Affirmed and Opinion filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-97-01324-CR

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LONG NGUYEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. 736,749

O P I N I O N

Long Nguyen ("Long") was indicted for the felony offense of capital murder. *See* TEX. PENAL CODE ANN. § 19.03 (Vernon 1994). Long pleaded not guilty and was tried by a jury. The jury found Long guilty and the trial court sentenced him to a term of life imprisonment in the Institutional Division of the Texas Department of Criminal Justice. *See* TEX. PENAL CODE ANN. § 12.31 (Vernon 1994). On appeal to this Court, Long assigns nineteen interrelated points of error, contending that (1) the evidence is legally and factually insufficient to support his conviction of capital murder under the law of parties or in his sole capacity, (2) the trial court erred in submitting an instruction to the jury on the law of parties because there was no

evidence to support it, (3) the trial court erred in overruling his respective hearsay objections to certain identification testimony, and (4) the trial court erred in permitting an in-court identification of him. We affirm.

BACKGROUND

Late one evening, Martin Rivera, Tommy Fulcomer and Huy Tu ("Lee") met Long and Khonekham Manokham ("Spanky") at a gas station in Houston. Martin, Tommy and Lee were to purchase approximately twenty pounds of marijuana from Long and Spanky for $9,000.[1] While at the gas station, Long and Spanky told the three men to follow them to a secluded area to complete the drug transaction. When they arrived at the desired location on Renn Road, Long and Spanky stopped their automobile. Martin stopped the van he was operating parallel to the automobile being operated by Long and Spanky. Spanky told the three men to move their van in front of his automobile and wait.

After two or three minutes, Long and Spanky began firing firearms, an AK-47 assault rifle and a nine millimeter handgun toward the van. The windows in the van began to burst as bullets were flying through the passenger compartment of the van. Though he tried, Martin was unable to start the van's engine so he could drive away. Martin then began crawling on the floor of the van to its side door to get out and run. Tommy was following behind Martin. Lee, who was sitting in the rear seat of the van, sustained a fatal gunshot wound to his head and remained inside the van. Martin exited the van and began running, though he sustained bullet wounds in at least one leg. Tommy exited the van and began running behind Martin but was gunned down approximately ten feet from the van. Martin was able to hide behind some thorn bushes off the roadway. Before fleeing the area, Long and Spanky circled the area in their automobile searching for Martin but were unable to locate him.

[1] Lee was personally acquainted with Long and Spanky; however, neither Martin nor Tommy had ever met Long or Spanky. Lee was a resident of Houston and Martin and Tommy were residents of Killeen, Texas.

Police officers arrived a short time later and Martin, hearing sirens, began yelling for help. The police officers found Martin and transported him to a hospital. Tommy and Lee were pronounced dead at the scene.

Later, Martin gave a statement to police in which he indicated that he could identify the two assailants. The police also received a tip through Crime Stoppers which helped lead them to Long and Spanky. After the police apprehended Long and Spanky, they were charged with capital murder.

DISCUSSION

Sufficiency of the Evidence

In his first four points of error, Long contends that the evidence was legally and factually insufficient to support his conviction for capital murder under the law of parties or in his sole capacity.

In reviewing the legal sufficiency of the evidence, we view the evidence in the light most favorable to the verdict. *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App. 1996). We accord great deference "to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id*. at n.13 (quoting *Jackson*, 443 U.S. at 326, 99 S.Ct. 2793). In our review, we determine only whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. (quoting *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789) (emphasis in original).

