In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-19-00189-CR

TERRYAUN LAMAR RODGERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 114th District Court
Smith County, Texas
Trial Cause No. 114-0449-17

MEMORANDUM OPINION

Appellant Terryaun Rodgers pleaded not guilty to the offense of aggravated robbery with the use of a firearm. *See* Tex. Penal Code Ann. § 29.03. A jury found Rodgers guilty and assessed punishment at twelve years of imprisonment, and the

trial court made a deadly-weapon finding. In two issues, Rodgers appeals his conviction. We affirm.[1]

Background

In March 2017, a grand jury indicted Rodgers for aggravated robbery, and the indictment alleged that

> . . . in the course of committing theft of property and with intent to obtain or maintain control of the property, [Rodgers] intentionally, knowingly, and recklessly cause[d] bodily injury to Dylan Hittle by striking Dylan Hittle with a firearm, and the defendant did then and there use or exhibit a deadly weapon, to-wit: firearm;
>
> . . . [and] while in the course of committing theft of property and with intent to obtain or maintain control of the property, intentionally and knowingly threaten[ed] or place[d] Dylan Hittle in fear of imminent bodily injury or death, and the defendant did then and there use or exhibit a deadly weapon, to-wit: firearm;
>
> And it is further presented that the defendant used or exhibited a deadly weapon, to-wit: a firearm, during the commission of or immediate flight from said offense[.]

The jury charge included instructions on Rodgers's liability for his own conduct and under the law of parties[2]. The jury charge also included an accomplice-witness instruction that

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[1] Under a docket-equalization order issued by the Supreme Court of Texas, this case was transferred to this Court from the Fifth Court of Appeals in Dallas, Texas. *See* Tex. Gov't Code Ann. § 73.001.

[2] The law of parties statute, Texas Penal Code section 7.01(a), provides that "[a] person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally

> Harley Linton is an accomplice to the crime of aggravated robbery, if it was committed. The defendant, Terryaun Rodgers, therefore cannot be convicted on the testimony of Harley Linton unless that testimony is corroborated.

Evidence

Testimony of Jaklin Nugent

Jaklin Nugent testified that, in February 2017, her friend Dylan Hittle was interested in a car in Tyler that had been advertised for sale on Facebook, and she and her boyfriend Cody Baldridge rode with Dylan from Longview to purchase the car. According to Jaklin, Dylan had been communicating with the seller through Facebook Messenger. Jaklin testified that the sellers gave them a place to meet but then kept changing locations. Jaklin testified that a blonde woman finally met them at an apartment complex and told them to follow her to a nearby house, and Jaklin agreed that the woman they met at the apartments was the same person pictured in Dylan's Facebook communications. According to Jaklin, upon arrival at the house, Cody and Dylan noticed that there was no car. Jaklin recalled that there were six people there, and three of them approached their truck and asked for money. Jaklin observed the men trying to reach inside their truck through the windows and "the

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responsible, or by both." Tex. Penal Code Ann. § 7.01(a). The evidence is legally sufficient to support a conviction under the law of parties where the accused is physically present at the commission of the offense and encourages the offense by either words or other agreement. *Burdine v. State*, 719 S.W.2d 309, 315 (Tex. Crim. App. 1986).

next thing you know, we see the guns and they're trying to get the money from Dylan[,]" one man was on the passenger's side of their vehicle, and another man pointed a gun at Dylan when they were trying to get the money. According to Jaklin, when Dylan refused to give the men money, Dylan and Cody were hit with guns repeatedly. After a while, Dylan drove away from the scene and they called the police. While waiting at a gas station for the police to arrive, Dylan "blacked out[.]"

According to Jaklin, both Dylan and Cody were injured, bleeding badly, and had "gashes on their head[.]" Jaklin agreed that State's Exhibits 8 through 11 were photos of Dylan and Cody in the ambulance that night. Jaklin identified Rodgers as the person who was on the passenger side of their truck and testified that she told the police he had a goatee and tattoos under his eye. Jaklin agreed that at one point she viewed multiple photo lineups and she identified Rodgers in one of the lineups by his goatee and tattoo with about "75 percent[]" certainty.

