Affirmed and Opinion filed May 10, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00678-CR

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DAVID LEON ST. JULES, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 767,901

O P I N I O N

Appellant was charged by indictment with the offense of capital murder. The jury convicted appellant of the charged offense. The trial court assessed punishment at confinement for life in the Texas Department of Criminal Justice--Institutional Division. Appellant raises five points of error. We affirm.

I. Severance.

The first point of error contends the trial court erred in denying appellant's pretrial motion to sever his trial from the trial of his co-defendant. The decision to try co-defendants

jointly or separately is in the discretion of the trial court. *See* TEX. CODE CRIM. PROC. ANN. art. 36.09. Appellate courts reverse such a decision only when an abuse of discretion is shown. *See Haggerty v. State*, 825 S.W.2d 545, 548 (Tex. App.—Houston [1st Dist.] 1992, no pet.). The proponent must introduce evidence supporting severance when the motion is presented, and error is waived in the absence of such evidence. *See Peterson v. State*, 961 S.W.2d 308, 311 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). In the instant case, there is no evidence to support appellant's motion. Therefore, the first point of error is overruled.

II. Comment on Weight of Evidence.

The second point of error contends the trial court erred in commenting on the weight of the evidence during the voir dire phase of appellant's trial. Such comments are prohibited by article 38.05 of the Code of Criminal Procedure. However, there was no objection to the alleged comment. Therefore, the issue has not been preserved for our review. *See Moore v. State*, 907 S.W.2d 918, 923 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd).

Nevertheless, we have reviewed the complained of remarks by the trial court and do not find them to be comments on the weight of the evidence, but rather an effort to explain to the venire when jurors may be asked to consider lesser included offenses. To constitute reversible error, the comment must be either reasonably calculated to benefit the State or to prejudice the defendant's right to a fair and impartial trial. *See Sharpe v. State*, 648 S.W.2d 705, 706 (Tex. Crim. App.1983). The complained of remarks are neither. The second point of error is overruled.

III. Ineffective Assistance of Counsel.

The third point of error contends counsel was ineffective in failing to request proper accomplice witness instructions. The right to the effective assistance of counsel is guaranteed to criminal defendants by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 10 of the Texas Constitution. The standard established in *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 2062-2063 (1984), is utilized

when reviewing ineffective assistance of counsel claims under the United States and Texas constitutions. *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The Supreme Court in *Strickland* outlined a two-step analysis. First, the reviewing court must decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below this standard, the reviewing court must decide whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Absent both showings, an appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991).

The defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998); *Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded and affirmatively demonstrated in the appellate record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997); *Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd). When handed the task of determining the validity of a defendant's claim of ineffective assistance of counsel, any judicial review must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *See Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984).

The trial court instructed the jury that Rashad Phillips and Larry Brown were accomplices as a matter of law; whether Tamika St. Jules was an accomplice was a fact question for the jury. There was no accomplice instruction related to Octavia Patt. Appellant argues trial counsel was ineffective in failing to request an instruction that Tamika and Octavia

were accomplices as a matter of law. Appellant argues that had the instructions been requested and given, the evidence would have been insufficient to corroborate their testimony and, therefore, the jury "would have been forced to find appellant not guilty based upon the facts and charge that would have been correctly presented to them."

We read appellant's argument as follows: Rashad, Larry, Tamika and Octavia were accomplices as a matter of law. There was no other testimony tending to connect appellant to the offense. Therefore, trial counsel was ineffective for not requesting accomplice as a matter of law instructions on both Tamika and Octavia. This argument is, however, premised upon the trial court sustaining appellant's objection to the testimony of Detective Anthony Rossi, which appellant concedes was sufficient to corroborate the accomplice witness testimony.

