IN THE
TENTH COURT OF APPEALS

No. 10-14-00336-CR

EUGENE LAMAR JENKINS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 272nd District Court
Brazos County, Texas
Trial Court No. 12-01244-CRF-272

MEMORANDUM OPINION

In the early morning of December 14, 2011, just after midnight, two men got out of a dark-colored Impala and approached the front door of the home of eighteen-year-old Raymond Cavazos, a drug dealer, in Bryan. When Cavazos opened the door, an exchange of several gunshots ensued. Cavazos was shot in the head and killed. The two men entered the home and took Cavazos's drugs and cash. They also took his gun.

Neighbors partially witnessed the events. Based on a description of the vehicle and a Crimestoppers tip, police were quickly led to Clifton Dean Montgomery, Jr., whom they arrested on December 16. Further investigation revealed that Appellant Eugene Lamar Jenkins was the second man involved in the robbery and murder. A jury found Jenkins guilty of capital murder, and because the State did not seek the death penalty, he was assessed an automatic life sentence without the possibility of parole.[1] Jenkins appeals his conviction in seven issues. We will affirm.

Batson Challenge

In his first issue, Jenkins asserts that the trial court erred in denying his objections to the State's use of its peremptory challenges to strike two African-Americans on the jury panel—Venireperson No. 6 and Venireperson No. 31. Jenkins asserts that the State's actions denied him due process of law and equal protection of the law in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The exclusion of a venireperson based on race violates the Equal Protection Clause of the Fourteenth Amendment. *Id.*, 476 U.S. at 89, 106 S.Ct. at 1719.

> Under *Batson,* a defendant may be entitled to "a new array" if he can demonstrate, by a preponderance of the evidence, that the prosecutor indulged in purposeful discrimination against a member of a constitutionally protected class in exercising his peremptory challenges during jury selection. As the process has been described by the Supreme Court:

[1] In a separate trial, Montgomery was also convicted of capital murder and received a life sentence without the possibility of parole. *Montgomery v. State*, No. 10-13-00298-CR, 2015 WL 4064837, at *1 (Tex. App.—Waco Jul. 2, 2015, no pet.) (mem. op., not designated for publication).

> Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.
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> At the second step of this process, the proponent of the strike need only tender an explanation that is racially neutral on its face. The ultimate plausibility of that explanation is then considered under the third step of the analysis, in which the trial court determines whether the opponent of the strike has satisfied his burden of persuasion to establish by a preponderance of the evidence that the strike was indeed the product of purposeful discrimination. Whether the opponent satisfies his burden of persuasion to show that the proponent's facially race-neutral explanation for his strike is pretextual, not genuine, is a question of fact for the trial court to resolve in the first instance.
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> A reviewing court should not overturn the trial court's resolution of the *Batson* issue unless it determines that the trial court's ruling was clearly erroneous. In assaying the record for clear error, the reviewing court should consider the entire record of voir dire; it need not limit itself to arguments or considerations that the parties specifically called to the trial court's attention so long as those arguments or considerations are manifestly grounded in the appellate record. But a reviewing court should examine a trial court's conclusion that a racially neutral explanation is genuine, not a pretext, with great deference, reversing only when that conclusion is, in view of the record as a whole, clearly erroneous.

Blackman v. State, 414 S.W.3d 757, 764–65 (Tex. Crim. App. 2013) (footnoted citations omitted, but quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S.Ct. 1769, 1770-71, 131 L.Ed.2d 834 (1995)).

Because the trial court conducted a *Batson* hearing, we must presume that Jenkins made a satisfactory prima facie case of purposeful discrimination. *See Watkins v. State*, 245 S.W.3d 444, 447 (Tex. Crim. App. 2008). And Jenkins does not dispute that the State offered facially race-neutral explanations for striking the prospective jurors. Instead, Jenkins argues that the explanations were merely a pretext for discrimination.

In regard to No. 31, the prosecution offered the following explanation for striking her from the panel:

> The next one, Judge, is . . . No. 31 . . . . The reason we struck her specifically, Judge, is when I was talking to the panel about the law of conspiracy, I asked her if she agreed with the law. She hesitated and then said yes. I came back and said that sounded like a maybe. Is that fair? Do you think the law on conspiracy is fair? And her specific response was: No, I don't think it's fair, but I'll follow it. The fact that she did not agree with and did not believe that the law pertained to conspiracy was fair was our basis for striking her.