Testimony of Cody Baldridge

Cody Baldridge testified that in February 2017, he and Jaklin went with Dylan to buy a car in Tyler that Dylan had learned about on Facebook. According to Cody, the people they were to meet about the car kept switching locations and dropping the price, which Cody thought was "a big red flag." Cody testified that eventually they met the woman who was messaging Dylan on Facebook, and after meeting her at an

apartment complex, she told them to follow her to a house nearby. According to Cody, he could see other people but no car. Cody testified that men with weapons approached both sides and the back of their vehicle: "The guy that was on the driver's side window had a revolver, and the guy that was on [the] passenger side had a semi-automatic weapon." Cody testified that the men pulled out guns and demanded money, and as Cody reached into his pocket for his pocketknife, one of the men hit him on his head three or four times with a pistol, and another started hitting Dylan. According to Cody, he was bleeding a bit and Dylan was bleeding, too. At some point, Dylan backed the truck away, and they called 911. Cody testified that the concussion he received that night made his seizures worse. Cody recalled that he was unable to identify anyone in a photo lineup.

Testimony of Dylan Hittle

Dylan testified that he buys cheap vehicles, fixes them up, and then sells them. He recalled going to Tyler in his truck with Cody and Jaklin after messaging someone on Facebook. Dylan vaguely remembered seeing a woman at an apartment complex and being at a gas station. Dylan testified that he has had two head injuries since February 2017, including a brain bleed, and he has memory problems. Dylan recalled being at the hospital and having a bandage on his head.

Testimony of Officer Joshua Smedley

Joshua Smedley, an officer with Tyler Police Department, testified that he responded to a call about a possible robbery, and when he arrived at the scene, he found two men lying on the ground and a woman standing over them telling the police what had happened. The men were bleeding from their heads, and they told the police that someone had pulled a gun on them. According to Smedley, the driver of the vehicle told the police that he believed he got all his money back except for $180. Smedley identified State's Exhibit 2 as a recording made from his body camera on the day of the incident. State's Exhibit 1, a recording of the 911 call, was also admitted into evidence.

Testimony of Detective Dennis Mathews

Detective Dennis Mathews testified that he is a detective with the Tyler Police Department currently working in the digital forensics department and was once assigned to the Major Crimes Unit. He agreed that in February 2017, he was assigned to work on an aggravated robbery and learned that three people were in a vehicle at the time of the robbery, two of whom had been assaulted. According to Mathews, the initial lead in the case was information from Facebook communication, and this led the police to identify and locate Harley Linton and Kendrick Warfield. Mathews testified that Linton confessed her involvement in the robbery to the police and said

Rodgers and Warfield were also involved, and the police recovered a .380 pistol from Warfield's truck.

Mathews also testified that Dylan, Cody, and Jaklin came to the police department to be interviewed, and he configured a photo lineup that included the suspects named to show to the victims. Mathews agreed that Dylan let him photograph the Facebook communications between him and Linton, and Mathews identified State's Exhibits 12 through 23 as copies of the photographs he took of the Facebook Messenger communications from Dylan's phone and State's Exhibit 24 as the Facebook profile page for "SnowDee" or Harley Linton. Mathews testified that Exhibit 12 was the initial advertisement for a Pontiac listed under the account name "SnowDee[,]" who police came to learn was Linton. According to Mathews, the communications show that after Linton changed the meeting location, Cody, and Dylan told her they were going back to Longview, she lowered the price of the car, and she gave Dylan a new meeting location, and after more changes, the final meeting location was an apartment complex. According to Mathews, the Facebook messages corroborated what he heard from the victims and from Linton and Warfield, and he obtained an arrest warrant for Rodgers.

Mathews testified that Linton initially denied her involvement, but she ultimately told the truth and indicated that Rodgers had threatened her and physically

forced her to participate in the robbery. Mathews also agreed that Linton told the police that Rodgers had logged into her Facebook account to correspond with the victims but later revised her account to say that she was communicating by phone with Rodgers present and instructing her on what to say in the messages. According to Mathews, Linton gave police a couple of phone numbers for Rodgers, but the numbers did not lead to Rodgers. Mathews recalled that Warfield admitted he was present for and involved in the robbery. Mathews agreed that there were other pending charges against Linton and that he arrested four people for aggravated robbery for this incident: Harley Linton, Keelan Smith, Kendrick Warfield, and Terryaun Rodgers.

During cross-examination, Defense counsel showed Detective Mathews one of the photo lineups that had been shown to Jaklin, and Mathews agreed that Rodgers was the only person in that lineup with a goatee, but later Mathews testified that it was unclear whether one of the men had facial hair. According to Mathews, the lineup was shown to three people and two did not identify Rodgers. Mathews agreed that the photo lineup was done in a manner consistent with the laws of Texas.

