In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00396-CR

CORY WAYNE TIDROW a/k/a KORY WAYNE TIDROW, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 69th District Court
Hartley County, Texas
Trial Court No. 1423H; Honorable Ron E. Enns, Presiding

June 23, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant, Kory or Cory Wayne Tidrow, appeals his conviction for murder via five issues. The victim was his father-in-law. We address each issue in turn and, upon doing so, affirm.

Party Charge

Appellant contends that the trial court erred in submitting a party instruction. This purportedly was so because the evidence did not support it, and it denied him his right to a unanimous verdict. We overrule those complaints.

Regarding whether evidence warranted the charge, we note that the charge permitted the jury to convict appellant if he was a party to his wife's murdering the decedent (i.e., her father). Furthermore, one is a party to a crime committed by another if, while acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person in committing the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011).

Here, the record contains evidence that wife and her Dad had a less than a loving relationship. Shortly before Dad's disappearance, she uttered to others that she was fed up with and wanted to rid herself of him. So too did she say it was "time for that old MFer to disappear." His body was found in an inoperative incinerator about four months later with two bullet holes in the skull. Remnants of two bullets were encountered within it as well, one fired from a .22 caliber weapon and the other from a .45 caliber. Either wound was enough to cause Dad's death, according to testimony.

On the morning of the killing, appellant was seen in Dad's home carrying a .45 caliber handgun while his wife carried a smaller caliber weapon. The individual who saw them was Buck, a neighbor. Appellant called Buck that morning and directed him to bring a wheelbarrow and other paraphernalia to Dad's house. Those items were ultimately used to dispose of the body. Upon arriving, Buck saw Dad's corpse within the home and heard appellant state that he (appellant) "had to use the .45 on him."

Assuming *arguendo* that the foregoing evidence could not reasonably be construed proof that wife killed Dad (as appellant seems to suggest), it certainly can be read, beyond reasonable doubt, as appellant himself committing the murder. So, even if the evidence were insufficient to show that appellant was a party to a murder committed by his wife, it is more than ample to insulate the trial court's submission of the party charge from reversal. This is so because the presence of evidence enabling a jury to deem the appellant as the primary actor renders the alleged error harmless. *White v. State*, No. 07-10-0387-CR, 2011 Tex. App. LEXIS 8805, at *3 (Tex. App.—Amarillo Nov. 3, 2011, no pet.) (per curiam) (mem. op., not designated for publication). And, the evidence enabled a jury to find appellant the primary actor in his father-in-law's murder.

As for the matter of a unanimous verdict, appellant suggests that jury unanimity was required regarding whether he was the primary actor or merely a party to a murder committed by his wife. Yet, a jury need not be unanimous when deciding whether the accused acted alone in committing murder or as a party assisting another. *Gray v. State*, No. 14-10-00200-CR, 2011 Tex. App. LEXIS 8086, at *69–70 (Tex. App.—Houston [14th Dist.] Oct. 11, 2011, pet. ref'd) (mem. op., not designated for publication); *Randall v. State*, 232 S.W.3d 285, 294 (Tex. App.—Beaumont 2007, pet. ref'd). So, contrary to appellant's contention, the trial court was not obligated to charge the jury in a manner assuring that its members were unanimous on whether appellant was the primary actor or merely a party to the murder.

Accomplice Witness Instruction – Wife

Next, appellant contends that the trial court erred in omitting an accomplice witness instruction encompassing out-of-court statements made by his wife, which statements

were admitted into evidence at trial. The argument derives from article 38.14 of the Code of Criminal Procedure. The statute provides that a "conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed." TEX. CODE CRIM. PROC. ANN. art. 38.14 (West 2005). Article 38.14, though, does not apply to out-of-court statements but, rather, live testimony of an accomplice at trial. *Bingham v. State*, 913 S.W.2d 208, 210–13 (Tex. Crim. App. 1995) (en banc) (op. on reh'g); *Marmolejo v. State*, No. 11-17-00071-CR, 2019 Tex. App. LEXIS 1529, at *8 (Tex. App.—Eastland Feb. 28, 2019, no pet.) (mem. op., not designated for publication); *Evans v. State*, No. 07-01-0295-CR, 2002 Tex. App. LEXIS 2705, at *5–6 (Tex. App.—Amarillo Apr. 15, 2002, no pet.). Appellant's wife did not testify. Instead, the utterances underlying appellant's complaint were reiterations at trial of comments made prior to the killing. So, the trial court was not required to submit an accomplice witness instruction encompassing them.

Accomplice Witness Instruction – Buck

Next, appellant questions the absence of an accomplice witness instruction encompassing the testimony of Buck. Allegedly, he "was an accomplice" especially since he was actually "charged for his involvement." We overrule the issue.

