

Affirmed and Memorandum Opinion filed February 15, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-01007-CR

JOSHUA DEON LAMB, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1237911**

MEMORANDUM OPINION

A jury found appellant Joshua Deon Lamb guilty of murder and sentenced him to life imprisonment. Lamb appeals his conviction contending that: (1) the evidence at trial is legally and factually insufficient to support a guilty verdict; (2) he received ineffective assistance of counsel; (3) the trial court erred in charging the jury on the law of parties, and (4) the State argued outside the record during closing argument. We affirm.

Joshua Deon Lamb was convicted of murdering Tedrick Carter in the early morning hours of May 15, 2008, following a confrontation outside the home of Carter's friend, Brandon Espree. The record reflects that Carter, for the most part, lived with Espree and Espree's family. Espree was awakened around 3 a.m. when he heard Carter open the front door and begin arguing with someone outside. Espree looked out a window and saw Carter standing half-way down the driveway arguing with someone standing at the end of the driveway. Espree then went outside and stood at Carter's side and about ten yards away from the man arguing with Carter. Espree identified the man as Lamb, whom he knew from high school. Espree testified that Lamb was wearing a red "Dickie suit" and was telling Carter to join him in the street. Espree further testified that three additional men were standing outside a green Buick and a red sedan parked in the street in front of the house next door.

Espree testified he grabbed Carter and began pulling him back toward the house. As Espree turned to open the garage door, he heard a gunshot. He testified that, upon turning around, he saw one of the men near the cars fire a shot and then saw Lamb fire several shots from the middle of the street while moving toward the cars. Espree and Carter ran into the garage and realized Carter had been hit. Espree immediately called 911 as the shooters fled.

Crime-scene investigators with the Harris County Sheriff's Office collected three groupings of 23 fired shell casings and a red bandana from the scene. Investigators determined the shells had been fired from at least two different guns. Sergeant Mark Reynolds, a homicide investigator with the sheriff's office, testified the three groupings were consistent with a shooter standing at the end of the driveway and backing away as he fired and a separate shooter firing from the area Espree testified the two cars had been parked.

Investigators also recovered Carter's cell phone from his pocket and enlisted Steve Lowenstein, an inspector with the United States Marshals Service, to analyze the call records. It was determined that Lamb and Carter exchanged several brief phone calls shortly before the shooting. Lamb first called Carter at 2:51 a.m., with additional calls following at 2:58, 3:00, 3:06, 3:36, and 3:39. Espree called 911 at 3:43 a.m., and no additional calls between Lamb and Carter followed. Inspector Lowenstein was able to track the movements of Lamb's cell phone during these calls by examining the cell towers used by the phone. He determined that up until 3:20 a.m., Lamb's phone was in the area of his apartment but moved from his apartment to the area of Carter's home in the 15 minutes immediately before the shooting. By 3:50 a.m., roughly seven minutes after the shooting, Lamb's phone had returned to the area of his apartment. The phone was never used again after that morning.

Lamb's girlfriend, Sheree Green, provided extensive testimony implicating Lamb. Green testified that on the morning of the murder she was with Lamb and three of his friends—"Low," "A-1," and an unknown man—at an apartment she rented for Lamb. The group was playing games and smoking marijuana. In the early morning hours, the three men decided to leave to buy more marijuana. Green testified Carter was known to sell marijuana. She further testified that Lamb received a phone call that morning and argued with the caller. Immediately after the phone call, Green testified Lamb got dressed in a red "Dickie outfit," grabbed his gun, and left the apartment with the three friends. Green did not know what car they left in but testified a red Impala owned by "Low" was parked at the complex that night.

Green testified that when the men later returned to the apartment and resumed smoking marijuana, Lamb was unusually "jittery." Green testified Lamb asked to make a call on her cell phone, which he did not normally do. Green did not hear the conversation that ensued, if any. Police later determined Carter's cell phone had two missed calls from Green's phone at 4:05 a.m. and 4:18 a.m.