Testimony of Harley Linton

Harley Linton testified that, at the time of trial, she was in prison following her guilty plea for the aggravated robbery that occurred on February 1, 2017. Linton

testified that she entered her plea about two and a half years before Rodgers's trial and she agreed her plea agreement was not conditioned on any promise, including a promise to testify. She also agreed that she had pleaded guilty to a theft charge.

According to Linton, she was friends with Rodgers, Kendrick Warfield, and Keelan Smith and they were "hanging out" together in late January 2017. Linton testified that she posted an ad on Facebook for a Pontiac, and that she sold the Pontiac to a woman—and not to Dylan, Cody, or Jaklin. After she sold the Pontiac, she received a message from someone who was interested in buying it, and she pretended she still owned the car "to get money from them." Linton agreed that she, Rodgers, Warfield, and Smith came up with a plan to rob the people who came to "buy" the Pontiac that had been sold. According to Linton, there was no specific plan to hurt or assault anyone but that using a weapon was "a symbolic threat."

Linton agreed that her nickname was "SnowDee" and that State's Exhibit 24 was her Facebook page. She agreed that State's Exhibit 12 was a copy of the ad she had posted on Facebook and Exhibit 13 was a message from someone wanting to buy the car. Linton also agreed that she sent some of the Facebook messages but not all of them. According to Linton, she and three other people were involved in planning the robbery, and Warfield, Smith, and Rodgers had guns. Linton testified that, at one point, they lowered the price of the car to entice the victims to come

back. According to Linton, when the victims arrived at the apartment complex, she directed them to a nearby house, and when they pulled up, she ran off and did not see what happened after that. Linton recalled that Rodgers, Warfield, and Smith waited for the victims to arrive and they had firearms.

Linton agreed that at first, she told the police that Rodgers forced her to participate in the robbery, but she also said that Rodgers did not force her to participate, and that Aaron Jackson, who was also involved, told her to say that Rodgers forced her. She also agreed that she lied to police when she told them that Rodgers was her boyfriend and was abusive to her.

Issues

In his first issue, Rodgers argues that the trial court erred in refusing to allow his attorney to examine Linton, a co-defendant and prosecution witness, about her guilty pleas and the sentence she received, which constituted a denial of his rights under the Confrontation Clause of the Sixth Amendment. According to Appellant, because he could not cross-examine Linton about "the lightness of her sentence[,]" the jury was left to conclude that Linton was a credible witness. Appellant further

argues that, had the jury known about her "light sentence[,]" it is highly likely that the verdict and punishment would have been different.[3]

Rodgers's second issue argues that the trial court erred in refusing to allow a jury instruction on the photo lineup presented to alleged victims. According to Rodgers, the lineup was "overly suggestive[]" in violation of article 38.20 of the Code of Criminal Procedure, and a jury instruction was required under article 38.23 of the Code. Appellant argues that the photo lineup used "was not based on the victim's description, but on proven false statements" by co-defendant Linton. Appellant also argues that the lineup was "overly suggestive[]" because Rodgers was the only person in the lineup with a goatee.

The State argues that Appellant's brief does not meet appellate requirements because it fails to cite to the record. We agree. *See* Tex. R. App. P. 38.1(i) (an appellate brief must include citations to the record and to relevant legal authority). Inadequate briefing presents nothing for review on appeal. *See Buntion v. State*, 482 S.W.3d 58, 79 (Tex. Crim. App. 2016) (a brief that "does not direct us to any part of the trial record[]" is inadequately briefed and presents nothing for review); *Lucio v. State*, 351 S.W.3d 878, 896-97 (Tex. Crim. App. 2011) (an inadequately briefed

[3] Appellant's brief presents the standard of review for the denial of a motion for new trial, but Appellant failed to provide any record references to any motion for new trial, nor do we find a Motion for New Trial in the appellate record.

issue presents nothing for appellate review); *Cardenas v. State*, 30 S.W.3d 384, 393 (Tex. Crim. App. 2000) (appellate court does not have to consider inadequately briefed points of error). That said, in the interest of justice we may address an appellant's issue if we can determine, with reasonable certainty, the alleged error about which a complaint is made. *See Borne v. State*, 593 S.W.3d 404, 409 (Tex. App.—Beaumont 2020, no pet.).

