. Appellant gave a DNA sample, and it matched DNA on a drinking glass found in the sink of Davis's kitchen. It also matched DNA found in a swab taken from the back of the handle of the butcher knife.

After the jury found appellant guilty as charged in the indictment, and during the punishment hearing, appellant pled true to the enhancement provisions in the indictment. The State produced evidence appellant also had other prior convictions. At one point in the State's closing argument on punishment, it noted to the jury that juries in appellant's previous cases might have "felt sorry for him and given some short sentences." The State then argued to the jury "[a]nd don't you know that jury back then wished they would have given him more." Appellant objected to the statements, the court sustained the objection and instructed the jury to disregard the statements. Appellant's motion for a mistrial was denied.

Analysis

Sufficiency of the Evidence

In his first appellate issue, appellant argues the evidence presented at trial was insufficient to prove his identity as the person who killed Davis.

In determining whether the evidence is sufficient to support a conviction, a reviewing court must consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S. Ct. 2781,

61 L. Ed. 2d 560 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). This "familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Gear v. State,* 340 S.W.3d 743, 746 (Tex. Crim. App. 2011), (*citing Jackson,* 443 U.S. at 319). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Gear,* 340 S.W.3d at 746, (*citing Hooper*, 214 S.W.3d at 13).

Our review of "all of the evidence" includes any improperly admitted evidence as well as that properly admitted. *Clayton v. State,* 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). When the record supports conflicting inferences, we presume the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Id.* Direct and circumstantial evidence are treated equally. *Id.* Even for an offense as serious as murder, "[c]ircumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Id.,* (*citing Hooper,* 214 S.W.3d at 13). The identity of the perpetrator of an offense may be proven by direct or circumstantial evidence. *Earls v. State*, 707 S.W.2d 82, 85 (Tex. Crim. App. 1986); *Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd). Further, the prosecution has no affirmative duty to "rule out every hypothesis except that of guilt." *Blackman v. State,* 350 S.W.3d 588, 595 (Tex. Crim. App. 2011).

Under the Texas Penal Code, a person commits the offense of murder if he intentionally or knowingly causes the death of another person. TEX. PENAL. CODE ANN.

§ 19.02(b)(1). Appellant's sufficiency argument challenges only the evidence that he was the person who caused Davis's death.

In support of his contention the evidence of his identity as the murderer was insufficient, appellant points to the absence of direct evidence of his guilt. He further points to the other suspects police considered, including McGee, Osby and McDowell, as well as another man. Appellant details the evidence against each of them, arguing this evidence conclusively establishes a reasonable doubt as to appellant's guilt. We disagree for two reasons. First, appellant's argument assumes that the evidence must eliminate all reasonable hypotheses other than his guilt. That manner of evaluating the sufficiency of evidence was rejected in *Geesa v. State,* 820 S.W.2d 154, 160-61 (Tex. Crim. App. 1991). *See Blackman,* 350 S.W.3d at 595. Second, the evidence appellant emphasizes merely raises inferences that conflict with appellant's guilt. As noted, the law makes it the responsibility of the jury to resolve such conflicting inferences. *Clayton,* 235 S.W.3d at 778.

Appellant is correct the State largely relied on circumstantial evidence to convict him. But, giving proper regard to the jury's responsibility to weigh the evidence and draw reasonable inferences, and considering the evidence in the light most favorable to its verdict, we find the record contains sufficient evidence to support appellant's conviction.

During 2011, appellant engaged in two voluntary interviews with police. The State used the audio recordings at trial, played in redacted form for the jury. In the first, appellant told of his sexual relationship with Davis and said he had been to her home rarely, perhaps two or three times. He told officers he had been in the bedrooms of the home as well as the bathroom and the living room. He denied ever being in the kitchen.

He also told officers he last saw Davis at her home in October or November 2003. Without being asked, he volunteered the information he had not been at her home in January 2004. He then told officers he had seen a report about Davis's death on the news and knew it occurred in January. However, he said he did not come forward to speak with officers because he thought he would be the "main suspect."

During the second interview, several months after the first, officers told appellant his DNA had been found on the drinking glass collected from Davis's kitchen sink. The officer showed appellant a picture of it. Appellant responded his DNA was on that glass because he drank water from it when he was at Davis's house. When told that his DNA was also found on the butcher knife, he stated only that he was inside the house "a lot."

The State's analyst testified appellant was the source of the DNA found on the drinking glass, to a reasonable degree of scientific certainty.[2] Appellant told police he drank from the glass but could not remember when. Kitchen photographs show a double kitchen sink, with washed dishes neatly stacked in one side. They show the drinking glass sitting in the other side of the sink. From his DNA on the glass, adjacent Davis's washed dishes,[3] the jury readily could infer two things: appellant was not being truthful when he told police he had last been in the house in October or November 2003, and he had used the glass near the time of Davis's death. But there were other

[2] The analyst testified her analysis of the STR DNA profile from the drinking glass showed, "The probability of selecting an unrelated person at random who could be the source of this DNA profile is approximately one in 814.3 septillion for Caucasians, one in 399.7 sextillion for blacks and one in 316.6 septillion for Hispanics."

