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COURT OF CRIMINAL APPEALS
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FILED
COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

DEMOND FRANKLIN
Appellant-Petitioner

v.

STATE OF TEXAS
Appellee-Respondent

Appealed from:

The 290th & 227th Judicial District Courts, Bexar County, Texas &

Fourth Court of Appeals, San Antonio, Texas;

Cause No(s).: [2015-CR-6149A] & [04-17-00139-CR], respectively.

AMENDED PETITON FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT:
[REQUESTED].

ATTORNEY FOR APPELLANT.

IDENTITY OF JUDGE, PARTIES, & COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) (West 2017), the parties and representatives to this action are as follows:

(1) Appellant: DEMOND FRANKLIN, T.D.C.J. No.: 02119674, Telford Unit; 3899 Hwy. 98, New Boston, TX 75570.

(2) Appellee: STATE OF TEXAS, by and through the Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710, San Antonio, TX 78205.

The trial attorneys are:

(3) For appellant: M'LISS CHRISTIAN, TBN: 13416550; 111 Soledad, Suite 358, San Antonio, TX 78205-2230; F. ALAN FUTRELL, TBN: 07562725; 319 Maverick St., San Antonio, TX 78212-4637; VINCENT D. CALLAHAN, TBN: 03651700; P.O. Box 12141, San Antonio, TX 78212-0141.

(4) For the State: WENDI K. WILSON, TBN: 24003241; KRISTINA A. ESCALONA, TBN: 24047443; JAMES H. ISHIMOTO, TBN: 24002339; Bexar County District Attorney's Office, 101 W. Nueva St., San Antonio, TX 78205.

The appellate attorneys are:

(5) For appellant: DEAN A. DIACHIN, TBN: 00796464; Bexar County Public Defender, 101 W. Nueva St., Suite. 370, San Antonio, TX 78205.

(6) For the State: APPELLATE SECTION, Bexar County District Attorney's Office; 101 W. Nueva St., Suite 710; San Antonio, TX 78205.

The trial court(s) are: The HON. LAURA L. SALINAS, 166th District Court, 100 Dolorosa St., San Antonio, TX 78205; HON. MELISA CHARMAINE SKINNER, 290th District Court, 300 Dolorosa St., San Antonio, TX 78205; HON. KEVIN MICHAEL O'CONNELL, 227th District Court, 300 Dolorosa St., San Antonio, TX 78205.

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GROUND FOR REVIEW NO. 1

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THE COURT OF APPEALS ERRED BY RULING THE AGE OF THE DEFENDANT AT THE TIME OF THE OFFENSE IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANT BEARS THE BURDEN OF PROOF. 4

GROUND FOR REVIEW NO. 3

EVEN IF DEFENDANTS BEAR THE BURDEN TO PROVE WHEN THEY WERE BORN, THE COURT OF APPEALS ERRED IN AFFIRMING THE INSTANT JUDGMENT BECAUSE THE TRIAL COURT NEVER SECURED AN EXPRESS WAIVER FROM APPELLANT, ADMISSION FROM APPELLANT, OR FINDING OF

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STATEMENT ON RECORD CITATIONS

The reporter's record will be cited as "RR" and the clerk's record will be cited as "CR." For example: (4 RR 135-137) is meant to reference "Reporter's Record, Volume 4, pages 135 through 137." Exhibits will be cited as: (SX- __) and (DX-__), respectively. The reporter's record, which consists of eighteen [18] volumes by six [6] different court reporters (Debbie Jimenez, Erminia Uviedo, Angeliz Rivera, Maria Fattahi, Mary Beth Sasala, & Carol Castillo) will be cited chronologically as follows:

(1 RR ___)	=	D. Jimenez, Vol. 1:	["Hearing"];
(2 RR ___)	=	E. Uviedo, Vol. 1:	["Motions"];
(3 RR ___)	=	A. Rivera, Vol. 1:	[Mt. for Continuance];
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(6 RR ___)	=	M.B. Sasala, Vol. 2:	[Pretrial Motions];
(7 RR ___)	=	M.B. Sasala, Vol. 3:	[Voir Dire];
(8 RR ___)	=	M.B. Sasala, Vol. 4:	[Trial Evidence];
(9 RR ___)	=	M.B. Sasala, Vol. 5:	[Trial Evidence];
(10 RR ___)	=	M.B. Sasala, Vol. 6:	[Trial Evidence];
(11 RR ___)	=	M.B. Sasala, Vol. 7:	[Trial, Closings, Verdict & Punishment];
(12 RR ___)	=	M.B. Sasala, Vol. 8:	[Mt. New Trial];
(13 RR ___)	=	M.B. Sasala, Vol. 9:	[Mt. New Trial];
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(16 RR ___)	=	N. Castillo, Vol. 2:	[Mt. Reconsider M.N.T.];
(17 RR ___)	=	N. Castillo, Vol. 3:	[Mt. Reconsider M.N.T.];
(18 RR ___)	=	N. Castillo, Vol. 4:	[Mt. Reconsider M.N.T.].