Appellant correctly points out that Buck underwent prosecution and conviction as a result of his activities. But, the charge consisted of tampering with a corpse, not murder or a lesser-included offense thereof. This is of consequence, because an accomplice is one whose participation with the defendant involved some affirmative act that promotes the commission of the offense with which the defendant is charged. *Druery v. State*, 225 S.W.3d 491, 498 (Tex. Crim. App. 2007). Knowing of the defendant's offense and failing

to disclose or even concealing it does not make one an accomplice. *Id.* Nor does having assisted in the disposal of the body when one testifies against a defendant accused of murder render him an accomplice to that murder. *Id.* at 500; *accord Paredes v. State*, 129 S.W.3d 530, 537 (Tex. Crim. App. 2004) (so concluding when the evidence illustrated that the witness merely assisted in the disposal of the dead bodies).

Appellant cites us to nothing of record indicating that Buck engaged in the actual murder of Dad or its planning. Nor does he attempt to illustrate how Buck could have been tried and convicted of murder or a lesser-included charge of murder. And, while wife may have requested that Buck obtain sleeping pills and Everclear (an alcoholic beverage) for her, Buck declined the request to secure the pills.[1] He merely bought Everclear, for which she paid. Furthermore, wife insinuated to him that she used the beverage to make smoothies for Dad.

That Buck also acceded to an earlier request from appellant to use his (Buck's) defunct incinerator falls short of illustrating participation in the murder or its planning. Appellant did not tell him the basis for his request. Nor did Buck ask. Instead, Buck simply granted permission, resulting in the topic being dropped. Admittedly, the purpose for the request may have become clear once appellant contacted Buck the morning of the killing and directed him to bring a wheelbarrow and other paraphernalia. By the time Buck arrived, though, Dad already was dead. The wheelbarrow and other paraphernalia then were used to assist in the disposal of the corpse within the incinerator.

Given the foregoing evidence and the applicable law as explained in *Druery* and *Paredes*, we cannot say that the trial court abused its discretion in withholding the

[1] In addition to the corpse being found with bullets within its skull, a "high but not lethal" quantum of diphenhydramine (a sleeping aid) was also discovered in its liver.

requested instruction. *See Villarreal v. State*, No. 01-18-00593-CR, 2019 Tex. App. LEXIS 9738, at *16 (Tex. App.—Houston [1st Dist.] Nov. 7, 2019, no pet) (mem. op., not designated for publication) (noting the applicable standard of review to be abused discretion). Buck may have been an accomplice with appellant but not in the murder of Dad. Thus, the instruction was unnecessary as part of appellant's trial for murder.

Hearsay

In his last issue, appellant complains of the trial court's decision to admit hearsay. The particular statements in question went unmentioned within the issue, though. So, we are left to assume that they consisted of utterances by wife and alluded to within the statement of facts portion of his brief. They consisted of either direct or offhand comments 1) depicting her attitude towards Dad, 2) soliciting help from others in ridding her of him, 3) requesting sleeping pills and alcohol, 4) regarding a move to Argentina since that country lacked an extradition treaty, and 5) evincing her disgruntlement with Dad's intent to exclude her from his will. We overrule the issue.

Of course, the standard of review is abused discretion. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018). Thus, we defer to the trial court's ruling so long as it falls within the zone of reasonable disagreement. *Id*.

Furthermore, it is true that hearsay statements generally are inadmissible unless they come within an exception to the hearsay rule. Yet, one such exception concerns the declarant's then-existing mental, emotional, or physical condition. That is, a statement by the declarant of his "then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition" is an exception to the hearsay rule. TEX. R. EVID. 803(3).

One could reasonably argue that each of wife's utterances mentioned above fell within some aspect of Rule 803(3). They can reasonably be viewed as either a declaration pertaining to her then-existing emotions toward Dad or her state of mind, motive, intent, and plan involving Dad. And, that this particular exception to the hearsay rule may not have been one voiced at trial matters not. This is so because a trial court's ruling may be upheld on grounds which no one mentioned at trial. *See State v. Cabral-Tapia*, 572 S.W.3d 751, 753–54 (Tex. App.—Amarillo 2019, pet. ref'd) (stating that "the reasons provided by the trial court in its findings and conclusions do not restrict our obligation to affirm on any ground, including those unmentioned by the trial court"). Thus, we cannot say that the trial court's decision to admit the utterances fell outside the zone of reasonable disagreement and constituted an abuse of discretion.

Having overruled each issue, we affirm the judgment of the trial court.

Brian Quinn
Chief Justice

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