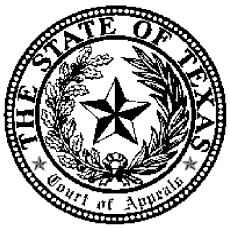
Affirmed and Opinion filed September 20, 2001.



In The

Fourteenth Court of Appeals

NO. 14-00-00974-CR

RHONDA DELORES THOMAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 821,855

O P I N I O N

A jury convicted appellant, Rhonda Delores Thomas, of capital murder and sentenced her to life imprisonment. In this appeal, she brings seven points of error. The first six claim that the evidence against her is both legally and factually insufficient to prove that she (1) intentionally (2) caused the death of the victim (3) during the course of a robbery. Her final point of error contends that the trial court erred in allowing a witness to begin testifying when it was apparent that he would refuse to take an oath. We affirm.

I. Introduction

Appellant was charged with the July 21, 1991, homicide of 61-year-old Paul Kominczak. He was last seen four days earlier, on Wednesday, when a friend of his, Jody Johnson, met Kominczak at their usual breakfast stop before Johnson would drive Kominczak to school, where he was studying to earn his GED and taking memory skills classes. According to the autopsy, Kominczak was stabbed seven times, but the coroner further testified death resulted from six stab wounds to the abdomen and back.

A neighbor, Efrin Saenz, who lived with his parents at the time of the murder, described Kominczak as a "very fragile person," "thin," "a small man."[1] Saenz also told jurors he and his father used to help Kominczak with odd jobs around his house, such as cutting the lawn or fixing a ceiling fan. Saenz testified that he saw a white man and a black woman other than appellant off and on at Kominczak's house, as well as other "street people." He also testified that, with respect to the black woman, "we never interfered with any of that business. We knew it seemed a little strange, but we weren't going to, you know --." On the Wednesday or Thursday before the body was found, Saenz testified that, when he was leaving his house to drive a friend home at 3:00 a.m., he saw the black woman and a black man standing on Kominczak's porch. He told jurors they seemed afraid when his lights shone on them. When he returned a few minutes later, the friend's home being just a block away, he saw the black couple walking down the street, then head in opposite directions. Concerned, Saenz called police. When Saenz walked to Kominczak's house with police, the white man Saenz used to see with Kominczak answered the door and told officers Kominczak was sleeping. Between this day, which Saenz testified could have been Wednesday or Thursday, and the day Kominczak's body was discovered, he never saw anyone at the house. Four days later, on Sunday, police were again called to Kominczak's house, this time by Saenz's father, who smelled a foul odor emanating from inside.

[1] The coroner testified that Kominczak was 5'9" tall and weighed 129 pounds, although he admitted the weight could be off by as much as 10 pounds due to decomposition of the body.

Houston Police Officer Michael Gee and his partner found the body of Kominczak, which Houston Police Officer Brian Foster identified using the victim's driver's license photo. Foster testified that the crime scene was primarily limited to the kitchen, where Kominczak's body was found, and, although the victim's eyeglasses were found in a nearby hallway there did not appear to be evidence of a struggle. Kominczak's left hip pocket on his pants was torn off, and from this, Foster concluded the killer may have stolen Kominczak's wallet. Seven unused checkbooks were found in the trash. Several knives were found in the kitchen, including a couple in the sink and one on a card table in the dining room; only the knife in the dining room had blood on it. H.P.D. Officer Leonard Dawson videotaped the crime scene and corroborated Foster's testimony to the extent that there was no evidence of a struggle in the kitchen, bedroom, or bathroom, and seven unused checkbooks were recovered from the trash. The State introduced evidence that fingerprints discovered on a drinking glass found in the kitchen belonged to appellant.

Appellant gave conflicting accounts of her involvement that night. H.P.D. Officer Brian Harris testified that, in appellant's initial written statement to him and his partner, she said that she was at Kominczak's house to have sex for money. She testified that she first met Kominczak the week before his murder. They were introduced at a nearby bar by a white prostitute whom she had never seen before this occasion. Appellant agreed go to Kominczak's house to have sex, where she saw the white prostitute and a white man. Kominczak paid for sex the first time they met, but not on the second occasion.[2] After he refused to pay for the sex, they argued. Appellant's statement indicated that she became frightened during the argument, so she picked up a frying pan and told him he was going to pay her. When Kominczak came towards her, she struck him in the head with the pan. Appellant's statement continued, "He went crazy. He started swinging and trying to grab me. He grabbed me from behind. There was a kitchen knife in a draw [sic] and since he