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Mr. Demond Franklin, appellant, files this petition by and through his appellate counsel of record, Mr. Dean A. Diachin, Bexar County Assistant Public Defender, and in support thereof would show this Honorable Court the following:

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests that oral argument be granted. This case is important to Texas jurisprudence because the court of appeals "decided an important question of state…law that has not been, but should be, settled by the Court of Criminal Appeals." TEX. R. APP. P. 66.4(b) (West 2017). Oral argument will provide the Court a crucial opportunity to ask any questions that might remain after briefing is complete and for the parties to explain how existing statutes and precedent should be applied to a novel fact situation likely to reoccur in future capital litigation.

STATEMENT OF THE CASE

Appellant was indicted for capital murder on June 10, 2015. (1 CR 8). The State later waived the death penalty. (2 RR 3). A jury found appellant guilty of capital murder on December 12, 2016. (1 CR 195); (11 RR 101). The trial court immediately dismissed the jury and sentenced appellant to life without parole. (1 CR 195); (11 RR 104). The trial court certified appellant's right of appeal that same date, December 12, 2016. (1 CR 197).

The Hon. Melisa Skinner presided at two [2] hearings on appellant's motion(s) for new trial, then recused herself and transferred the case to a different trial court for additional hearings. (1 CR 286, 290, 291). The new trial court denied appellant a new trial on February 24, 2017. (18 RR 10). That same trial court appointed the Bexar County Public Defender's Office to serve as appellate counsel on March 3, 2017. (1 CR 294). This appeal then followed.

STATEMENT OF PROCEDURAL HISTORY

The court of appeals filed a memorandum opinion affirming appellant's conviction and sentence on June 27, 2018.[1] *See* Appendix A (containing court of appeals' memorandum opinion). Appellant's *pro se* motion for en banc reconsideration was filed on July 16, 2018 and denied on July 20, 2018. TEX. R. APP. P. 49.7 (West 2017). Appellant timely filed his initial petition for discretionary review on July 27, 2018 and the instant petition on July 31, 2018. TEX. R. APP. P. 68.2 (West 2017).

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1. Delivering a memorandum opinion was improper in this case because this appeal involves: (1) issues important to the jurisprudence of Texas; and (2) application of existing rules to a novel fact situation likely to recur in future cases. *See* TEX. R. APP. P. 47.4(a),(b) (describing circumstances in which memorandum opinions are inappropriate). The rules of law at issue here were announced in: *Miller v. Alabama*, 567 U.S. 460, 479 (2012) and *Garza v. State*, 435 S.W.3d 258 (Tex.Crim.App. 2014).

QUESTIONS PRESENTED FOR REVIEW [INTERRELATED]

QUESTION NO. 1:

The court of appeals ruled that "because Franklin failed to raise the [*Miller v. Alabama*] issue of whether he was eighteen years' old at the time of the offense, the issue cannot be raised now on direct appeal." Does this ruling contradict this Court's 2014 holding in *Garza v. State* that "sentencing claims under…*Miller* are not forfeited by inaction [at trial]"? (7 RR 52-53); (11 RR 104).

QUESTION NO. 2:

Under Texas' capital sentencing statutes, which party bears the burden of proving the defendant's age at the time of the offense? Must the State prove a defendant was over the age of eighteen [18] at the time of the offense to secure a sentence of life without parole, or must defendants show they were not yet eighteen [18] years old on that date to avoid a guaranteed death in TDCJ? (7 RR 52-53); (11 RR 104).

QUESTION NO. 3:

Even if defendants bear the burden to prove the date when they were born, did the trial court nevertheless err by sentencing appellant without first securing an express waiver by appellant, admission by appellant, or finding-of-fact that appellant was over the age of eighteen [18] on October 22, 2014? (7 RR 52-53); (11 RR 104).

GROUNDS FOR REVIEW
[INERRELATED]

Ground for Review No. 1

THE COURT OF APPEALS ERRED IN RULING THAT APPELLANT'S *MILLER v. ALABAMA* CLAIM WAS FORFEITED BY INACTION.

Ground for Review No. 2

THE COURT OF APPEALS ERRED BY RULING THE AGE OF THE DEFENDANT AT THE TIME OF THE OFFENSE IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANT BEARS THE BURDEN OF PROOF.

Ground for Review No. 3

EVEN IF DEFENDANTS BEAR THE BURDEN TO PROVE WHEN THEY WERE BORN, THE COURT OF APPEALS ERRED IN AFFIRMING THE INSTANT JUDGMENT BECAUSE THE TRIAL COURT NEVER SECURED EITHER AN EXPRESS WAIVER FROM APPELLANT, ADMISSION FROM APPELLANT, OR FINDING OF FACT THAT APPELLANT WAS INDEED OVER THE AGE OF EIGHTEEN [18] ON OCTOBER 22, 2014.

ARGUMENT

<u>Ground for Review No. 1</u>

THE COURT OF APPEALS ERRED IN RULING THAT APPELLANT'S *MILLER v. ALABAMA* CLAIM WAS FORFEITED BY INACTION.

A. Guiding Legal Principles

A mandatory life sentence without parole is cruel and unusual when applied to a person not eighteen [18] years of age at the time of the offense. *Miller v. Alabama*, 567 U.S. 460, 479 (2012). Further, because *Miller* announced a new substantive rule, the holding in that case is retroactive. *Montgomery v. Louisiana*, 577 U.S. ___ ; 136 S.Ct. 718, 736 (2016); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex.Crim.App. 2014).