Jenkins did not respond to the prosecutor's explanation, offering nothing to rebut the prosecution's race-neutral reason for striking No. 31. Jenkins now argues that the prosecution's reason for striking No. 31 was a pretext because she was questioned disparately from every other venireperson. That reason was not presented to the trial court; nevertheless, we assume without deciding that Jenkins may raise his argument on appeal. *See Hill v. State*, No. 10-03-00281-CR, 2005 WL 170552, at *1 (Tex. App.—Waco Jan. 26, 2005, pet. ref'd) (mem. op., not designated for publication) ("[A] defendant who raises a *Batson* claim at trial forfeits his opportunity to complain on appeal about what his response to the State's race neutral reasons would have been when he fails to timely

present his evidence in rebuttal of the State's race neutral reasons or object to the trial court's refusal to let him do so.").

When questioning the panel about conspiracy, the prosecutor had the following exchange with No. 31 and other venirepersons:

> [PROSECUTOR]: . . . Let's assume you are on the jury, and you hear the evidence in the case whatever that is. And the evidence gets you there that, yeah, I believe they have proven the elements of a conspiracy that this guy committed a robbery. During the robbery one of them committed an intentional murder. I believe that is something that should have reasonably anticipated happened in doing this robbery. Under those circumstances the law would require a conviction of capital murder. Can you follow the law?
>
> [VENIREPERSON]: I can follow the law.
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> [PROSECUTOR]: Who else on the second row has a hard time with that, says, [Prosecutor], I don't think so, in my heart I can't do that? [No. 31], are you okay with it?
>
> [NO. 31]: I'm okay with it.
>
> [PROSECUTOR]: You hesitated for a second. What are you thinking? Do you think that's fair?
>
> [NO. 31]: No, not really.
>
> [PROSECUTOR]: That's the hesitation I'm talking about. Tell me about that. What are you thinking?
>
> [NO. 31]: I would have to follow the law. I couldn't do that.
>
> [PROSECUTOR]: Well, again, like we talked about with some folks over here, that's the real cool thing is right now you have not taken an oath to follow the law. You can have your own opinion and act on your own opinion. The worst thing that happens to you is you get to go home. We have to know about it now. The reason we have that conversation at

this point is, like we talked about before lunch, the only oath y'all have taken at this point is to do what? To tell the truth. Those of you who make it over here, the very, very first thing that you do when you get over here is you take a separate oath to now follow the law.

And we have had this happen before, and it's bad when it does. Is somebody is on the fence like you are telling me you are. I don't know if I agree with that. They make it here and then, and only then, do they go, no, I can't do it. I can't follow the law. Now, at that point it's too late. So that's why we get to have this opportunity now to talk about it before you take the oath.

Just looking inside yourself, and be honest with yourself, how do you feel about that? Could you convict somebody of capital murder even if the evidence doesn't show that they're the one that pulled the trigger? Could you do that?

[NO. 31]: Yes, I could follow the law. I could.

[PROSECUTOR]: Thank you, ma'am. [Venireperson]?

[VENIREPERSON]: (Moving head up and down.)

[PROSECUTOR]: And you?

VENIREPERSON: (Moving head up and down.)

[PROSECUTOR]: Keep going down that row.

VENIREPERSON: (Moving head up and down.)

The foregoing exchange demonstrates that No. 31 was questioned more extensively because she was the only venireperson to express some doubt about whether she could find a defendant guilty of a capital murder committed during the course of a robbery when the defendant was not the "triggerman." The other venirepersons stated they could follow the law without the hesitation exhibited by No. 31. Additionally, No.

31's answer, "I couldn't do that," was at best unclear as to whether she could follow the law. Given the record before us, we conclude that the trial court's finding that the prosecution's reason for striking No. 31 was not a pretext for discrimination was not clearly erroneous.

In regard to No. 6, the prosecutor gave the following explanation for striking her:

> [PROSECUTOR]: Judge, I'll start first with respect to . . . No. 6. . . . We had numerous grounds on her. When I first spoke to [No. 6] with regards to the evidence and specifically talking about when I had the puzzle piece slides up there, she hesitated on that. When everybody else agreed it was a gun, she hesitated on that. There were times throughout the voir dire when everybody on her row would be nodding agreement with the question except for her. She also indicated she would follow the law on conspiracy, but, again, hesitated on that. And then she, along with . . . No. 58 . . . who was a Caucasian female together came back, I believe, more than ten minutes late after lunch. Had we gotten to [No. 58], we would struck her too on that basis.
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> . . . .
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> There was another thing, Judge. [Prosecutor No. 2] had noticed and documented that when we asked about the defendant's family who knew them specifically, the defendant's mother, for a time after we had that discussion, that juror continued to mouth the defendant's mother's name to herself as if trying to recall if she knew her. Looked like to us there was a possibility she might know her.
>
> Based on kind of collectively those things, those were our bases: That she was weak on evidentiary questions, she was weak on conspiracy, hesitated on several questions, and then came back late from lunch and then we thought based on her actions she may have - -
>
> Right, and when I say hesitated on the gun thing, she indicated at one point she had a reasonable doubt that that picture of a gun was, in fact, a picture of a gun . . . .