Evidence of a Co-Defendant's Plea Agreement

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial court abuses its discretion if its decision falls outside the zone of reasonable disagreement. *Id.* at 83. A defendant's Sixth Amendment right to confront witnesses includes the right to cross-examine witnesses to attack their general credibility or to show their possible bias, self-interest, or motives in testifying for the State. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Hammer v. State*, 296 S.W.3d 555, 561 (Tex. Crim. App. 2009). But a trial court possesses wide latitude to impose reasonable limits on cross-examination "'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant.'" *Irby v. State*, 327 S.W.3d 138, 145 (Tex. Crim. App. 2010) (quoting *Delaware v. Van Arsdall*, 475

U.S. 673, 679 (1986)). "'[T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination[,]' because that is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'" *Johnson v. State*, 433 S.W.3d 546, 551 (Tex. Crim. App. 2014) (quoting *Davis*, 415 U.S. at 315-16).

A defendant is allowed great latitude in showing any fact which would tend to establish ill feeling, bias, motive, and animus on the part of the witness testifying against him. *Hurd v. State*, 725 S.W.2d 249, 252 (Tex. Crim. App. 1987) (citations omitted). "[E]vidence that a witness who testifies against the accused has pending criminal charges against him, or is awaiting sentencing [], is always admissible against him in order to show a possible motive for testifying for the State and against the accused." *Miller v. State*, 741 S.W.2d 382, 389 (Tex. Crim. App. 1987) (citing *Bates v. State*, 587 S.W.2d 121, 123 (Tex. Crim. App. 1979)). But the disposition of the case against one co-defendant is not admissible in the trial of another co-defendant. *Beasley v. State*, 838 S.W.2d 695, 703 (Tex. App.—Dallas 1992, pet. ref'd). A co-defendant's conviction and punishment are not relevant mitigating evidence during sentencing and "[e]ach defendant should be judged by his *own* conduct and participation and by his *own* circumstances." *Evans v. State*, 656

S.W.2d 65, 67 (Tex. Crim. App. 1983); *see also Joubert v. State*, 235 S.W.3d 729, 734 (Tex. Crim. App. 2007).

During oral argument, the trial court advised defense counsel "I don't want to hear a word about anybody else's sentence in this case." Later, defense counsel argued to the trial court that, under the Confrontation Clause, it should be permitted to question Linton about any plea agreements she had entered. Defense counsel conceded that Linton had already entered her plea and had been sentenced. The State told the court that Linton's plea agreement was made two years previously and was "not contingent on any fact." Citing to *Joubert* and *Miller*, the trial court found:

> . . . With regard to Harley Linton's testimony, the Court is going to permit some examination of Ms. Linton on her conviction and plea agreement, that it was pursuant to a plea agreement.
>
> You may -- [defense counsel] may explore bias or motive for testifying. You may inquire to the fact of a plea agreement, but not the sentence. And may inquire into conviction, but not the sentence.
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> . . .
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> . . . you can say [Linton] was offered a plea agreement, the Court followed the plea agreement, she was sentenced to a term in prison. And that's the end of it.

In her testimony, Linton agreed that, as a result of the statements she made to police and her admission that she was involved in the robbery, she entered a plea agreement, she received a prison sentence, and she was serving her sentence at the time of trial. Linton also denied that her plea agreement was conditioned upon any promise to testify and that the District Attorney's Office had not promised her

anything in exchange for her testimony. Neither the State nor the defense sought to examine Linton during the punishment phase of trial.

The record reflects that Linton had been sentenced before Rodgers's trial, and the record does not reflect that Linton had any pending criminal charges or that she was awaiting sentencing. As defense counsel told the trial court:

> . . . The plea agreement indicates apparently that she has to testify about what happened.
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> But there's no consequences to it because she's already pled. So she's taken a deal that effectively, you know, she's paid her price and no matter what she does, she's -- she's okay.

On this record, we cannot conclude that Rodgers was denied his Sixth Amendment right of confrontation where the trial court merely limited the scope of a co-defendant's testimony and did not permit the defense to question Linton about the sentence she received. *See Joubert*, 235 S.W.3d at 734; *Miller*, 741 S.W.2d at 389. We overrule Appellant's first issue.[4]

[4] Appellant's brief fails to cite to the record that Linton provided "false and/or misleading" information to the police. *See* Tex. R. App. P. 38.1(i) (an appellate brief must provide citations to the record and to relevant authority). "An appellate court may not consider factual assertions that are outside the record[.]" *Whitehead v. State*, 130 S.W.3d 866, 872 (Tex. Crim. App. 2004) (citing *Janecka v. State*, 937 S.W.2d 456, 476 (Tex. Crim. App. 1996)).