B. Preservation of Error

Of equal importance, a defendant may not forfeit a *Miller* claim by failing to raise the issue at trial. *See Garza v. State,* 435 S.W.3d 258, 262 (Tex. Crim. App. 2014) (holding, "sentencing claims…embraced by *Miller* are not forfeited by inaction [of a defendant at trial]"). A trial objection is also unnecessary to preserve error caused by legally insufficient evidence. Thus, whether sufficient evidence exists to either prove or rebut a *Miller* claim may be raised for the first time on direct appeal. *Cf. Mayer v. State*, 309 S.W.3d 552, 555 (Tex. Crim. App. 2010).

C. Application of Law to Facts

1. Reasoning Adopted by the Court of Appeals

The entire "discussion" the court of appeals devoted to appellant's third point of error consists of the following:

> As a preliminary matter, we note the appellate record is completely devoid of any evidence regarding Franklin's date of birth. We further note that the State initially sought the death penalty in the underlying case, but nothing in the record before us indicates any objection to the State pursuing the death penalty because of the defendant's age at the time of the offense. We conclude that because Franklin failed to raise the issue of whether he was eighteen years' [sic] old at the time of the offense, the issue cannot be raised now on direct appeal.

Franklin v. State, 04-17-00139-CR, 2018 WL 3129464, at *5 (Tex.App.—San Antonio [June 27, 2018], pet. filed) (not designated for publication).

2. The Reasoning of the Court of Appeals is Flawed

This case, like *Garza v. State* before it, originated in the 290th Judicial District Court, was then affirmed by the Fourth Court of Appeals, and then ultimately reversed by this Court. In so doing, this Court observed and held:

> The Fourth Court of Appeals refused to review his claim and held that, by failing to lodge an objection in the trial court, Garza has forfeited this claim on appeal. We reverse the court of appeals' decision because it conflicts with this Court's subsequently delivered opinion in *Ex parte Maxwell*.
>
> …
>
> While on its face, *Maxwell* appeared to address a pure retroactivity question, it [also] held by necessary implication that a claim asserting an Eighth Amendment violation under *Miller* was not subject to procedural default….[T]he majority [then] granted…relief by vacating [Maxwell's] life-without-parole sentence and remanding the case for further sentencing proceedings permitting the factfinder to determine whether Maxwell's sentence should be assessed at life with or without parole.

> …
> *Maxwell's* result decided the issue before us today:…claims under the Eighth Amendment and embraced by *Miller* are not forfeited by inaction.

Garza v. State, 435 S.W.3d at 261, 262. As required on remand, the court of appeals then ordered the trial court to conduct a new sentencing hearing. And given the same defect is present here, the same relief ought to have been ordered in this case.

Which is to say, because "the appellate record is completely devoid of any evidence regarding Franklin's date of birth," the State might well have waived the death penalty here because appellant was a juvenile at the time of the offense. Were the contrary true, the State certainly could have conditioned its waiver of the death penalty on a corresponding waiver by appellant concerning his age at the time of the offense. No evidence of any such waiver is in the record. *See* (2 RR 3) (asking only by: "THE COURT:…it is my understanding that the State no longer wishes to seek the death penalty on this case. Is that correct? THE STATE: That is correct, Judge"). Whatever the case may be, neither the State nor the Fourth Court of Appeals has offered any legal rationale for disregarding this Court's ruling in *Garza*.

3. Conclusion

Given *Miller* claims are not forfeited by inaction in the trial court, the refusal by the court of appeals to reach the merits of appellant's third point of error should be reversed, and, at a minimum, a more complete review of that point granted.

Ground for Review No. 2

THE COURT OF APPEALS ERRED BY RULING THE DEFENDANT'S AGE AT THE TIME OF THE OFFENSE IS AN AFFIRMATIVE DEFENSE FOR WHICH THE DEFENDANT BEARS THE BURDEN OF PROOF.

A. Guiding Legal Principles

When this Court remanded *Garza*, the Fourth Court of Appeals did more than simply order a new sentencing hearing. The court ruled that the age of a defendant at the time of the offense is an affirmative defense for which the defendant bears the burden of proof at sentencing. *See Garza v. State*, 453 S.W.3d 548, 554, 555 (Tex.App.—San Antonio 2014, pet. ref'd) (hereinafter: "*Garza II*") (stating, "we hold that like mental retardation, Garza's age at the time of the offense is in the nature of an affirmative defense, and it is his burden to prove by a preponderance of the evidence that he was seventeen at the time of the offense in order to avoid the penalty of life without the possibility of parole…we remand this case to the trial court for resentencing").

B. Reasoning Adopted by the Court of Appeals

Although the "discussion" the Fourth Court of Appeals provided for appellant's third point of error is devoid of any legal citation whatsoever, the intermediate appellate court did cite with approval elsewhere in its opinion the "burden analysis" originally set forth in *Garza II*. *See Franklin*, 2018 WL 3129464, at *5 (reciting,

"A defendant's age at the time of the offense is in the nature of an affirmative defense, which must be proven by the defendant by a preponderance of the evidence regardless of whether the issue is presented at trial or in a habeas proceeding").

C. The Reasoning Adopted by the Court of Appeals is Flawed

This Court has never placed a burden on young defendants to either prove their birthdate, or automatically face the harsher of the available penalty options at sentencing. The court of appeals has therefore "decided an important question of state…law that has not been, but should be, settled by the Court of Criminal Appeals." TEX. R. APP. P. 66.4(b) (West 2017). Similarly, just as a presumption of innocence governs during the guilt-innocence phase, so too ought each defendant be presumed to be eligible for life with the possibility of parole, unless the State can prove otherwise beyond a reasonable doubt.

