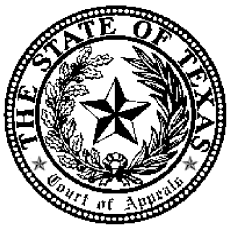
Affirmed and Opinion filed December 6, 2001.



In The

Fourteenth Court of Appeals

NO. 14-96-01562-CR

ZERICK MARVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 736,148

O P I N I O N O N R E M A N D

Zerick Marvis appeals his conviction for murder. The jury assessed his punishment at seventy-five years imprisonment. On original submission, we reversed and acquitted, in part, because we concluded the evidence was legally and factually insufficient to support appellant's conviction as a principal. *Marvis v. State,* 3 S.W.3d 68, 76 (Tex.App.–Houston[14th Dist.] 1999) (*Marvis I).* We further found the evidence was legally and factually sufficient to sustain appellant's conviction as a party, but reversed and remanded for a new trial because of jury-charge error. *Id.* The State obtained discretionary review, and the court of criminal appeals reversed our decision and remanded the cause for

consideration of appellant's remaining point of error concerning prosecutorial misconduct. *See Marvis v. State*, 36 S.W.3d 878, 880 (Tex. Crim. App. 2001) (*Marvis II*). We affirm.

PROCEDURAL BACKGROUND

On original submission, we held the evidence to support appellant's conviction as a principal in the murder of Carlton Brown was legally and factually insufficient. *Marvis I*, 3 S.W.3d at 72, 76. However, we found the evidence was legally and factually sufficient to support appellant's conviction as a party. *Id.* We further held that the trial court's jury charge was erroneous because the application paragraph did not properly apply the law of parties to the facts in the case. *Id.* at 73. Because we found the charge error resulted in egregious harm to appellant, we reversed and remanded the cause for a new trial for appellant as a party to the offense of murder. *Id.*

On petition for discretionary review by the State, the court of criminal appeals held that the jury charge adequately instructed the jury as to the law of parties and appellant suffered no egregious harm. *Marvis II*, 36 S.W.3d at 880. Accordingly, the court reversed our decision reversing appellant's conviction, and remanded the case to this court to address appellant's remaining point of error concerning prosecutorial misconduct.

FACTS

According to the evidence adduced at trial, appellant heard a knock on his door while at home one night. He answered the door and saw Jerome Dickey and Carlton Brown standing in the hall. Appellant went back into his apartment, put on a bulletproof vest, got a gun, and returned to the hall. Thereafter, an argument took place among the three men. According to appellant, Dickey shot Brown in the head as Brown started to reach for his pistol. Appellant claimed that he then fired his gun in self defense. Four of appellant's bullets hit Brown, and a shot aimed at Dickey misfired. Brown suffered a total of ten gunshot wounds, six from Dickey and four from appellant. Appellant sustained a gunshot wound in his lower leg. Physical evidence indicated that Dickey and appellant struggled

after the gun fight.

PROSECUTORIAL MISCONDUCT

In his sole remaining point of error, appellant asserts his conviction was obtained through the prosecutorial misconduct of the State by the intentional use of perjured testimony and other evidence which it knew to be false. Specifically, appellant asserts that the State tried to prove appellant fired the first shot at Brown by misleading questions and attempts to elicit testimony from the witnesses that would demonstrate this false theory.

First, appellant contends the State tried to prove appellant fired the first shot through the testimony of Trinnie Scott as to the sounds of the gunshots she heard. Ms. Scott stated she first heard slower, steady gunshots followed by fast, continuous gunshots. Appellant did not object to any part of this question and answer testimony of Ms. Scott.

Second, appellant contends the State tried to connect the sounds of the gunshots to the weapons actually used by appellant and Dickey through the testimony of Officer Robert Baldwin. Appellant did not object to any part of this question and answer testimony.

To preserve an issue for appellate review, the defendant must make a timely request, objection, or motion stating specific grounds for the ruling he desires the trial judge to make. TEX. R. APP. P. 33.1(a)(1); *King v. State*, 953 S.W.2d 266, 268 (Tex. Crim. App. 1997). By failing to object, appellant has not preserved these first and second subpoints of error for review.

Third, appellant contends the State tried to convey the impression that Brown was the "peacemaker" through the testimony of Ms. Scott about overhearing a conversation between appellant, Dickey, and Brown in the hallway about all of them being "friends." Appellant objected twice on hearsay grounds, and was overruled. Appellant again objected that the testimony was speculation on the part of the witness, and Ms. Scott answered before the trial court ruled on his objection.

On appeal, appellant's complaint is that the questioning by the State constituted prosecutorial misconduct because the prosecutor was trying elicit answers to prove the State's false theory that appellant fired the first shot. At no time during this part of the State's examination of Ms. Scott did appellant lodge any objection on prosecutorial misconduct grounds.

In order to preserve error in cases of prosecutorial misconduct, the defendant must (1) make a timely and specific objection; (2) request an instruction that the jury disregard the matter improperly placed before the jury; and (3) move for a mistrial. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996), *cert. denied*, 117 S. Ct. 1442(1997). Regarding the specificity of the objection, "all a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the court is in a proper position to do something about it." *Lankston v. State*, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992).

Although appellant objected to one part of Ms. Scott's testimony at trial, he did not object on the basis of prosecutorial misconduct. Appellant's objection did not adequately inform the trial court of the complaint now urged on appeal. *Jackson v. State*, 516 S.W.2d 167, 175 (Tex. Crim. App. 1974). Thus, the failure to make a specific objection at trial based upon prosecutorial misconduct precludes our review based on this theory. *See id.*

Fourth, appellant asserts that the State used this wrongfully obtained evidence in its final jury argument. Appellant did not object to any part of the State's jury argument on any grounds. Appellant has failed to preserve this subpoint of error for review. *Cockrell*, 933 S.W.2d at 89.

Fifth, appellant urges us to consider witness testimony and other evidence presented in Dickey's trial, which was in the same trial court, but with another judge at another time. None of this evidence was presented to the trial court in this case. Appellant asks this court

to take judicial notice of the proceedings in Dickey's trial in consideration of his claim of prosecutorial misconduct.

Although an appellate court will take judicial notice of its own records in the same or related proceedings involving the same or nearly the same parties, the general rule is that an appellate court cannot go to the record of another case for the purpose of considering testimony not shown in the record of the case before it. *Salinas v. State*, 542 S.W.2d 864, 867 (Tex. Crim. App.1976); *Ex parte Sotelo*, 878 S.W.2d 179, 181 (Tex. App.–Fort Worth 1993, pet. ref'd). Accordingly, we will not take judicial notice of testimony in Dickey's trial because it was not before the trial court in this case.

For the reasons stated, we overrule appellant's sole point of error on this remand. We affirm the judgment of the trial court.

/s/ Don Wittig
Senior Justice

Judgment rendered and opinion filed December 6, 2001.
Panel consists of Justices Edelman, Wittig[1], and Amidei.[2]
Do Not Publish – TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.

[2] Former Justice Maurice Amidei sitting by assignment.