THE COURT: I find all those to be race neutral.

Jenkins's attorney responded: "Just for our record, I do feel like it's important. I know the Court's made the ruling. But with respect to . . . No. 6 in terms of the gun and reasonable doubt, she agreed actually with . . . No. 22, for our record, and a white male, No. 22." In his brief, Jenkins points to additional reasons why the prosecutor's explanation for striking Juror No. 6 was merely a pretext for discrimination. Again, we assume without deciding that Jenkins may raise these reasons for the first time on appeal. *See Hill*, 2005 WL 170552, at *1.

The record reflects the following questioning in regard to slides of a gun puzzle the prosecutor exhibited to the venire:

[PROSECUTOR]: [No. 22], what's that a picture of?

[NO. 22]: Some puzzle pieces.

[PROSECUTOR]: Of what? What's the puzzle?

[NO. 22]: I don't know.

[PROSECUTOR]: [Juror No. 6], you want to take a shot at it?

[NO. 6]: I don't know either.

[PROSECUTOR]: What do you think? [No. 7], you want to take a guess?

[NO. 7]: Just looks like multiple colors and stripes and spots.

[PROSECUTOR]: What is it now?

[VENIREPERSON]: Looks like a weapon.

[PROSECUTOR]: Are you a sure? What do you think? Is that a gun?

VENIREPERSON: Looks like a gun.

[PROSECUTOR]: Are you sure that's a gun beyond a reasonable doubt based on what you are seeing?

[NO. 22]: Yes.

[PROSECUTOR]: Everybody agree with him? Yeah, that's a gun. Is there anybody here that has a reasonable doubt that's a picture of a gun?

[No. 22], let me ask you, are you sure beyond a reasonable doubt that's a gun? There's still some pieces missing. A lot of pieces missing, right? How can you be sure beyond a reasonable doubt that's a gun?

[NO. 22]: Context of clues.

. . . .

[PROSECUTOR]: All right. [No. 6], you were one of the ones - - and that wasn't a fair question. I showed you three pictures of nothing up there. What do you think about what your neighbor . . . just said? Just because you have some unanswered questions doesn't mean you can't know what happened based on everything else you know. Do you agree with that?

[NO. 6]: Yes, I agree with that.

[PROSECUTOR]: There was a little bit of hesitation. What are you thinking?

[NO. 6]: Well, because the information that you receive or the evidence that you have in front of you to know what is pertaining to, but looking at this picture of this gun where there's pieces of the puzzle missing, it could be piece of a gun that's missing that might trigger the whole thing off.

[PROSECUTOR]: What do you mean by that - - might trigger the whole thing off?

[NO. 6]: As far as blood that was on the gun.

[PROSECUTOR]: Sure, okay.

[NO. 6]: Fingerprints.

[PROSECUTOR]: I understand. So what you are saying - - I don't want to misunderstand you. I want to make sure we're on the same page. You are saying you might have some really unimportant unanswered questions?

[NO. 6]: Right.

[PROSECUTOR]: Even if some of the unanswered questions are really important, do you think it's still have enough information to know what happened in a situation?

[NO. 6]: No.

No. 6's answers indicate that she would have problems reaching a conclusion unless all of her questions are answered, unlike the other prospective jurors questioned during this exchange. She also hesitated in giving her answer, while the other prospective jurors did not. While Jenkins provides hypothetical reasons for No. 6's hesitation, there is no support in the record for his claims.

Jenkins now asserts that the following also establishes that the prosecution's remaining reasons for striking No. 6 were a pretext for discrimination: (1) No. 6 was asked questions that other non-minority prospective jurors were not asked in relation to the puzzle and reasonable doubt; (2) No. 6 was not "weak" on conspiracy law and party

liability as the prosecution claimed because she agreed that a person could be convicted of capital murder even though that person had no intent to harm anyone; (3) the record does not support that No. 6 was late returning from lunch, her tardiness did not interrupt court proceedings, no one inquired about her reasons for being late, and no other prospective juror was struck for being late; and (4) any hesitation she displayed in answering questions could have been due to her giving "thoughtful consideration to her answers" before answering. These arguments are either unsupported by the record or insufficient to establish that the trial court's ruling was clearly erroneous.

Although Jenkins asserts that there was nothing in the record to indicate that No. 6 was late returning from lunch, the record reflects that the court had to wait for No. 6 and No. 58 to enter the courtroom before proceeding. The lawyers discussed at the bench whether to proceed without them or not, with the defendant requesting that the court wait for all jurors to be present. As noted, the prosecutor indicated that he would have struck No. 58, a Caucasian female, if she had been in the strike zone. The fact that a prospective juror is late is race neutral in that it is not a characteristic that is peculiar to any race. *See Ingram v. State*, 978 S.W.2d 627, 630 (Tex. App.—Amarillo 1998, no pet.). Jenkins argues that the prosecutor did not question the prospective jurors as to the reasons for their late arrival. However, the prosecution has no burden other than to offer a race-neutral reason for striking a juror. *Blackman,* 414 S.W.3d at 764–65. The burden

was on Jenkins to prove that the reason was merely a pretext for discrimination. *Id*. at 765.