The "exemptions" to which the court of appeals analogized are grounded in very different law than the statute at issue here. Indeed, mental retardation, insanity, and incompetence to be tried or executed are all primarily grounded in Sixth Amendment principles as interpreted by the U.S. Supreme Court in Washington, D.C. Here, a categorical ban on sentencing young people to life without parole was first promulgated in 2013 by our own state legislature in Austin. The relevant provision enacted by our legislature states:

> (a) … An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for:
>
> (1) life, if the individual committed the offense when younger than 18 years of age; or
>
> (2) life without parole, if the individual committed the offense when 18 years of age or older.

TEX. PENAL CODE § 12.31(a)(1),(2) (West 2013). By its own plain language, this provision does more than merely "exempt" a certain class of people from a single maximum penalty; rather, the provision establishes *different* maximum penalties depending on the age of the defendant at the time of the offense. *See* TEX. GOV. CODE § 508.145(b) (West Supp. 2014) (allowing capital defendants the possibility of parole after forty [40] calendar years if they were sufficiently young at the time of the offense). Thus, the category in which any given defendant falls is a question of fact for which the State must have to produce proof beyond a reasonable at sentencing.

Had our legislature intended to create an affirmative defense in § 12.31(a)(1)(2), they surely could have done so more explicitly, just as it did with the code provisions governing "self-defense" and "sudden passion." In each of those instances, the legislature clearly placed a burden on a defendant to prove: (1) specific substantive elements; (2) at a particular stage of the proceedings; (3) by an enumerated or imputed standard of evidence. *See, e.g.,* TEX. PENAL CODE § 9.32 (West 2017) (setting forth

elements of "Deadly Force In Defense of Person"); *Id.* § 19.02(d) (noting, "At the punishment stage of trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause"). Section 12.31(a)(1)(2), meanwhile, does none of those things.

Furthermore, mental retardation, insanity, and incompetence to be tried or executed all largely depend on facts in existence (and thus may be evaluated) at or near the time of trial, whereas a person's date of birth is, by definition, an accident that happens far earlier in time, i.e., as much as eighteen [18] years *prior* to the offense date. As such, the court of appeals' supposition that "[defendants will] naturally have more convenient access to documentation or other evidence establishing their age at the time of the offense [than the State does]," will absolutely *not* be true for a significant number of young people. One can easily imagine, for instance, a mentally-ill, homeless, or emigrated teenager who either does not know, or who simply has no way to prove, when she was born. The court of appeals would nevertheless presume all defendants are age-appropriate for the harshest sentence available under the law—life without parole—despite a categorical ban on that result for Texans not yet eighteen [18] at the time of the offense. Under *Garza II*, it's only a matter of time before a person dies in prison who would otherwise have been placed on parole due to her youthful age at the time of the offense.

Further, in today's electronic day and age, placing the burden on the State to prove a person's date of birth at sentencing is certainly not asking too much. In most cases the State will have equal, if not greater, access to such proof as the defendant's birth certificate, driver's license, identification card, etc. And even in those rare instances when no such evidence is available, no injustice will result given the only other option is forty [40] calendar years' imprisonment before the convicted person may even apply for parole. TEX. GOV. CODE § 508.145(b) (West Supp. 2014). But when, as here, the record is utterly devoid of any evidence of the defendant's age at the time of the offense, "the tie should go to the defendant,"[2] and a new sentencing hearing is thus in order. *See United States v Booker*, 543 U.S. 220, 226 (2005) (holding, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt").

Given the capital sentencing scheme enacted in Texas, the affirmance by the court of appeals should again be reversed and a new sentencing hearing ordered.

---

2. *United States v. Santos*, 553 U.S. 507, 514 (2008).

Ground for Review No. 3

EVEN IF DEFENDANTS BEAR THE BURDEN TO PROVE WHEN THEY WERE BORN, THE COURT OF APPEALS ERRED IN AFFIRMING THE INSTANT JUDGMENT BECAUSE THE TRIAL COURT NEVER SECURED AN EXPRESS WAIVER FROM APPELLANT, ADMISSION FROM APPELLANT, OR FINDING OF FACT THAT APPELLANT WAS INDEED OVER THE AGE OF EIGHTEEN [18] ON OCTOBER 22, 2014

A. Guiding Legal Principles

In *Garza*, both this Court and the court of appeals agreed that a defendant's age at the time of the offense is a question of fact that must be resolved at sentencing by a factfinder. *See, e.g., Garza v. State,* 435 S.W.3d 258, 262 (Tex. Crim. App. 2014) (noting relief granted previously included "vacating…[the] life-without-parole sentence and remanding the case for further sentencing proceedings permitting the factfinder to determine whether…sentence should be assessed at life with or without parole"); *Garza II*, 453 S.W.3d at 553 (observing that "[b]oth parties agree there must be a factual determination as to Garza's age at the time of the offense," and ruling, "we remand this matter to the trial court for resentencing in accordance with this court's opinion").