Green testified that the next day Lamb told her without explanation that he had thrown away all of his phones. Later that day, “Low” picked up Green from work and drove her to Lamb’s apartment to gather her belongings. Someone then dropped her off at a bus station, from which she traveled to Dallas and stayed with her mother. Green did not testify as to her reason for going to Dallas but did testify it was not her decision to do so. She would return to Houston several days later after a homicide detective contacted her. Green gave the detective a statement, after which she testified Lamb told her to stop talking to the police. Green further testified that Lamb told her about a month before trial to not show up.

The jury convicted Lamb of murder and the trial judge sentenced him to life imprisonment. This appeal followed. On appeal, Lamb complains that: (1) the evidence is legally and factually insufficient to support a verdict of guilty beyond a reasonable doubt; (2) he received ineffective assistance of counsel because his attorney failed to secure his election to have the judge determine sentencing, failed to secure rulings on two filed motions in limine, and failed to object when the State argued outside of the record on closing argument; (3) the trial court improperly charged the jury on the law of parties, and (4) the State improperly argued outside the record during closing argument. We affirm.

II

Lamb first complains that the evidence against him is legally and factually insufficient to support a finding of guilty beyond a reasonable doubt. In evaluating the legal sufficiency of the evidence to support a criminal conviction, we view all evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Childs v. State*, 21 S.W.3d 631, 634 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d). We give deference to “the responsibility of the trier of fact to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic

facts to ultimate facts.” *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 318–19). The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, and it is the exclusive province of the jury to reconcile conflicts in the evidence. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Hence, we do not reevaluate the weight and credibility of all the evidence or substitute our judgment for the fact finder’s. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Appellate courts merely ensure that the jury’s decision was rational. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d).

A majority of the judges on the Court of Criminal Appeals have determined that the *Jackson v. Virginia* legal-sufficiency standard is the only standard a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, J.J.); *id.* at 926 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality). Accordingly, we will analyze Lamb’s factual-sufficiency issue under the *Jackson v. Virginia* standard and ask only if the evidence against him was legally sufficient to sustain a verdict of guilty beyond a reasonable doubt. *See id.* at 912 (plurality op.); *Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Sufficient evidence was presented from which a rational jury could draw the conclusion that Lamb was guilty beyond a reasonable doubt. *See Muniz*, 851 S.W.2d at 246. Espree testified he identified Lamb as one of the shooters while he was standing next to Carter and roughly ten yards away from Lamb. Espree testified he knew who Lamb was from high school and later identified him in a pictorial lineup as one of the shooters. It is well-established that the testimony of a single eyewitness may be legally sufficient to support conviction. *Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.]

2005, no pet.) (citing *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971)). Furthermore, Green's testimony as to Lamb's whereabouts on the night of the shooting and evidence showing Lamb's cell phone traveled from the area around his apartment to Espree's home and back again in conjunction with the timeline of the shooting corroborated Espree's identification of Lamb as a shooter. Both Espree and Green testified Lamb was wearing a red "Dickie suit" on the night of the shooting, and Green testified Lamb was "jittery" after returning to his apartment after the shooting occurred and disposed of all his cell phones.

Lamb complains that Espree and Green were both incredible witnesses. On cross-examination, Espree was confronted with his initial statements to police at the murder scene that he did not recognize any of the men who confronted and shot at Carter, describing them only as "dark-skinned males." Additionally, Espree testified he told the 911 dispatcher he could not see who shot Carter. Espree explained, "I wasn't in my right mind at the time," and "I was just trying to get them in the area for the ambulance." After being taken to a police station for questioning, Espree provided a written statement in which he described the men and the vehicles at the murder scene and said he "believed" the man wearing the "Dickie suit" was Lamb. A week later, in a third statement to police, Espree stated he felt "for sure with a little more certainty" that Lamb was one of the shooters. Lamb also points out that Espree lied to police about handling a gun, as shown by a positive gunshot-residue test, and that a neighbor witnessed Espree with a gun during the shooting. As to Green, Lamb argues she was "clearly biased" because of her anger toward Lamb after she learned he was seeing another woman.