Employing this deferential standard of review, we conclude that a rational trier of fact could have found beyond a reasonable doubt that Long committed the offense alleged in his indictment. Appellant was indicted for the felony offense of capital murder. Its essential

elements provide, in pertinent, that a person commits an offense if he commits murder and "the person murders more than one person during the same criminal transaction . . ." TEX. PENAL CODE ANN. § 19.03(a)(7)(A) (Vernon 1994). Martin's testimony showed that Long instructed Martin, Tommy and Lee to follow him and Spanky to a secluded area of Houston to complete a drug transaction. The testimony shows, however, that rather than selling approximately twenty pounds of marijuana to the three men, Long and Spanky were intent on murdering the three men and taking their cash. Martin testified that shortly after arriving to the secluded location, Long and Spanky began firing two firearms toward Martin's van. The evidence showed that while Martin was able to escape after being wounded, Tommy and Lee were both murdered by Long and Spanky at the same time and at the same location. There is nothing in the record to suggest that anyone other than Long and Spanky murdered Tommy and Lee. Accordingly, viewed in the light most favorable to the jury's verdict, the evidence shows that Long participated in the murder of more than one person during the same criminal transaction, either in his sole capacity or under the law of parties. *See id.*; *see also* TEX. PENAL CODE ANN. §§ 7.01.-02 (Vernon 1994) (a person is criminally responsible for an offense committed by another if, acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense); *Richardson v. State*, 879 S.W.2d 874, 879-80 (Tex.Crim.App. 1993), *cert. denied*, 513 U.S. 1085, 115 S.Ct. 741, 130 L.Ed.2d 643 (1995). The evidence is legally sufficient, therefore, to support Long's conviction of capital murder beyond a reasonable doubt. *See Clewis*, 922 S.W.2d at 129, 133.

Next, we review the factual sufficiency of the evidence to support Long's conviction. In reviewing the factual sufficiency of the evidence, we "view all the evidence without the prism of 'in the light most favorable to the prosecution'" and will set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust." *Clewis*, 922 S.W.2d at 134. However, appellate courts "are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable." *Id.* at 135. In other words, we will not substitute our judgment for that of

the jury. *Id*. at 133. Such action would violate a defendant's right to trial by jury. *Id.* To find the evidence factually insufficient to support a verdict, the appellate court must conclude that the jury's finding is manifestly unjust, shocks the conscience, or clearly demonstrates bias. *Id.* at 135.

Long's specific complaint in his factual sufficiency challenge is that the State failed to prove beyond a reasonable doubt that Long "was the shooter and that he intended or was aware that his conduct was reasonably certain to cause the deaths of Lee and [Tommy] or that he was a party to Spanky's intentional or knowing killings." He also contends that the "State's witnesses were either actively lying or simply did not know what happened."

All of the State's evidence showed that Long was present and actively participated in the murder of Tommy and Lee. Long presented no evidence. The record shows that Martin saw Spanky driving the automobile and Long sitting in the front passenger's seat of the automobile when they arrived to the location where they were to complete the purported drug transaction. The record shows that Long and Spanky were both present when the shooting began. Conversely, there is no evidence to suggest that anyone else was present when the shooting began. The evidence also shows that police recovered several spent shell casings from two different calibers of firearms. This evidence leads to the logical inference that two persons were firing at Martin, Tommy, and Lee. After Martin escaped and Tommy and Lee were dead, testimony from an eyewitness of the shootings showed that before they drove off, the passenger of the automobile exited from the passenger's side of the automobile, walked to the van and fired additional shots inside the van. The testimony from Martin, viewed in juxtaposition with the testimony from the eyewitness, strongly indicates that it was Long who exited the automobile and fired additional shots inside the van. Thus, contrary to Long's assertion in his brief, there is evidence in the record to show that Long was one of the shooters and that he intended his actions to cause the death of Tommy and Lee. We conclude that the evidence is factually sufficient to support the jury's verdict in this case. The jury's finding is not manifestly unjust, does not shock the conscience, nor clearly demonstrates bias. *See Clewis*, 922 S.W.2d at 134. Points of error one through four are respectively overruled.

Jury Charge

In his next three points of error, Long contends that the trial court erred in submitting an instruction to the jury on the law of parties. Specifically, Long contends that the evidence of guilt in this case showed him guilty, if at all, only as a primary actor and that there was no evidence showing him to be guilty merely as a party.