B. Application of Law to Facts

Here, even if appellant did bear a burden at sentencing to prove his age at the time of the offense, the trial court nevertheless erred by ordering life with no parole without first securing either an express waiver by appellant, admission by appellant, or

finding of fact resolving whether appellant was indeed over the age of eighteen on October 22, 2014. By releasing the jury prematurely, appellant was deprived of his right to present or demand evidence to support his claim and to a factual determination by the factfinder. Under *Garza*, the resulting failure of evidence and due process is not forfeited by inaction below. *See Garza*, 435 S.W.3d at 263 (stating, "we hold that Garza's claim was not forfeited by his failure to urge his claim in the trial court"). Accordingly, this case should be remanded to the trial court for further sentencing proceedings not inconsistent with this Court's ruling in *Garza*.

PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays the Honorable Court of Criminal Appeals of Texas grants appellant's petition for discretionary review, orders further briefing, and allows oral argument.

Respectfully submitted,

/s/ *Dean A. Diachin*
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ATTORNEY FOR APPELLANT.

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies this petition was generated by computer, and thus is limited to four-thousand-five-hundred (4,500) words. The "word count" function within Microsoft Word 10.0 indicates this brief consists, in relevant part, of no more than 2,346 words. The brief therefore complies with TEX. R. APP. 9.4(i)(2)(D) (West 2017).

/s/ *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Petition for Discretionary Review has been delivered to the Bexar County District Attorney's Office, Appellate Section, at the Cadena-Reeves Justice Center, 300 Dolorosa Street, San Antonio, Texas on this 31st day of July, 2018.

/s/ *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender.

Appendix A.

Court of Appeals
(Fourth Court of Appeals District)

Memorandum Opinion
(Not Designated for Publication)

Delivered & Filed:
06-27-18.

2018 WL 3129464
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR
DESIGNATION AND SIGNING OF OPINIONS.

DO NOT PUBLISH
Court of Appeals of Texas, San Antonio.

Demond FRANKLIN, Appellant
v.
The STATE of Texas, Appellee

No. 04-17-00139-CR
|
Delivered and Filed: June 27, 2018

From the 227th Judicial District Court, Bexar County, Texas, Trial Court No. 2015CR6149A, Honorable Melisa Skinner, Judge Presiding

Attorneys and Law Firms

APPELLANT ATTORNEY: Dean Diachin, Bexar County Public Defender's Office, 101 W. Nueva, Suite 370, San Antonio, TX 78205.

APPELLEE ATTORNEY: Jay Brandon, Assistant District Attorney, 101 W. Nueva, 3rd Floor, San Antonio, TX 78205.

Sitting: Marialyn Barnard, Justice, Patricia O. Alvarez, Justice, Irene Rios, Justice

MEMORANDUM OPINION

Opinion by: Irene Rios, Justice

***1** Demond Franklin appeals his conviction for the offense of capital murder and sentence of life imprisonment without parole. Franklin raises four issues on appeal, arguing the trial court erred by: admitting a pre-trial photo identification and cellular mapping analysis evidence; imposing the sentence of life without parole absent evidence Franklin was eighteen years' old at the time of the offense; and refusing to grant Franklin's motion for new trial. We affirm the judgment of the trial court.

BACKGROUND [1]

In a two-count indictment, the State charged Franklin with the offenses of capital murder and felony murder for the shooting death of Deandre Thompson, which occurred during a home invasion-robbery in the early-morning hours of October 22, 2014. The State presented the jury with testimony from nineteen witnesses, and Franklin presented testimony from two witnesses. The jury found Franklin guilty of capital murder. Because the State did not pursue the death penalty, the trial court assessed punishment at life imprisonment without parole. This appeal followed.

ANALYSIS

Pretrial Photo Identification

In his first issue, Franklin contends the trial court erred by admitting evidence of a pretrial photo identification in which witness Angel Mendez identified Franklin. Franklin filed a motion to suppress the identification prior to trial, alleging the photo identification was impermissibly suggestive. The trial court denied the motion to dismiss. On appeal, Franklin specifically argues the photo identification was improper because two "fillers" in the photo array exhibited receding hairlines, which Franklin does not have, and Franklin was the only individual in the photo array with a widow's peak.

Standard of Review and Applicable Law

A pretrial "identification procedure may be so suggestive and conducive to mistaken identification that subsequent use of that identification at trial would deny the accused due process of law." *Barley v. State*, 906 S.W.2d 27, 32-33 (Tex. Crim. App. 1995). In determining whether a particular pretrial identification procedure amounted to a denial of due process, we determine (1) whether the procedure was impermissibly suggestive, and if so, (2) whether the suggestiveness gave rise to a substantial likelihood of irreparable misidentification. *Nunez-Marquez v. State*, 501 S.W.3d 226, 235 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd.).

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"A defendant bears the burden of establishing by clear and convincing evidence that the pretrial identification procedure was impermissibly suggestive." *Burkett v. State*, 127 S.W.3d 83, 86 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd.). Suggestiveness may result from the manner in which the procedure is conducted, such as when the police point out the suspect or suggest that a suspect is included in the lineup. *Barley*, 906 S.W.2d at 33.