Additionally, Jenkins's argument that No. 6's "hesitation" before answering questions could be due to her "giving thoughtful consideration to her answers" is mere speculation and unsupported by the record. A prospective juror's "hesitation" in answering questions is the type of circumstance that does not appear in the record but is observed by the trial court, thus requiring "an evaluation of the credibility and demeanor of prosecutors and venire members," which is peculiarly within the trial court's province. *Grant v. State*, 325 S.W.3d 655, 657 (Tex. Crim. App. 2010). In such situations, the reviewing court must defer to the trial court "in the absence of exceptional circumstances." *Id*.

The other reasons given by the prosecution, such as No. 6 not nodding when other prospective jurors did or acting as if she knew Jenkins's mother, also do not appear in the record and also fall into the category of matters that require the trial court to evaluate the credibility and demeanor of the prosecutor and venirepersons. The trial court in this case, who had the opportunity to view the prosecutor and each of the venirepersons during voir dire, determined that the prosecution's reasons for striking No. 6 and No. 31 were racially neutral and that Jenkins failed to carry his burden of proving that those reasons were merely a pretext for discrimination.

We defer to the trial court's ruling, as Jenkins has identified no exceptional circumstances. Given the record before us, we conclude that the trial court's determination that No. 6 and No. 31 were not struck by the prosecution because of their race was not clearly erroneous. Jenkins's first issue is overruled.

Fair Cross-Section

In his second issue, Jenkins asserts that the trial court erred when it failed to dismiss the jury venire because African-Americans were underrepresented.

In order to establish a prima facie violation of the requirement that there be a fair cross-section of the community, an appellant must show: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Pondexter v. State*, 942 S.W.2d 577, 580 (Tex. Crim. App. 1996) (citing *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979)).

The first prong is satisfied because African-Americans are a distinctive group. *See id.* Jenkins's claim of error fails at the second prong because he failed to present any evidence "that showed that the difference between the percentage of African-Americans in the county and the percentage on the jury panel was in fact not fair and reasonable." *Id*. Jenkins attempted to make such a showing at voir dire by having the trial court take

judicial notice of the 2013 census for Brazos County regarding the percentage of African-Americans in the county. However, the trial court responded, "I don't have any knowledge of that." Jenkins's attorney then represented, "Judge, we will present the Court with that information." There is nothing in the record to indicate that any such information was ever provided. Accordingly, we overrule Jenkins's second issue.

Juror Disqualification

In his third issue, Jenkins contends that the trial court erred in determining that Venireperson No. 57[2] was not qualified for jury service. During voir dire, No. 57 admitted that he had been convicted of a felony in the past and placed on probation. No. 57 further noted that he had successfully discharged his term of probation. Jenkins argues that because No. 57's probation was discharged, he was then eligible to serve on the jury.

Articles 35.16 and 35.19 of the Code of Criminal Procedure exclude from jury service individuals who have been convicted of a felony offense. *Day v. State*, 784 S.W.2d 955, 956 (Tex. App.—Fort Worth 1990, no pet.); *see* TEX. CODE CRIM. PROC. ANN. arts. 35.16(2), 35.19 (West 2006). "However, a juror who has completed a felony probation, had his conviction set aside, and had the case dismissed is released from the disabilities attendant upon conviction thereby regaining his qualification to serve as a juror." *Day*, 784 S.W.2d at 956; *see* TEX. CODE CRIM. PROC. ANN. art. 42A.701(e), (f) (West Supp. 2016).

[2] This number was assigned before a jury shuffle that occurred after a number of venirepersons had been excused for cause or disqualified.

Jenkins relies on *Payton v. State*, 572 S.W.2d 677 (Tex. Crim. App. 1978), *overruled on other grounds by Jones v. State*, 982 S.W.2d 386 (Tex. Crim. App. 1998), to support his argument that discharge from probation alone was sufficient to reinstate No. 57 as an eligible prospective juror. Interpreting former article 42.12, section 7 of the Code of Criminal Procedure,[3] the *Payton* court determined that a prospective juror who "had satisfactorily served out his probation term and been discharged" had been "'released from all penalties and disabilities' resulting from his earlier conviction, including the disability to serve on a jury." *Payton*, 572 S.W.2d at 678-79. Since *Payton*, however, the Court of Criminal Appeals, interpreting a substantially similar version of the pertinent part of the statute, has recognized the distinction between the discharge of felony probation and the dismissal of the legal disabilities attendant upon a felony conviction.[4]

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[3] Former article 42.12, section 7 stated in pertinent part:

> Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, . . . shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty . . . .

Act of May 27, 1965, 59th Leg., R.S., ch. 722, § 1, art. 42.12, sec. 7, 1965 Tex. Gen. Laws 317, 492. The section was both renumbered and amended after *Payton*. The Legislature then repealed article 42.12, effective January 1, 2017, and enacted chapter 42A of the Code of Criminal Procedure, as part of a nonsubstantive revision of community-supervision laws. *See* Act of May 26, 2015, 84th Leg., R.S., ch. 770, §§ 1.01, 3.01, 4.01-.02, 2015 Tex. Sess. Law Serv. 2320, 2320-94 (West). The current version of the pertinent part of the section is codified in article 42A.701(e) and (f) of the Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 42A.701(e), (f).

[4] The version of the statute at issue in the case stated in pertinent part:

See Cuellar v. State, 70 S.W.3d 815, 818-19 (Tex. Crim. App. 2002). The *Cuellar* court stated that while a probationer who successfully completes all of the terms of his probation must be discharged, a trial court has the discretion to relieve the probationer of all legal disabilities through a type of "judicial clemency." *See id.* "If a judge chooses to exercise this judicial clemency provision, the conviction is wiped away, the indictment dismissed, and the person is free to walk away from the courtroom 'released from all penalties and disabilities' resulting from the conviction." *Id.* at 819. A person whose conviction is set aside in this manner is not a convicted felon. *Id.* at 820.

There was nothing before the trial court to indicate that after his discharge from probation, No. 57's guilty plea had been set aside or the charging instrument against him had been dismissed such that he was released from all penalties and disabilities resulting from his felony conviction.[5] Therefore, the trial court did not err in ruling that No. 57 was

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> Upon the satisfactory fulfillment of the conditions of community supervision, and the expiration of the period of community supervision, the judge, by order duly entered, . . . shall discharge the defendant. If the judge discharges the defendant under this section, the judge may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against the defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty . . . .

Act of May 29, 1993, 73d Leg., R.S., ch. 900, § 4.01, art. 42.12, sec. 20, 1993 Tex. Gen. Laws 3586, 3739 (repealed) (current version at TEX. CODE CRIM. PROC. ANN. art. 42A.701(e), (f)).

[5] The version of the statute in effect on the presumed date that No. 57 committed the offense for which he was placed on probation stated in pertinent part:

> Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, . . . shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere to an offense other than an offense under Subdivision (2), Subsection (a), Section 19.05, Penal Code, or an offense under Article 6701*l*-1, Revised Statutes, and the court has discharged the defendant hereunder, such court may set aside the verdict or

disqualified from jury service. *See Gardner v. State*, 306 S.W.3d 274, 300-301 (Tex. Crim. App. 2009) ("The issue of whether a venireman is disqualified under the statute is one of fact; thus, if the evidence is conflicting, the trial judge does not abuse his discretion by finding either that the veniremember is or is not disqualified."). Jenkins's third issue is overruled.

Law of Parties

In his fourth issue, Jenkins contends that the trial court erred in charging the jury regarding the liability of parties when the indictment did not include such an allegation. Jenkins further argues that the trial court erred in denying his motion to quash the indictment on the same grounds.

Jenkins acknowledges that the Court of Criminal Appeals has repeatedly held that a trial court may charge the jury on the law of parties even though there is no such allegation in the indictment. *See Marable v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002) (reiterating that "it is well-settled that the law of parties need not be pled in the indictment"); *Pitts v. State*, 569 S.W.2d 898, 900 (Tex. Crim. App. 1978) ("If the evidence supports a charge on the law of parties, . . . the court may charge on the law of parties

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> permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty . . . .

Act of May 23, 1989, 71st Leg., R.S., ch. 679, § 2, art. 42.12, sec. 7, 1989 Tex. Gen. Laws 3166, 3166; Act of May 29, 1989, 71st Leg., R.S., ch. 785, § 4.17, art. 42.12, sec. 23, 1989 Tex. Gen. Laws 3471, 3516 (repealed) (current version at TEX. CODE CRIM. PROC. ANN. art. 42A.701(e), (f)).

even though there is no such allegation in the indictment."). Nonetheless, Jenkins urges us to overrule this line of cases. As an intermediate appellate court, we must follow the binding precedent of the Court of Criminal Appeals. *McKinney v. State*, 177 S.W. 3d 186, 192 (Tex. App.—Houston [1st Dist.] 2005), *aff'd*, 207 S.W.3d 366 (Tex. Crim. App. 2006). We lack authority to do otherwise. *See Davis v. State*, 276 S.W.3d 491, 500 (Tex. App.–Waco 2008, pet. ref'd). Jenkins's fourth issue is overruled.