When the evidence is sufficient to support both primary and party theories of liability, the trial court does not err in submitting an instruction on the law of parties. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex.Crim.App. 1994), *cert. denied*, 519 U.S. 1030, 117 S.Ct. 587, 136 L.Ed.2d 516 (1996). Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement. *Id*. "In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act." *Id*. Further, circumstantial evidence may be used to prove party status. *Id.*

Although it is not clear who fired the fatal shots at Tommy and Lee, the evidence in the record clearly shows that Long and Spanky each fired several shots at Martin, Tommy and Lee while the three men sat inside their van and after Martin and Tommy attempted to escape from the van. Martin, the only survivor, testified that he saw Long and Spanky together inside the automobile behind his van shortly before the murders were committed. While Long contends that Spanky was solely responsible for the "intentional and knowing killings," we hold that the evidence was sufficient to show that Long was present at the crime scene and aided the commission of the murders. The trial court was justified in submitting a jury instruction on the law of parties in this case. *See Ransom*, 920 S.W.2d at 302. Points of error five through seven are respectively overruled.

Hearsay Testimony

In his next ten points of error, Long contends that the trial court erred in overruling his respective hearsay objections to certain testimony provided by Martin and Joshua Thorne.[2] All of his hearsay objections related to (1) Martin testifying that Lee identified Long and Spanky on the evening of the murders, and (2) Joshua testifying that Lee and Long discussed being part of a drug transaction on the evening of the murders. Long maintains that the "most harmful aspect of the erroneously admitted hearsay surrounds the identification of [him] in the commission of the capital murder."

The trial court is the institutional arbiter of whether hearsay is admissible under exceptions to the general rule of exclusion of such testimony upon objection under Texas Rule of Evidence 802. *See Coffin v. State*, 885 S.W.2d 140, 149 (Tex.Crim.App. 1994). Thus, whether hearsay testimony is properly admitted in evidence is a question for the trial court to resolve, reviewable on appeal only under an abuse of discretion standard. *See id.* Our role is limited to determining whether the record supports the trial court's ruling. *See id.*

A recognized exception to the hearsay rule provides that hearsay testimony may be admissible in evidence when the declarant of the proffered statement is unavailable to testify. Specifically, under Rule 804, "unavailability" includes situations in which the declarant of the proffered statement is unable to be present or testify at the hearing "because of death." *See* TEX. R. EVID. 804(a)(4); *see also Davis v. State*, 961 S.W.2d 156, 158 (Tex.Crim.App. 1998) (Baird, J, concurring). Under these circumstances, hearsay testimony is admissible at the discretion of the trial court. *See id.* In this case, Lee was murdered and was thus unavailable to be present or testify at Long's trial. Accordingly, the testimony by Martin and Joshua concerning statements made by Lee identifying Long was admissible in evidence in this case.

We glean from the record that the trial court admitted the complained of testimony because the statements made by Lee were statements made by a co-conspirator and/or under the hearsay exception of present sense impression. *See* TEX. R. EVID. 801(e)(2)(E)

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[2] Joshua Thorne was Lee's roommate. Joshua was not part of the purported drug transaction and was not present when Martin was shot and Tommy and Lee were murdered.

(statements made by co-conspirator not hearsay); TEX. R. EVID. 803(1). Further, these are the bases for admission of the statements advocated by the State in its brief. Without deciding these exceptions are not applicable in this case, we observe that the mere fact that a correct ruling is given for the wrong reason should not result in a reversal; a trial court's evidentiary ruling should not be disturbed on appeal if it is correct on any theory of law applicable to the case. *See Jones v. State*, 833 S.W.2d 118, 125 n.15 (Tex.Crim.App. 1992), *cert. denied*, 507 U.S. 921, 113 S.Ct. 1285, 122 L.Ed. 678 (1993). Under Rule of Evidence 804(a)(4), the complained of hearsay testimony by Martin and Joshua was admissible.

This Court discerns no abuse of discretion in the trial court's ruling. Points of error eight through seventeen are respectively overruled.

In-Court Identification

In his final two points of error, Long contends that the trial court erred in admitting the in-court identification of him by Martin because the pre-trial out-of-court photo line-up identification made by Martin was impermissibly suggestive. He argues that "of the six photos in the photo spread, [his] was the only one with a light blue background rather than a white background."