***2** "[W]hether a pretrial identification procedure was impermissibly suggestive is a mixed question of law and fact that does not turn on an evaluation of credibility and demeanor; therefore, we apply a de novo standard of review." *Gilmore v. State*, 397 S.W.3d 226, 234 (Tex. App.—Fort Worth 2012, pet. ref'd.) (citing *Gamboa v. State*, 296 S.W.3d 574, 581–82 (Tex. Crim. App. 2009)). In determining whether the photo identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification, we consider the totality of the circumstances. *Gamboa*, 296 S.W.3d at 581-82. The non-exclusive factors to be considered include the witness's opportunity to view the offender at the time of the offense, the witness's degree of attention, the accuracy of the witness's prior description of the offender, the witness's level of certainty, and the length of time between the offense and the confrontation. *Luna v. State*, 268 S.W.3d 594, 605 (Tex. Crim. App. 2008) (citing *Neil v. Biggers*, 409 U. S. 188, 199 (1972)).

Discussion

During a hearing on Franklin's motion to suppress, San Antonio Police Department Detective Mark Duke testified he administered the photo identification as a blind administration, meaning he did not know which of the people included in the photo array was the suspect. Detective Duke testified the photo array included eight folders, six of which contained photos and two that were empty. Detective Duke explained that during the identification procedure, the witness opened the folders individually to view the contents. The witness then either signed the photograph he identified as the suspect or "fill[ed] out the identification page." In this case, Mendez indicated the photo number from the photo array by marking the identification page. The identification page submitted into evidence indicates Mendez identified photo number three, which was the photo of Franklin.

Franklin's expert, Dr. Roy Malpass, testified as an eyewitness identification expert during the hearing. Dr. Malpass expressed concerns about the identification procedures used in this case. Dr. Malpass testified the photo array was suggestive because, unlike the other individuals in the array, Franklin had a widow's peak, which Dr. Malpass described as "a little dip in the hairline, etcetera." Dr. Malpass further noted the level of the hairlines in the other photos varied from "lower" to "medium" to "very, very high." Additionally, Dr. Malpass pointed out that in one photo, "the mass of the hair ... is quite larger" and the hairline in another of the photos was "kind of a scooped shape." The trial court denied Franklin's motion.

Before the jury, Mendez described seeing two men outside his apartment between 1:30 a.m. and 1:45 a.m. on October 22, 2014. Mendez testified he viewed the two men from as close as one to two feet away as he walked his dog. Mendez returned to his apartment at approximately 1:45 a.m. Mendez testified he found the men suspicious and therefore watched the two men for another fifteen to twenty minutes until the men walked out of his view. Mendez explained that he contacted authorities the next day to report the suspicious men after he learned that a murder occurred at his apartment complex.

Mendez took part in a photo identification on November 3, 2014. Mendez testified he identified photo number three with eighty percent assurance that photo number three was one of the men he viewed outside his apartment on the date of the murder. Dr. Malpass also testified before the jury and expressed his concerns regarding the identification procedure. Dr. Malpass explained, as described above, his reasons for believing the pretrial identification procedure was unreliable.

In this case, all the photos included in the photo array are "head shots" depicting African-American men who appear to be similarly aged. The photos do not indicate the men's height or weight. Mendez testified the photo array consisted of black and white photocopied photographs. The clothing worn by the men in the photos is evenly split between light-toned and dark-toned, as well as between collared and non-collared shirts. The faces of all six men are clearly visible, and they all appear to have a slight amount of facial hair. All six men have their hair cut in the same general style, although three men have their hair cut shorter than the others. *See Luna*, 268 at 607-08 (noting

that photographs included in a photo array "need not be identical to satisfy due process requirements").

***3** Thus, notwithstanding Dr. Malpass's testimony regarding problems with the composition of the photo array, Franklin has not established that the procedure leading to Mendez's identification of him as one of the men outside Mendez's apartment near the time of the murder was unnecessarily or impermissibly suggestive. Accordingly, we conclude the trial court did not err by admitting evidence of Mendez's pretrial identification.

Issue one is overruled.

Cellular Mapping Analysis

In his second issue, Franklin contends the trial court erred by allowing FBI Special Agent Mark Sedwick to testify regarding cellular mapping analysis. Specifically, Franklin argues the location data upon which Agent Sedwick relied was undated, unauthenticated, and not sufficiently reliable to be relevant.

Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *Walters v. State*, 247 S.W.3d 204, 217 (Tex. Crim. App. 2007); *Estrada v. State*, 352 S.W.3d 762, 768 (Tex. App.—San Antonio 2011, pet. ref'd). A trial court does not abuse its discretion if its decision lies within the zone of reasonable disagreement. *Walters*, 247 S.W.3d at 21.

An objection must be specific, timely, and made each time inadmissible testimony or evidence is offered. *Haley v. State*, 173 S.W.3d 510, 516-17 (Tex. Crim. App. 2005). However, a party is not required to continue making objections if he either obtains a running objection or requests a hearing outside the presence of the jury. *Id.* at 517; *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). Evidentiary error is not preserved when the same evidence is admitted elsewhere without objection. *Lane v. State*, 151 S.W.3d 188, 193 (Tex. Crim. App. 2004).

Discussion

During a pretrial hearing, Agent Sedwick explained that he is a member of the FBI's cellular analysis survey team, "a group of specially trained agents and task force officers who have been trained as experts in the analysis of historical call detail records or CDRs." Agent Sedwick testified call detail records provide "the person who made the call, person who received the call, and then the date and time, the length of the call, and also the cell tower and sector that was utilized during that phone call." Agent Sedwick also testified that he could plot the cell towers on a map and the approximate locations from where mobile phone calls were made or received in relation to the cell tower that was utilized and in relation to other towers in the area. The trial court determined Agent Sedwick could testify as an expert witness in the area of historical cellular mapping and analysis.