Chapter 19 of the Penal Code and Sudden Passion

In his fifth issue, Jenkins contends that the trial court erred in failing to declare chapter 19 of the Penal Code unconstitutional and in failing to set aside the indictment. Jenkins argues that the present Penal Code violates his right to equal protection under the federal and state constitutions because a person charged with capital murder is denied jury consideration of "sudden passion" as a mitigating factor unless the person is first convicted of the lesser-included offense of murder.

Texas's current statutory scheme does not allow juries to consider "sudden passion" in capital cases in which the State does not seek the death penalty, but it does allow juries to consider "sudden passion" in the punishment phase of murder cases. *See* TEX. PENAL CODE ANN. § 19.02(b)-(d) (West 2011); § 19.03 (West Supp. 2016). Jenkins's claim that the scheme deprives him of equal protection has been rejected by the Court of Criminal Appeals in *Westbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000). The *Westbrook* court recognized that "[t]he Legislature, through its broad power to classify

crimes and those who stand accused of crimes, chose not to permit the defense of 'sudden passion' in the context of capital murder." *Id*. at 113. "No equal protection concerns are present as a result of the Legislature's prerogative to treat capital murder defendants differently from other murder defendants in this manner." *Id*. As previously noted, as an intermediate appellate court, we must follow the binding precedent of the Court of Criminal Appeals. *McKinney*, 177 S.W.3d at 192. Jenkins's fifth issue is overruled.

Sufficiency of the Evidence

In his sixth issue, Jenkins asserts that the evidence introduced at trial was insufficient to support his conviction for capital murder. Specifically, he argues that the evidence was insufficient to prove his guilt either as a principal or as a co-conspirator or party to the felony offense of robbery.

The Court of Criminal Appeals has expressed our constitutional standard of review of a sufficiency issue as follows:

> In determining whether the evidence is legally 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." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. "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." *Hooper*, 214 S.W.3d at 13.

Lucio v. State, 351 S.W.3d 878, 894 (Tex. Crim. App. 2011).

The Court of Criminal Appeals has also explained that our review of "all of the evidence" includes evidence that was properly and improperly admitted. *Conner v. State*, 67 S.W.3d 192, 197 (Tex. Crim. App. 2001). And if the record supports conflicting inferences, we must presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination. *Jackson*, 443 U.S. at 326, 99 S.Ct. at 2793. Further, direct and circumstantial evidence are treated equally: "Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt." *Hooper*, 214 S.W.3d at 13. Finally, it is well established that the factfinder "is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties." *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991).

S. F.,[6] a detective with the Bryan Police Department, testified that he was called to the scene of Cavazos's murder. He testified that Cavazos had been shot under the right eye. Next to Cavazos's body was discovered a spent .380 shell casing. Two bullet holes were found in Cavazos's residence—one in the ceiling and one to the right of the front door. S.F. testified that a bullet was recovered from the ceiling, but not from the area next

[6] The witnesses who testified at trial or who were informational are identified by initials.

to the door. The blood and other matter on the ceiling indicated that the bullet that was recovered from there had passed through Cavazos.

K.C., a deputy medical examiner with the Travis County Medical Examiner's Office in Austin, testified that he conducted the autopsy of Cavazos. Cavazos was five feet, two inches tall. K.C. testified that the trajectory of the fatal gunshot depended on the location of the victim's head at the time he was shot. If the victim was looking down, the shot came from someone much lower shooting upward. If the victim was looking straight ahead, the shot came from a taller person shooting down.

S.F. testified that no money or drugs, other than a small amount of marijuana, were found in Cavazos's residence. Only the one .380 shell casing was found, leading the police to believe that the second gun involved was a revolver.

S.F. testified that he developed information regarding the identity of one of the robbers and the ownership of the car they had used, a dark, gray Impala that was registered to T.C. The information led to Clifton "C.J." Montgomery, who was arrested two days after the murder still driving the Impala. Information provided by T.C. led to the conclusion that Jenkins was in the Impala with Montgomery the weekend of the murder.

The victim's brother, R.C., testified that Cavazos was a drug dealer, selling powder cocaine and "ice" methamphetamine. He further testified that he was familiar with his brother's customers, and that Montgomery was one of those customers, and that

Montgomery had been inside Cavazos's residence. He also testified that Cavazos had been the victim of a number of attempted robberies in the past and that he had installed a security system, but it only had a live feed. The witness noted that, because of the past robberies, Cavazos was generally careful about letting people into his house, checking the security feed first. R.C. further testified that people generally called Cavazos before they came over, and that, if someone arrived unannounced, Cavazos would answer the door with his .38 caliber, snub-nosed revolver behind his back. He testified that his brother kept his drugs and money in a couple of safes in a back closet, one of which was handheld. R.C. further testified that he was with his brother up until approximately thirty minutes before the murder and that the safe full of drugs and the revolver were in Cavazos's house at that time.