Photo Lineup

At trial, the State offered a copy of a photo lineup presented to Jaklin Nugent. The defense objected that the exhibit was not properly authenticated because the State had sought to admit it through the victim witness and not through the police detective. The court sustained the defense's objection. On cross-examination of Detective Mathews, the defense offered the lineup photographs as Defense Exhibit 1 into evidence. The State argued that the defense had waived any objection to the photo lineup "[b]ecause he admitted it." The State also argued that if the defense thought the photo lineup was impermissibly suggestive, it should have filed a motion to exclude the evidence.

Defense counsel requested a jury instruction under article 38.23 of the Code of Criminal Procedure, arguing that the photo lineup presented to one of the victims was "overly suggestive" and that Rodgers was the only person with a goatee in the lineup. According to the defense, the jury should have an opportunity to review the matter and determine whether the photo lineup evidence should be suppressed. The trial court denied the request:

> The Court finds that there is no factual dispute for the Court to submit to the jury, which is what would be required. There has not been any factual dispute identified about how the lineup was conducted as to the physical characteristics of the other lineup participants. And so[,] the Court refuses the 38.23 instruction.

Generally, Article 38.23(a) codifies the Texas exclusionary rule and provides that evidence obtained in violation of the laws or Constitution of the United States or Texas is not admissible in a criminal case. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a). In any case where the legal evidence raises an issue about whether the evidence was obtained in violation of the Constitution or the law, then "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." *Id*.; *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012) (A jury instruction should be submitted if a fact issue arises about whether a violation occurred.).

Three predicates are required for a defendant to be entitled to an article 38.23 jury instruction: "(1) the evidence heard by the jury must raise an issue of fact, (2) the evidence on that fact must be affirmatively contested, and (3) the contested factual issue must be material to the lawfulness of the challenged conduct." *Hamal*, 390 S.W.3d at 306 (citing *Spence v. State*, 325 S.W.3d 646, 653-54 (Tex. Crim. App. 2010); *Oursbourn v. State*, 259 S.W.3d 159, 177 (Tex. Crim. App. 2008)).

A jury instruction is proper "only if there is a contested issue of fact about [] obtaining [] the evidence[,]" and "[t]here is no issue for the jury when the question is one of law only." *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000)

(citing *Bell v. State*, 938 S.W.2d 35, 48 (Tex. Crim. App. 1996)). The Court of Criminal Appeals has explained,

> [i]f there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law. And if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. The disputed fact must be an essential one in deciding the lawfulness of the challenged conduct.

Madden v. State, 242 S.W.3d 504, 510-11 (Tex. Crim. App. 2007) (internal citations omitted). To justify the need for an article 38.23(a) instruction, there must be controverted evidence showing a "'factual dispute about how the evidence was obtained.'" *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) (quoting *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004)).

Appellant has not identified a contested issue of fact about how the lineup was obtained. Appellant has not identified how the photo lineup violated the laws or Constitutions of the United States or Texas. *See* Tex. Code Crim. Proc. Ann. art. 38.23(a). Thus, we cannot say the trial court erred in denying a jury instruction under article 38.23. *See id.*; *Hamal*, 390 S.W.3d at 306. And, when Appellant introduced the photo lineup into evidence, Appellant waived any objection to the evidence. *See* Tex. R. App. P. 33.1(a); *cf. Soliz v. State*, 432 S.W.3d 895, 903 (Tex. Crim. App. 2014) ("By offering his oral statement into evidence, appellant waived error

concerning the trial court's ruling on his motion to suppress this statement."); *Decker v. State*, 717 S.W.2d 903, 908 (Tex. Crim. App. 1986) (where appellant offered his confession into evidence before the jury and the trial court admitted it as a defense exhibit, appellant waived his objection to the admission of his confessions). We overrule Appellant's second issue.

Having overruled both Appellant's issues, we affirm the judgment of the trial court.

AFFIRMED.

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LEANNE JOHNSON
Justice

Submitted on May 20, 2020
Opinion Delivered June 24, 2020
Do Not Publish

Before McKeithen, C.J., Horton and Johnson, JJ.