Before the jury, Agent Sedwick referenced four maps he created using data provided by the cellular phone carriers. State's Exhibit No. 75 shows the location of cellular towers in the Bexar County area as well as four addresses of interest. Agent Sedwick testified he used the map of towers depicted in Exhibit No. 75 to create State's Exhibit No. 76, which shows the cellular tower usage by the cellular phones associated with Franklin and two witnesses between 10:06 p.m. and 11:55 p.m. on October 21, 2014, as well as the addresses of interest.

Franklin objected to the admission of State's Exhibit No. 76, specifically stating:

> We're going to object to the hearsay and then we're also—I need a clarification from the Court because he previously just said that these maps have to do with September of 2014. So if it's September 2014 maps, then we're going to object to the relevance.

***4** Agent Sedwick clarified the data he used in creating the maps was provided by cellular phone carriers. The trial court noted that the phone numbers associated with Franklin and the two witnesses were part of the previously admitted records that were provided to Agent Sedwick in order to generate the mapping analysis. According to Agent Sedwick, the map of towers was specifically created from "the most recent tower list published by the phone companies" in relation to the date of the offense and that the tower list indicated "the towers that were

in existence at the time of the crime." The trial court overruled Franklin's objections and admitted Exhibit No. 76.

Shortly thereafter, the State offered State's Exhibits No. 77 and No. 78, which show the cellular usage by the same three phones between 12:15 a.m. and 3:10 a.m. and between 3:22 a.m. and 6:58 a.m. on October 22, 2014, respectively. Exhibits No. 77 and No. 78 also depict the same cellular tower locations and addresses of interest included in Exhibit No. 76. Franklin did not object to the admission of Exhibits No. 77 and No. 78. By failing to object to Exhibits No. 77 and No. 78, which contain the same information as Exhibit No. 76, Franklin waived review of this issue. *Id.*

Franklin's second issue is overruled.

Improper Sentence

In his third issue, Franklin contends the trial court erred by imposing the sentence of life without the possibility of parole without evidence of Franklin's age at the time of the offense. Franklin argues the trial court's "sentence was illegal because the State presented no evidence establishing [Franklin] was at least eighteen (18) years old on the date of the offense" during either the guilt/innocence phase or sentencing. Franklin further argues the "default position" regarding punishment in this case, without proof of his age, should have been to presume he was not yet eighteen years of age on the date of the offense. In response, the State points out that this court previously concluded in *Garza v. State*, that a defendant's age for purposes of avoiding a sentence of life imprisonment without parole is an affirmative defense for which a defendant bears the burden, not an element of the offense for which the State bears the burden. *See Garza v. State*, 453 S.W.3d 548, 555 (Tex. App.—San Antonio 2014, pet. ref'd).

Applicable Law

The Texas Code of Criminal Procedure states:

> If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment or to life imprisonment without parole as required by Section 12.31, Penal Code.

TEX. CODE CRIM. PROC. ANN. art. 37.071 (West Supp. 2017). Penal Code section 12.31(a) requires that:

> An individual adjudged guilty of a capital felony in a case in which the state does not seek the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for ... life, if the individual committed the offense when younger than 18 years of age; or ... life without parole, if the individual committed the offense when 18 years of age or older.

TEX. PENAL CODE ANN. § 12.31(a) 1, 2 (West Supp. 2017).

In *Garza v. State*, we equated the proof of age at the time a capital offense occurred to proof of mental retardation in capital cases. *Garza*, 453 S.W.3d at 553-54. We noted that the Texas Court of Criminal Appeals "held the burden was upon the defendant to establish [mental retardation] by a preponderance of the evidence." *Id.* at 554 (citing *Ex parte Briseno*, 135 S.W.3d 1, 2 (Tex. Crim. App. 2004)). We further pointed out the Court of Criminal Appeals "explained that a lack of mental retardation is not an implied element of the crime of capital murder that the State must prove.... [T]he absence of mental retardation does not increase the penalty of the crime beyond the statutory maximum, and thus, is not an element of the offense." *Id.* (internal citations omitted). We additionally recognized the Court of Criminal Appeals' decision in *Hall v. State*, in which the court held that mental retardation is "comparable to an affirmative defense," for which the defendant bears the burden to prove by a preponderance of the evidence. *Id.* (quoting *Hall v. State*, 160 S.W.3d 24, 38 (Tex. Crim. App. 2004)).

***5** Guided by the reasoning in *Briseno* and *Hall*, we held "that like mental retardation, [a defendant's] age at the time of the offense is in the nature of an affirmative defense, and it is [the defendant's] burden to prove by a preponderance of the evidence that he was [under the age of eighteen] at the time of the offense in order to avoid the

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penalty of life without the possibility of parole." *Garza*, 453 S.W.3d at 554. A defendant's age at the time of the offense is in the nature of an affirmative defense, which must be proven by the defendant by a preponderance of the evidence regardless of whether the issue is presented at trial or in a habeas proceeding. *C.f. Hall*, 160 S.W.3d at 36, 37 (recognizing that the issue of mental retardation to avoid the death penalty may be presented in a habeas proceeding as well as at trial).