[3] Several witnesses testified Davis kept her home "tidy" and "clean." Photographs in evidence depict a tidy home.

drinking glasses found at locations in the house, perhaps weakening the inferences properly drawn from the presence of appellant's DNA on that glass.

The State's analyst also testified appellant was the "major contributor" to the Y-STR[4] profile obtained from a swab of the back of the handle of the butcher knife. She said his DNA was found at 14 of the profile's 16 "loci." She identified the profile as "partial" because she did not "have a result at all 16 of those locations."[5] She also identified the profile as "consistent with a mixture" because the analysis showed a single "peak" that could not be attributed to appellant. The analyst told the jury the finding of the one peak not consistent with appellant's DNA could, but did not necessarily, indicate another person's DNA was at that location. The minor component finding ("that one tiny extraneous peak"), she said, required her to classify the profile as a mixture, but was "insufficient to really compare to anybody else."[6]

Appellant does not challenge the evidence that the butcher knife found next to Davis's body was the murder weapon. Only appellant's, and Davis's, DNA was actually identified on the knife. A witness testified she saw a butcher knife "lodged in the back door to secure it" when she visited Davis four days before her murder. Assuming that

[4] A Y-STR profile focuses on the presence of male DNA because it does not amplify female DNA. The analysis here removed Davis and other females from consideration.

[5] She said, however, that a result at 14 out of 16 locations is "actually very good for a Y-STR profile."

[6] Appellant also presented the testimony of a DNA expert. She had not performed an independent analysis of any of the DNA collected. She agreed the major male component of the profile taken from the back of the knife handle corresponded with appellant's DNA, but also saw the "strong indicators that potentially" there was a second male contributor. On cross-examination, she told the jury she did not disagree with any of the State's analyst's testimony.

the knife lodged in the door also was the murder weapon, it is possible appellant innocently handled that knife on some occasion and thereby deposited his DNA on it. But it is also possible his DNA was deposited there on the occasion of Davis's stabbing. The jury was free to see the combined force of appellant's DNA on the murder weapon and his DNA on the drinking glass as strong evidence of appellant's guilt. *See Hooper*, 214 S.W.3d at 16 ("an inference is a conclusion reached by considering other facts and deducing a logical consequence from them").

The jury also was free to see appellant's inconsistent statements regarding the frequency of his visits to Davis's home, and his volunteered denial of being present there in January 2004, the month of her death, as indicating a consciousness of guilt. *See Ziegler v. State,* No. 08-09-00188-CR, 2011 Tex. App. LEXIS 1679, at *24-25 (Tex. App.—El Paso Mar. 9, 2011, no pet.) (mem. op., not designated for publication) (a defendant's conduct in lying to police officers shows a consciousness of guilt, and may be considered as circumstantial evidence of guilt) (*citing King v. State,* 29 S.W.3d 556, 565 (Tex. Crim. App. 2000) and *Torres v. State,* 794 S.W.2d 596, 598 (Tex. App.—Austin 1990, no pet.) (similar finding). *See also Guevera v. State,* 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (inconsistent statements and implausible explanations to police are probative of wrongful conduct and are also circumstances indicating guilt). The record contains evidence that Davis's home was not burglarized, indicating she probably knew the person who killed her, particularly since witnesses testified she kept her doors locked and carried a key on a lanyard around her neck. The record of calls made to Davis's home within days of her death from appellant's mother's number also can be seen as confirming his contact with her near the time of her death, again

contrary to appellant's initial statement he had not been in the home since October or November.

Two men other than appellant told police they had sexual relationships with Davis. One, Orsby, said he spent the Sunday night with her before her body was found on Wednesday. And, not all the DNA evidence supports appellant's identity as the murderer. Appellant was excluded as a contributor from DNA evidence collected from Davis's socks, another swabbing of the entire knife handle, and a mop handle. As noted, the DNA found on the cigarette butt found next to Davis's body was that of McDowell, not appellant.

Considering all the evidence in the proper light, and presuming the jury resolved conflicting evidence in favor of its verdict, we find a rational jury could have concluded beyond reasonable doubt that appellant stabbed Davis. We overrule appellant's first issue.

Exclusion of Evidence Regarding McGee

During trial, the State examined a detective about his investigation into Davis's murder and one of the suspects, McGee. As part of pre-trial discovery, the State furnished appellant with documentation showing McGee was accused of stabbing someone with a butcher knife in 1999 in New Mexico. Appellant sought, outside the presence of the jury, to question the detective about the 1999 accusation, arguing it was relevant to determine the identity and knowledge of the person who stabbed Davis. On appeal, he argues the trial court erred when it concluded any discussion or presentation of that evidence was inadmissible.