A number of witnesses identified Jenkins as being involved in the robbery and murder, including E.T. and E.J.W. E.T. testified that he saw two African-American men park a dark-colored Impala in an empty lot and walk to Cavazos's residence. One of the men was taller than the other, and the shorter man was wearing a red "beanie." (S.F. testified that Montgomery was five feet, seven inches tall and that Jenkins was five feet, two inches tall.) Immediately after the two men knocked on Cavazos's door, E.T. heard gunshots—one big bang and one or two smaller ones. He testified that the shorter of the men fell backward, but then recovered and walked into Cavazos's residence. E.T. testified that he and the friends he was with left the scene, but returned quickly after

remembering the small children living in Cavazos's house and being "nosey." When they neared the scene, he testified that he saw the two robbers carrying items from Cavazos's house to the Impala.

E.J.W. testified that she heard the shots and also saw Jenkins and Montgomery carrying items from Cavazos's residence. Other witnesses, including D. M. and J. K., saw Jenkins after the murder with an unusual amount of powder cocaine and ice. E.T. and J.K. both testified that they saw Jenkins in possession of firearms after the murder, one of which, a .380 semi-automatic, he was trying to sell. J.K. further testified that the other firearm she saw in proximity to Jenkins was a snub-nosed revolver.

Each of the witnesses knew Jenkins or could identify him. D.M. testified that she had known Jenkins for some time, while J.K. testified that Jenkins was her cousin. E.J.W. testified that she had known Jenkins since he was a child and that her sister had married into Jenkins's family. She admitted that she had not seen Jenkins since he was a child, but then she noted that she had seen him a couple of times more recently at his brother's house. E.J.W. also testified her mother had been in the nursing home where Jenkins's mother worked. C.P. from the Brazos County Sheriff's office testified that E.J.W.'s name was on Jenkins's visitors's list, a list that is compiled by the inmates and not the jail personnel, corroborating the relationship between Jenkins and E.J.W.

E.T. testified that he had never seen Jenkins before the night of the murder, but recognized him later when he saw Jenkins at two drug houses he frequented. E.T.

testified that he first saw Jenkins at M.W.'s house within a day of the murder. A man E.T. later identified as Jenkins tried to sell him a pistol. When the man walked away, he recognized his walk as belonging to the shorter of the two robbers he had seen at Cavazos's house. E.T. testified that the next day he saw Jenkins again at another drug house belonging to Jenkins's brother, M.J. E.T. further testified that while at M.J.'s residence, he saw a scale that he recognized as belonging to Cavazos. E.T. admitted that he was a frequent customer of Cavazos's and had seen the scale on numerous occasions. E.T. also testified that he got high on ice for the first time while at M.J.'s residence.

J.K. testified that she was also at M.J.'s residence after the murder and saw a large amount of powder cocaine and ice that she had never seen there before. She further testified that she saw Jenkins in possession of a .380 semi-automatic handgun and that Jenkins asked her if she knew someone who wanted to buy it. She also saw a snub-nosed revolver on the washing machine.

L.I. placed Jenkins and Montgomery together on the night of the robbery. He testified that Montgomery and Jenkins drove to his place in the early evening of December 13 in an Impala. He further testified that Montgomery returned after midnight alone saying over and over, "We fucked up." C.W., Montgomery's girlfriend, testified that Jenkins was Montgomery's friend. She further testified that she overheard a conversation between the two of them planning a robbery about a week before the murder. C.W.'s testimony also placed Jenkins and Montgomery together on the day of

the murder. S.F. testified that police found a red ski mask with holes cut in it in the trash at C.W.'s house after execution of a search warrant. She testified the mask belonged to her nephew.[7]

S.F. further testified that a search of the Impala when Montgomery was arrested uncovered nine grams of ice in the console and a cell phone. The cell phone included numerous text messages dealing with powder cocaine, and Montgomery texted another individual to tell Jenkins to keep his mouth shut because he was talking too much. C.W. testified that she texted Montgomery after she heard about the murder, inquiring about Jenkins's location. Montgomery responded that Jenkins was with him.

Jenkins attempted to discredit the testimony of the prosecution's witnesses. E.T., E.J.W., D.M., and J.K. admitted that they were drug users. E.J.W. and J.K. further admitted that they had convictions for various drug and theft offenses, and E.J.W. admitted that she was on parole at the time of her testimony. J.K. also testified that she had worked out a deal with the prosecutors to receive a lesser sentence on a theft charge in exchange for her testimony. E.J.W. admitted that she had been diagnosed with bipolar schizophrenia and that she was prescribed numerous medications for her condition. She also testified that she had been admitted to Austin State Hospital. Jenkins introduced several witnesses who testified that E.J.W. had a poor reputation for truthfulness.