The jury's role as trier of fact renders it the sole judge of the credibility of the witnesses and strength of their testimony. See *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury was made aware Espree did not immediately identify Lamb, and defense counsel had ample opportunity to cross-examine Espree regarding his delayed identification. The jury was also free to take into account Green's relationship

with Lamb and any motivation she might have to lie. We do not reevaluate the weight and credibility of all the evidence or substitute our judgment for the fact finder's. See *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). The evidence presented at trial was sufficient for a rational jury to find Lamb guilty beyond a reasonable doubt. See *Muniz*, 851 S.W.2d at 246. Lamb's first issue is overruled.

III

Lamb next complains that he received ineffective assistance of counsel. Lamb complains his representation was ineffective because counsel (1) failed to know and apply the current law regarding sentencing election, resulting in the trial court rather than the jury assessing punishment in contravention of Lamb's wishes, (2) failed to secure rulings from the trial court on two filed motions in limine, and (3) failed to object when the State allegedly argued outside the record during closing argument.

An accused is entitled to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983). In reviewing claims of ineffective assistance of counsel, we apply a two-prong test. See *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005) (citing *Strickland*, 466 U.S. at 687). To establish ineffective assistance, an appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Strickland*, 466 U.S. at 687; *Mallett v. State*, 65 S.W.3d 59, 62–63 (Tex. Crim. App. 2001) If a criminal defendant can prove that trial counsel's performance was deficient, he must still affirmatively prove that counsel's actions prejudiced him. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). To demonstrate prejudice, a defendant must establish a reasonable probability that the result of the proceeding would have been

different if trial counsel had acted professionally. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Mallett*, 65 S.W.3d at 63.

When evaluating a claim of ineffective assistance, the appellate court looks to the totality of the representation and the particular circumstances of each case. *Thompson*, 9 S.W.3d at 813. In making such an evaluation, any judicial review must be highly deferential to trial counsel and avoid the distorting effects of hindsight. *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984) (citing *Strickland*, 466 U.S. at 689). As such, there is a strong presumption that counsel's conduct fell within a wide range of reasonable representation. *Salinas*, 163 S.W.3d at 740. The appellant bears the burden of proving by a preponderance of the evidence that counsel was ineffective. *Thompson*, 9 S.W.3d at 813 (citing *Cannon v. State*, 668 S.W.2d 401, 403 (Tex. Crim. App. 1984)). To overcome the presumption of reasonable professional assistance, any allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Id.* at 814. Direct appeal is usually an inadequate vehicle for raising such a claim because the record is generally undeveloped. *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005). When the record is silent as to trial counsel's strategy, we will not conclude that defense counsel's assistance was ineffective unless the challenged conduct was "so outrageous that no competent attorney would have engaged in it." *Id.* (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

We address, in turn, each of Lamb's complaints against his counsel. Lamb first contends his counsel was ineffective because counsel failed to timely file Lamb's election to be sentenced by the trial court. Months before trial and on the day trial began, Lamb's counsel filed motions electing sentencing by the jury. After the jury returned a "guilty" verdict, counsel attempted to change the sentencing election to have the judge assess punishment. The State objected on the grounds that a defendant may only change his election after a guilty verdict is returned with consent from the prosecutor, who did not

agree to the change. *See* Tex. Code Crim. Proc. art. 37.07, § 2(b). Defense counsel then made the following statement on the record:

As the State and Court are aware, Mr. Lamb advised me as early as Monday of this week that if he were found guilty of the offense of murder, that he would like to have the Court assess punishment. It was my understanding that he could make that election at any time, so I advised them that we would wait and see, if in fact, there was a guilty verdict returned in this case. I was unaware of the apparent change in the law. Therefore, so I improperly advised Mr. Lamb in regards to whether or not he should or should not make such an election. As a matter of fact, he wanted me to come up and make it and I told him: We'll just have to wait until the verdict is returned. At least if my reading of the statute is correct as it appears, it's the same as the Court's reading of the election, that that [sic] election should have been made before this jury returned a verdict of guilty in this case So it would appear that if, in fact, the Court rules in favor of the State, that the fault for the election not being changed falls on my shoulders.