In considering the scope of due process rights afforded a defendant with regard to the admission of identification evidence, a pre-trial identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law. *See Barley v. State*, 906 S.W.2d 27, 32-33 (Tex.Crim.App. 1995), *cert. denied*, 516 U.S. 1176, 116 S.Ct. 1271, 134 L.Ed.2d 217 (1996) (citations omitted). A two-step analysis is employed to determine the admissibility of an in-court identification: (1) whether the out-of-court identification procedure was impermissibly suggestive, and (2) whether that suggestive procedure gave rise to a very substantial likelihood of irreparable misidentification. *See id.* at 33. This analysis requires an examination of the "totality of the circumstances" surrounding the particular case and a determination of the reliability of the identification. *See id.*

Turning to the first prong of the analysis, suggestiveness may be created by the manner in which the pre-trial identification procedure is conducted; for example, by police pointing out the suspect or suggesting that a suspect is included in the line-up or photo array. *See id.* Or it may also be created by the content of the line-up or photo array itself if the suspect is the only individual closely resembling the pre-procedure description. *See id.* Furthermore, an individual procedure may be suggestive or the cumulative effect of the procedures may be suggestive. *See id.*

In the instant case, the only photo line-up procedure complained of by Long was the utilization of a photograph of him in the line-up containing a solid light blue background as opposed to the mostly white background contained in the five photographs of the other line-up participants. The background in the photograph of Long appears to be a lightly-colored brick wall. The backgrounds in the photographs of the other line-up participants appears to be white-colored with a few thin horizontal black lines. A suspect's photo containing a modestly different background from the other line-up participants, however, will not make a photo line-up impermissibly suggestive. *See Barley*, 906 S.W.2d at 33. Further, all of the photo line-up participants, including Long, possess strikingly similar physical features and appear to be of similar build. The testimony clearly showed that at no time did police indicate to Martin that a suspect was included in the photo line-up, nor did they suggest which individual Martin should choose, if any. Considering the totality of the circumstances, Long has not shown that the photo line-up was impermissibly suggestive. *See id.* at 33-34.

However, assuming *arguendo*, that the effect of the disparity in photo line-up backgrounds constitute impermissibly suggestive pre-trial identification procedures, we must determine whether a very substantial likelihood for irreparable misidentification has been created. *See id.* at 34. Reliability is the "linchpin" in determining admissibility of such identification testimony. *See id.* (citing *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)). If indicia of reliability outweigh suggestiveness, then an identification is admissible. *See id.* An appellant must show by clear and convincing evidence that the identification has been irreparably tainted before this Court will reverse his conviction.

See id. In making a determination as to whether a very substantial likelihood for irreparable misidentification has been created, we consider several non-exclusive factors: (1) the witness' opportunity to view the criminal act, (2) the witness' degree of attention, (3) the accuracy of the suspect's description, (4) the level of certainty at the time of confrontation, and (5) the time between the crime and confrontation. *See Barley*, 906 S.W.2d at 34-35. These factors are weighed against the corrupting effect of any suggestive identification procedures. *See id.*

The testimony from Martin shows that he saw Long very clearly on the night of the murders. Martin testified that he identified Long out of the photo line-up based upon his observations of Long on the night of the murders, both at the gas station and again after they arrived to the location where the purported drug transaction was to be completed. The gas station where Martin first encountered Long was well-lit and Martin saw Long very clearly as he walked up to the van to give Martin directions on where they were going to complete the drug transaction. Shortly after the murders, Martin told police that the assailants were two Asian males and gave brief descriptions. The time between the murders and the photo line-up identification by Martin was less than one week. Finally, we cannot discount the fact that Martin testified that his identification in-court was based solely upon what he personally observed on the night of the murders. Weighing this reliability against the modest suggestive aspect of the pre-trial identification procedure leads us to conclude that no substantial risk of irreparable misidentification was created so as to deny Long due process and that the testimony was properly allowed before the jury. *See id.* Points of error eighteen and nineteen are respectively overruled.

The judgment is affirmed.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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