[7] DNA analysis of two samples taken from the ski mask excluded Jenkins as a contributor. DNA analysis of the passenger compartment of the Impala did not exclude Jenkins as a contributor.

E.T., E.J.W., D.M., J.K., and C.W. also admitted that they initially lied to the police when questioned. None of them were willing to identify Jenkins when they first talked with police, nor did they voluntarily provide information to the police about the murder.

S.F. and Sergeant P.M. with the Bryan Police Department, who had worked in vice and narcotics, testified that the area where Cavazos's residence was located was a high-drug-use area. They noted that people who live in such communities are generally unwilling to talk with police because they do not want to be identified as cooperating with law enforcement and subjected to retaliation from the perpetrators or from others in the community. In many instances, the residents in such communities will often lie when first questioned by the police and will not volunteer information. As E.T. explained his situation, "That wasn't none of my business. I try to stay - - my mother - - the way we was taught was to, you know, just keep, you know what I'm saying, stay away from harm, stay away from trouble. They done did this to this boy, and ain't no telling what they're going to do to me."

Despite all of the attempts to impeach and discredit the witnesses, the jury gave credence to their testimony. As previously noted, the jury is the sole judge of the credibility of the witnesses. *See Chambers*, 805 S.W.2d at 461 (stating that the jury "can choose to believe all, some, or none of the testimony presented").

Having reviewed all of the evidence in the light most favorable to the verdict, we conclude that a rational fact finder could have found the essential elements of the crime

beyond a reasonable doubt. The witnesses' testimony provided the links that, when put together, formed a chain connecting Jenkins to the robbery/murder: (1) Jenkins was overheard planning the robbery with Montgomery; (2) Jenkins was seen with Montgomery before the robbery; (3) Montgomery confirmed in a text message that Jenkins was with him after the robbery; (4) Jenkins was identified as one of the robbers by someone who had known him since he was a child; (5) Jenkins was seen after the murder with an unusual amount of powder cocaine and ice; (6) Jenkins tried to sell a .380 semi-automatic handgun that was the same caliber as the spent shell casing found at the murder scene; (7) Jenkins was seen by his cousin in proximity to a revolver that resembled the one taken from Cavazos; and (8) Jenkins was seen in proximity to scales that were identified as Cavazos's. From the testimony of K.C. and E.T., the jury could have believed that Jenkins shot Cavazos after Jenkins had fallen to the ground, considering the upward trajectory of the bullet. The jury could also have determined that Montgomery was the shooter and that Jenkins was a party to the armed robbery that resulted in Cavazos's death. There being sufficient evidence to support Jenkins's conviction as a principal or as a party, his sixth issue is overruled.

Sentence of Life Without Parole and Cruel and Unusual Punishment

In his seventh issue, Jenkins contends that the trial court erred in denying his motion to declare sections 7.02 and 12.31 of the Penal Code and section (1) of article 37.071 of the Code of Criminal Procedure unconstitutional. Jenkins argues that the application

of the foregoing provisions subjected him to cruel and unusual punishment because the jury was permitted to convict him of capital murder under a theory of parties when there was no evidence that he had the intent to kill. Jenkins contends that the resulting mandatory life sentence constitutes cruel and unusual punishment.

As with Jenkins's other constitutional issues, the courts have rejected his argument that a conviction for capital murder using a theory of parties is cruel and unusual punishment. *Buhl v. State*, 960 S.W.2d 927, 935-36 (Tex. App.—Waco 1998, pet. ref'd). This conclusion is supported by the United States Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). S*ee also Westbrook*, 29 S.W.3d at 113; *Murkledove v. State*, 437 S.W.3d 17, 30 (Tex. App.—Fort Worth 2014, pet. dism'd, untimely filed); *Cienfuegos v. State*, 113 S.W.3d 481, 495 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) ("Texas courts have consistently held that the life sentence required under section 12.31(a) of the Penal Code and article 37.071, section 1 of the Code of Criminal Procedure is not unconstitutional as cruel and unusual punishment under the Eighth Amendment and Article 1, section 13 of the Texas Constitution.").

In addition, because the record, as noted above, reveals evidence upon which a reasonable fact finder could have found that Jenkins should have anticipated that, during the course of the armed robbery someone could be murdered, we hold that, as applied to Jenkins in this case, the life sentence required under section 12.31(a) of the Penal Code and article 37.071, section 1 of the Code of Criminal Procedure does not constitute cruel

or unusual punishment under either the Eighth Amendment or article 1, section 13 of the Texas Constitution. Jenkins's seventh issue is overruled.

Having overruled all of Jenkins's issues, we affirm the trial court's judgment.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed November 8, 2017
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[CRPM]