Discussion

As a preliminary matter, we note the appellate record is completely devoid of any evidence regarding Franklin's date of birth. We further note that the State initially sought the death penalty in the underlying case, but nothing in the record before us indicates any objection to the State pursuing the death penalty because of the defendant's age at the time of the offense. We conclude that because Franklin failed to raise the issue of whether he was eighteen years' old at the time of the offense, the issue cannot be raised now on direct appeal.

Issue three is overruled.

Motion for New Trial

In his fourth issue, Franklin contends the trial court erred by denying his motion for new trial. The trial court held a hearing on Franklin's motion for new trial, which alleged improper outside influence on the jury. Following that hearing, the trial court denied Franklin's motion for new trial. Thereafter, the trial court granted a motion to reconsider the motion for new trial and recused herself. A second hearing was held by a different trial court. At the close of the second hearing, the second trial court denied Franklin's motion for new trial.

Standard of Review

We review a trial court's denial of a motion for new trial under an abuse of discretion standard. *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014). "We do not substitute our judgment for that of the trial court; rather, we decide whether the trial court's decision was arbitrary or unreasonable." *Id.* A trial court abuses its discretion in denying a motion for new trial "when no reasonable view of the record could support [its] ruling." *Id.* We "view the evidence in the light most favorable to the trial [court's] ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party." *Id.* At a motion for new trial hearing, "the [trial court] alone determines the credibility of the witnesses." *Id.* "Even if the testimony is not controverted or subject to cross-examination, the trial [court] has discretion to disbelieve that testimony." *Id.*

Discussion

Franklin raised a single matter in his motion for new trial: "during the [j]ury's deliberation, ... an outside influence was improperly brought to bear on one or more jurors ... in violation of Texas Rule of Evidence, R. 606(b)(2)(A)." Franklin attached an affidavit from juror P.J., who attested the following:

> After the conclusion of the trial and during deliberations in the jury room in which I was the single hold-out vote for not guilty, one of the jurors, [R.M.], disclosed that he had been to the crime scene at the apartments where the shooting took place and conducted his own investigation into issues raised at the trial. As a result of this juror's information which he imparted to me, along with pressure from other jurors, I was influenced to change my vote to guilty.

"Texas Rule of Evidence 606(b) prohibits a juror from testifying about 'any matter or statement occurring during the jury's deliberations.' " *McQuarrie v. State*, 380 S.W.3d 145, 150 (Tex. Crim. App. 2012) (citing TEX. R. EVID. 606(b)). The relevant exception to this rule is that a juror may testify about "whether any outside influence was improperly brought to bear upon any juror." *Id.*; *see* TEX. R. EVID. 606(b)(2)(a). An outside influence is "something originating from a source outside of the jury room and other than from the jurors themselves." *McQuarrie*, 380 S.W.3d at 154.

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***6** During the second hearing, the trial court heard the following testimony from seven jurors to determine the extent, if any, to which juror R.M.'s visit to the crime scene and the information he shared with other members of the jury influenced jury deliberations or impacted the outcome of the case.

- Juror J.B. testified he was aware another juror went to the crime scene. According to J.B., R.M. "said it was exactly like the video that we saw." J.B. testified he and the other jurors did not discuss what R.M. told them. J.B. did not think the information from R.M. made much difference, and he stated the information "absolutely [did] not" affect his deliberations.

- Juror D.D. testified she remembered R.M. saying he went to the apartment complex. D.D. stated, "I think he basically said that he went there and that was about it." D.D. affirmed the information had no impact on her verdict.

- Juror C.L. testified R.M. told the jury he went to the scene and "said it was just the same." C.L. was unconcerned and testified she was not aware of any specific discussion provoked by the information because she was playing on her phone at the time. C.L. stated the information R.M. imparted had no impact on her verdict.

- Juror D.R. testified he understood R.M. went to the crime scene and his visit confirmed what the jury had heard in court regarding the layout, lighting, and apartment location. According to D.R., R.M.'s comments were minimal and generated no discussion.

- Juror M.S. testified he recalled one of the jurors went to the crime scene, but he did not recall at what point during trial the visit occurred. M.S. stated there was no discussion regarding the information from R.M. and the information did not affect his verdict.

- Juror R.W. testified that R.M.'s report to the jury that "he could see" with regard to the lighting at the apartment complex did not impact his verdict.

- Juror P.J. testified R.M. informed the jurors the lighting at the apartment complex was "pretty much" what they had heard in the trial testimony. According to P.J., R.M. made no other observations, but the information provoked discussion and affected her verdict.

After hearing the testimony and reading the transcript of the first hearing, the second trial court denied Franklin's motion for new trial.

We conclude that a reasonable view of the record supports the trial court's determination. As noted above, all of the jurors called testified the information imparted by R.M. as a result of his visit to the crime scene did not contradict the testimony presented during trial. The information imparted by R.M. provoked little to no discussion. Further, all but one of the jurors testified the information had no impact on their verdict. Accordingly, we find the trial court did not abuse its discretion by denying Franklin's motion for new trial.

Issue four is overruled.

CONCLUSION

Based on the foregoing reasons, we affirm the judgment of the trial court.

All Citations

Not Reported in S.W. Rptr., 2018 WL 3129464

Footnotes

1 Because Franklin does not challenge the sufficiency of the evidence supporting the jury's guilty verdict, we forgo a recitation of the facts surrounding the underlying offense.

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