[2] Appellant testified repeatedly that, on both occasions, she had sex with Kominczak in the "bedroom with the ceiling fan" pictured in one of the exhibits, however, the State called the decedent's sister, who testified that the ceiling fan was not installed until after Kominczak's death.

was behind me, I was able to go in the draw [sic] and pull it out. He grabbed me in a big bear hug from behind. When he did this, I stabbed him once in the side and was able to break from his grip. I then turned around and stabbed him once, I think in the stomach. After I stabbed him, I threw the knife in the sink. I was scared and I think I tried to wash off the knife. [Kominczak] was down on the ground and holding his stomach. I then ripped his side pocket and took his wallet." Her statement indicates she threw the wallet away in a dumpster a few blocks from his house because there was no money in it. Her statement also indicates that she called a friend, Archie Lamont Ross, and told him what happened a few days later. Appellant's statement concludes, "I was very angry and very, very scared. I am sorry that this happened. I am now the mother of four children."

Earlier, however, Harris testified that appellant told him she was there that day with a white prostitute, that she used the frying pan to cook eggs and a knife to cut an onion, had a glass of juice with her food, and then left. On cross-examination, appellant denied telling the police that she used the frying pan to cook eggs, and testified instead that the other prostitute used the frying pan to cook eggs.[3] Appellant's testimony about the fight with Kominczak was otherwise fairly consistent with her written statement, including the fact that she hit him with the frying pan, and the number, nature, and location of the stab wounds she inflicted, as well as the reason for their fight. She added, however, that Kominczak was also upset because she threatened to tell her mother he raped her.[4] She described Kominczak as a large man who was able to overcome her with his strength. Appellant told jurors that she hit Kominczak with the frying pan, and that he hit her with it, leaving a scar on her leg. She

[3] The State sought to discredit appellant with this line of questioning by pointing out that, because she was unfamiliar with the kitchen, she would have no way of knowing in which drawer the knives were kept.

[4] On cross, she admitted, however, that she lied to the police in her statement when she said she grabbed the frying pan before Kominczak touched her. She also testified on cross that she told investigators about the rape allegation, but they failed to include that in her statement, that they lied when they included in her statement that she tried to wash the knife off, and she neglected to include certain other details, like the fact that Kominczak threatened her by stating, "You're not going anywhere," when she demanded payment and that he initiated the fight by pulling her by the hair while she lay on the couch after having sex.

testified that she stabbed Kominczak twice, both times in the stomach, once to release herself from his grip and a second time in the stomach as she faced him. Finally, she told jurors that Kominczak's pants ripped during their struggle, and he threw his wallet to the ground, denying that she told police investigators she took the wallet from his pants.

The coroner testified that the victim's body did not have any wound to the head consistent with being struck with a frying pan. He also testified that a person in a bear hug like appellant described could not have caused the wounds to the victim's back, but could have caused the injury to the abdomen. Finally, the coroner opined that the victim did not die immediately; rather, some time elapsed between the time the fatal injuries were inflicted and the time that the victim eventually passed out and died.

II. Legal and Factual Sufficiency

In her first six points of error, appellant claims that the evidence is legally and factually insufficient to prove she (1) intended (2) to cause Kominczak's death (3) during a robbery. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994).

The law on legal and factual sufficiency is well settled. *See, e.g., Wesbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000) (legal); *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (factual). A legal sufficiency review calls upon the reviewing court to view the relevant evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995). In contrast, a factual sufficiency review dictates that the evidence be viewed in a neutral light, favoring neither party. In a factual sufficiency review, we discard the prism utilized in a legal sufficiency review and, instead, view all of the evidence in a neutral light favoring neither side. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.* A factual sufficiency review

must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "The court's evaluation should not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony."

Essentially, appellant claims that the evidence is insufficient because her account of what happened July 17, 1991 is different from the State's theory of the crime. For a murder to qualify as a capital murder under § 19.03(a)(2) of the Penal Code, the intent to rob must be formed prior to or concurrent with the murder. *Garrett v. State*, 851 S.W.2d 853, 856 (Tex. Crim. App. 1993). Intent, however, may be inferred from the defendant's actions or conduct. *McGee v. State*, 774 S.W.2d 229, 234 (Tex. Crim. App. 1989). The jury heard evidence, mostly originating from appellant, that she intended to kill Kominczak in the course of a robbery. For instance, the jury heard testimony that she thought he reneged on his promise to pay for sex, and she threatened him with a frying pan if he did not pay as promised. She admitted to stabbing him twice in the stomach. She testified on cross that she stabbed him and left him for dead. Her statement provides that, after she stabbed him, she ripped his wallet from his pocket. Finally, the coroner's testimony established that the two wounds she admitted to inflicting were among the six wounds considered fatal. Nothing corroborated appellant's testimony, and while corroboration certainly is not required, the jury was likewise not required to believe appellant simply because she said the events happened a certain way, particularly in light of her conflicting version of events and the medical evidence which simply does not support her testimony. Appellant's first six points of error are overruled.