Counsel's admission that he was unaware of the current state of the law regarding sentencing election rebuts the presumption that defense counsel acted reasonably. *See Salinas*, 163 S.W.3d at 740. Furthermore, counsel's admitted failure to know and apply the current law regarding sentencing election fell below the standard of prevailing professional norms. *See Strickland*, 466 U.S. at 688. However, *Strickland* also requires an appellant establish a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *Id.* at 694. Lamb has not fulfilled this requirement.

The jury imposed a sentence of life imprisonment. Lamb acknowledges he "can't guess about Judge Guerrero's decision about punishment that day" but suggests the State possibly would have put on a different punishment case or that the trial court may have given "a bit of a concession to a defendant who 'streamlines the process' of a trial."

In *Schaired v. State*, counsel advised the defendant to elect sentencing by a jury because the trial judge assigned to the case was "generally regarded . . . as the toughest sentencer in Harris County." 786 S.W.2d 497, 498 (Tex. App.—Houston [1st Dist.]

1990, no pet.). However, it was later discovered that a visiting judge would preside over the case. *Id.* Counsel incorrectly advised the defendant that if he decided to change his election to be sentenced by the judge, there was no chance the judge originally assigned to the case would determine the sentence. *Id.* The original judge, however, returned to court for sentencing and assessed punishment at 50 years' confinement. *Id.* In denying a motion to abate, the court noted the "dangers inherent in an appellate tribunal making an estimate, in hindsight, about the decision a trial judge (or jury) would have reached under the same or similar circumstances." *Id.* at 499.

In *Ross v. State*, trial counsel failed to file an election for jury sentencing. 180 S.W.3d 172, 177 (Tex. App.—Tyler 2005, pet. ref'd). The appellant argued that because the judge imposed the maximum sentence, appellant at worst would have "tied" the sentence if the jury had assessed punishment, and might have received a lesser sentence. *Id.* However, the court similarly refused to speculate that the jury might have assessed a lesser punishment. *Id.*

We follow the *Schaired* and *Ross* courts in refusing to speculate as to whether the judge would have imposed a lesser sentence, and Lamb has advanced no reasoning suggesting his sentence would have been less severe if imposed by the judge.

The evidence adduced during the punishment phase makes us doubt whether Lamb had hope for a more lenient sentence regardless of whom he elected to decide it. During the punishment phase, the jury learned that after being arrested for murdering Carter, Lamb was confronted about the shooting at a clothing store by Paul Simpson, a friend of Carter's. Lamb responded by shooting Simpson several times. After Simpson fell to the ground, Lamb stood over him, aimed his gun at Simpson's head, and pulled the trigger, but the gun did not fire. Roughly ten people were in the store at the time. The jury also learned of Lamb's array of tattoos, including five bullets on his face, an AK-47 assault rifle and dynamite on his chest, and the phrase "Fuck Y'all" accompanied by an obscene hand gesture on his side. Lastly, the jury learned of Lamb's prior misdemeanor and felony

convictions. In light of the foregoing evidence, Lamb offers no reasoning to suggest that the judge would have given Lamb a lesser sentence or that the State would have presented a different case at the punishment phase if the judge were assessing punishment. Although counsel clearly erred, Lamb has not shown a reasonable probability that, but for counsel's deficiency, the result of the trial would have been different. *See Strickland*, 466 U.S. at 694.