One who is indicted for the same or lesser included offense as the defendant is an accomplice as a matter of law. *See Ex parte Zepeda*, 819 S.W.2d 874, 875 (Tex. Crim. App. 1991); *Kunkle v. State*, 771 S.W.2d 435, 439 (Tex. Crim. App. 1986), *cert. denied*, 510 U.S. 840 (1993). An accomplice as a matter of fact is someone (1) who has participated with the defendant before, during, or after the commission of the crime, and (2) who can be prosecuted for the same offense with which the defendant is charged. *See Zepeda*, 819 S.W.2d at 876. A witness does not become an accomplice merely because she knew about the offense and failed to disclose it. *See Kunkle*, 771 S.W.2d at 439-40. And a witness's presence at the scene, during the commission of the crime, is insufficient, standing alone, to make her an accomplice witness. *See Creel v. State*, 754 S.W.2d 205, 214 (Tex. Crim. App. 1988). When the evidence clearly shows that the witness is an accomplice witness as a matter of law, the trial court has a duty to so instruct the jury. *See Arney v. State*, 580 S.W.2d 836, 839 (Tex. Crim. App. 1979). If there is doubt about whether a witness is an accomplice witness, the trial court may submit the issue to the jury. *See Kunkle*, 771 S.W.2d at 439.

When considering appellant's argument in light of the foregoing, we find as follows: Tamika testified on direct examination to the events surrounding the robbery and abduction of

the complainant. From this testimony she was not an accomplice. On cross-examination, however, she admitted giving a statement to the police wherein she said she, along with appellant and others, traveled with the complainant in the trunk to the location where he was eventually murdered. From this testimony, one could find Tamika was an accomplice. In light of Tamika's testimony on both direct and cross, we find the trial court correctly instructed the jury on Tamika's status as an accomplice as a matter of fact. Therefore, counsel was not deficient for failing to request an instruction that Tamika was an accomplice as a matter of law. Regarding Octavia, we find nothing in her testimony that would make her an accomplice as a matter of law or fact. Therefore, counsel was not deficient for failing to request such an instruction as it related to Octavia. Finally, as it relates to the testimony of Detective Rossi, appellant acknowledges trial counsel objected to this corroborative testimony. However, that objection was overruled. Counsel, therefore, actively pursued a course of conduct that would have prevented admission of Rossi's testimony. We do not find such conduct to be deficient.

For these reasons, we hold appellant has failed to meet *Strickland's* first prong. The third point of error is overruled.

IV. Extraneous Offense Evidence.

The fourth point of error contends the trial court erred in "failing to grant" appellant's objection to evidence of an extraneous offense. During the direct examination of Larry Brown, testimony was elicited regarding marihuana consumption. Appellant timely objected and the trial court removed the jury. After admonishing the witness, the trial court asked counsel if there was any other request. Counsel for appellant responded in the negative. The jury was returned and Brown's testimony continued without further incident.

An adverse ruling is required to preserve for appellate review the admission of an extraneous offense. *See Montgomery v. State*, 810 S.W.2d 372, 387 (Tex. Crim. App. 1990) (Op'n on Reh'g). Because appellant did not pursue his objection until receiving an adverse ruling, this issue is not preserved for our review. The fourth point of error is overruled.

V. Limitation of Cross-Examination.

The fifth point of error contends the trial court erred in limiting the cross-examination of Tamika St. Jules. During that cross-examination, the following exchange occurred:

> Q. When they came back, no one ever said that [appellant] had had anything to do with [the complainant] being shot, did they?
>
> THE STATE: I object.
>
> THE COURT: Your objection is?
>
> THE STATE: It's hearsay.
>
> THE COURT: Sustained.
>
> THE WITNESS: No.
>
> THE COURT: Ma'am, when the attorneys stands [sic] up to object, just save your answer until I rule, okay? But if you don't understand my ruling, just ask; and I'll let you know, okay?

The State did not request a motion to strike Tamika's response. *See* TEX. R. EVID. 103(a)(1). Therefore, the answer was before the jury. *See Heidelberg v. State*, 36 S.W.3d 668, 672 (Tex. App.—Houston [14th Dist.) 2001, no pet.). Because the answer was before the jury, appellant's cross-examination of Tamika was not limited. Accordingly, the fifth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed May 10, 2001.

Panel consists of Justices Fowler, Edelman and Baird.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird sitting by assignment.