We review the trial court's rulings on the admissibility of evidence for an abuse of discretion. *Casey v. State*, 215 S.W.3d 870, 879 (Tex. Crim. App. 2007). A trial court abuses its discretion when its decision lies outside the zone of reasonable disagreement. *Id*. It does not abuse its discretion unless it has "acted arbitrarily and unreasonably, without reference to any guiding rules and principles." *Montgomery v. State,* 810 S.W.2d 372, 380 (Tex. Crim. App. 1991) (op. on reh'g); *see also Breeding v. State*, 809 S.W.2d 661, 663 (Tex. App.—Amarillo 1991, pet. ref'd). The trial court's ruling will be upheld if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Ramos v. State,* 245 S.W.3d 410, 418 (Tex. Crim. App. 2008). Rule of Evidence 403 allows for the exclusion of otherwise relevant evidence when its probative value is substantially outweighed by a danger of, *inter alia*, unfair prejudice, confusing the issues or misleading the jury. TEX. R. EVID. 403.

McGee was immediately investigated as a suspect. A police officer testified at trial that McGee's son, Adrian Rainwater, told police McGee had a problem with crack cocaine and was in the process of selling homes owned by McGee's deceased mother. These homes included the home occupied by Davis. The police officer agreed Rainwater told police his father was "most eager" to get Davis out of the house, and told them he was concerned his father was involved in Davis's murder.

Appellant argued evidence that McGee stabbed someone in New Mexico in 1999 was relevant evidence under Rules 401 and 402 of the Rules of Evidence and applicable to his case under Rule 404(b). Appellant argued to the court, "I'm making an offer of proof as to this witness's knowledge of a stabbing incident involving Kenneth Wayne McGee in New Mexico in approximately 1999 as being relevant, because it's

probative to the case; in that, it shows a stabbing committed by a major suspect in a criminal case that the State has opened the door to a certain extent." He went on to argue that the evidence was "essential to the Defendant's defense." The trial court sustained the State's relevance objection.

The trial court permitted evidence that McGee was an immediate suspect in Davis's murder, had motive to kill her, had a relationship with her, and was gathered with others outside Davis's home the night her body was found. The jury also had before it evidence from another witness that McGee knew about Davis's death before the news media reported it. All of this evidence was relevant to appellant's defensive theory that he was not the person who killed Davis. However, the trial court could have reasonably, within its discretion, determined appellant's proffer of the criminal complaint alleging McGee stabbed someone in another state five years prior to Davis's murder was more prejudicial than probative and would serve only to confuse the issues before the jury. *See* TEX. R. EVID. 403. We cannot say the trial court abused its discretion by excluding the evidence. Appellant's second issue is overruled.

Failure to Grant Mistrial

In his third appellate issue, appellant contends the trial court erred when it denied his request for a mistrial during the punishment phase of trial. As noted, during its closing argument, the State argued that juries in prior cases in which appellant was convicted "may have felt sorry for him and given him some short sentences." The State then argued, "[a]nd don't you know that jury back then wished they would have given him more?" Counsel objected to the statements as outside the record and

inflammatory, and the court sustained the objection. The court also instructed the jury to disregard the statements but denied appellant's request for a mistrial.

We review the court's ruling on a motion for mistrial for abuse of discretion. *Archie v. State,* 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). The following factors should be used to evaluate whether the trial court abused its discretion in denying a motion for mistrial made because of improper argument during the punishment phase of trial: (1) the severity of the misconduct; (2) measures adopted to cure the misconduct; and (3) the certainty of the punishment assessed absent the misconduct. *Id.* at 700.

The approved general areas of argument are: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) answer to argument of opposing counsel, and (4) plea for law enforcement. *Freeman v. State,* 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). Even when an argument exceeds the permissible bounds of these approved areas, such will not constitute reversible error unless, in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute, or injects new facts harmful to the accused into the trial proceeding. *Wesbrook v. State,* 29 S.W.3d 103, 115 (Tex. Crim. App. 2000). The remarks must have been a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial. *Id.* In most instances, an instruction to disregard the remarks will cure the error. *Id.*

The court properly sustained appellant's objection to the prosecutor's invitation to the jury to speculate on previous juries' thinking. However, the prosecutor's statements were brief, reasonably could have been construed as a plea for law enforcement, and were quickly followed by an instruction to disregard from the trial court. We presume

the jury complied with the court's instruction. *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998). Only offensive or flagrant error warrants reversal when there has been an instruction to disregard, and we find the prosecutor's statements here were not so flagrant as to render ineffective the court's instruction to disregard them. *Hawkins v. State,* 135 S.W.3d 72, 79 (Tex. Crim. App. 2004). Further, the jury had before it appellant's extensive criminal history for misdemeanor theft, attempted aggravated sexual assault of a child, sexual assault, theft of a firearm and failure to register as a sex offender. Given the serious nature of the murder charge and appellant's significant criminal history, the jury's assessment of a life sentence is not surprising. We find it unlikely the jury was moved to assess such a sentence by the prosecutor's brief references in her argument to the actions of previous juries.

We resolve appellant's final issue against him.

Conclusion

Having overruled each of appellant's three issues, we affirm the judgment of the trial court.

James T. Campbell
Justice

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