III. Testimony of Unsworn Witness

In her final point of error, appellant claims the trial court erred in allowing the State to call a witness, Archie Lamont Ross, when the State knew he would refuse to take an oath to tell the truth. Appellant maintains that Ross's refusal to be sworn is analogous to a witness's assertion of a privilege, such as the privilege against self-incrimination or spousal

privilege.

The State called Ross who, outside the presence of the jury, indicated that he would not raise his hand and swear to testify truthfully. The court found Ross in contempt and asked the lawyers what suggestions they had regarding Ross's refusal to be sworn. The State suggested that the jury be called in, and Ross "can give whatever answer he wants to give." After admonishing the witness of the consequences of his refusal to take the oath, the court again found him in contempt, this time sentencing him to 180 days in jail and a 500.00 fine. The jury was then called in and Ross continued to refuse to be sworn in as a witness. Once again, the jury was removed and the court found Ross in contempt a third time.

In order to complain of a matter on appeal, a party must make a timely objection, calling to the court's attention the matter complained of. TEX. R. APP. P. 33.1. An objection on appeal must conform to the objection raised at trial. *Id.*; *Santellan v. State*, 939 S.W.2d 155, 171 (Tex. Crim. App. 1997). Although counsel for appellant approached the bench for an off-the-record discussion, we do not have a record of what, if any, objection was made to the court's ruling that Ross would be questioned in front of the jury. Further, no objection was lodged when the court asked the witness in the jury's presence whether he was refusing to take an oath to testify truthfully. The only objection appellant made was to the prosecutor soliciting unsworn testimony. Accordingly, appellant waived this point of error.

Moreover, assuming counsel's objection preserved error, appellant does not show how she was harmed by the court's decision to allow Ross to be called as a witness or by the court's questions to the witness in front of the jury. As noted above, appellant claims that Ross's refusal to testify is analogous to a witness invocation of the privilege against self-incrimination. We disagree. As a general rule, a court ought not allow a witness to appear before a jury where the court knows the witness will refuse to testify on a claim of privilege against self-incrimination. *Ellis v. State*, 683 S.W.2d 379, 382 (Tex. Crim. App. 1984); *Vargas v. State*, 442 S.W.2d 686, 687 (Tex. Crim. App. 1969). However, as appellant points out, the rationale of this rule is "that in refusing to answer a question the witness is

exercising a personal constitutional right which should neither help nor harm any third person."[5] *Ellis*, 683 S.W.2d at 383 (citing *Glasper v. State*, 486 S.W.2d 350 (Tex. Crim. App. 1972)). Unlike the situation where an inference may be drawn as to a witness's refusal to testify on a claim that it violates the privilege against self-incrimination, nothing in the record suggests that Ross's testimony would have incriminated Ross. Also, it is unclear from the record why Ross refused to testify. And a witness is not necessarily precluded from testifying simply because he refuses to swear or affirm to testify truthfully. *Cf. Bisby v. State*, 907 S.W.2d 949, 954–55 (Tex. App.—Fort Worth 1995, pet. ref'd) (finding no error in trial court's decision to permit witness to testify, even though witness refused to swear or affirm to testify truthfully on religious grounds, where witness was admonished about penalty for perjury). In the present case, Ross may have been refusing to provide truthful testimony, or he may have been refusing to swear or affirm on religious grounds. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed September 20, 2001.

Panel consists of Justices Yates, Fowler, and Sears.[6]

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

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[5] Appellant cites *Washburn v. State*, among other cases, as an example of reversible error on this point. 299 S.W.2d 706 (Tex. Crim. App. 1956). There, the witness, a co-defendant in a murder case, was asked fact-laden questions about his involvement with Washburn in the planning and commission of the murder for which Washburn was on trial. *Id.* at 707. The court found that "the trial court committed error in permitting the state to call the witness Nelson, a co-defendant, to the stand and require him to claim his privilege against self-incrimination and refuse to testify in the presence of the jury. Such refusal to testify was prejudicial because it could be used as an incriminating fact against the appellant." *Id.* at 708.

[6] Senior Justice Ross A. Sears sitting by assignment.