Next, Lamb complains counsel failed to secure rulings on two motions in limine.¹ But it is not clear from the record that trial counsel in fact failed to secure the rulings. Although the motions filed with the court do not contain the judge's signature or markings reflecting that the motions were granted or denied, the trial court did schedule a hearing on pre-trial motions the morning of trial. No record of this pre-trial hearing is included in the record. However, during trial counsel approached the bench twice to address the admissibility of evidence covered by the motions in limine.

A claim of ineffective counsel must be firmly supported by the record. *Thompson*, 9 S.W.3d at 814. Here, it is not clear that counsel did not secure rulings on the motions in limine, and, in fact, counsel's conduct during trial in approaching the bench to discuss the motions in limine and the admissibility of evidence addressed by the motions suggests that one or both were possibly granted during the pre-trial hearing. However, we decline to speculate as to whether counsel secured rulings on the motions because at any rate the record does not "affirmatively demonstrate the alleged ineffectiveness." *Id.* Furthermore, even if counsel did not secure rulings on the motions, his decision could have

¹ The first motion required the State to approach the bench to obtain a ruling on admissibility before introducing any evidence of prior arrests or acts of misconduct, any written or oral statements by Lamb purporting to represent admissions of guilt or knowledge of facts involved in the case, and any extraneous offenses allegedly committed by Lamb. The second motion includes the evidence addressed by the first motion as well as evidence showing Lamb called or threatened potential witnesses, that he compelled the prostitution of underage and of-age females, that he was known to carry a handgun and associate with gang members, and that he was a known member of the Blood street gang.

been a strategic one. Lamb has not rebutted the presumption that his counsel's conduct fell within the wide range of reasonable representation.

Lamb finally complains that counsel failed to object to the State's improper closing argument. Specifically, Lamb contends counsel should have objected when the State suggested Lamb "shipped [Green] to Dallas" to keep her from talking to anyone about the murder. Lamb argues this suggestion was outside the record as Green did not explicitly state Lamb was the person who forced her to go to Dallas after Carter's murder.

Generally, isolated instances of a failure to object to inadmissible argument or evidence does not necessarily render counsel ineffective. *Hill v. State*, 303 S.W.3d 863, 879 (Tex. App.—Fort Worth 2009, pet. ref'd). Moreover, assuming *arguendo* the argument was improper, the record does not affirmatively reflect why counsel did not object. As such, Lamb has failed to rebut the presumption that counsel's decision not to object was reasonable. *See Salinas*, 163 S.W.3d at 740. Having found none of the bases for Lamb's ineffective-assistance-of-counsel claim meet the requirements imposed by *Strickland*, we overrule Lamb's second issue.

IV

Lamb next complains that the trial court erred in charging the jury on the law of parties. Lamb first complains the instruction was improper because no notice was given in the indictment that the State intended to pursue a theory of culpability based on the law of parties. Lamb further complains that the evidence was insufficient to support a law-of-parties instruction.

The law of parties provides that a party may be held "criminally responsible as a party to an offense" if the offense was committed "by his own conduct, by the conduct of another for which he is criminally responsible, or by both." Tex. Penal Code § 7.01(a). A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits,

encourages, directs, aids, or attempts to aid the other person to commit the offense. *Id.* § 7.02(a)(2).

It is well-settled that the State need not specify in the indictment its intent to seek a conviction based on the law of parties. *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005); *see also Marable v. State*, 85 S.W.3d 287, 292 (Tex. Crim. App. 2002) (rejecting contention that indictment did not provide adequate notice for accused to prepare defense when indictment did not allege State’s intended reliance on law of parties). It was therefore unnecessary for the indictment to indicate the State intended to pursue a conviction based on a law-of-parties theory.

In determining whether the accused participated as a party, the court may look to events occurring before, during, and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985). The evidence outlined above in both the factual background and in response to Lamb’s first issue is sufficient to support a “guilty” verdict against Lamb as the primary actor or as a party to the offense. *See Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (holding that when the evidence is sufficient to support both primary and party theories of liability, the trial court does not err in submitting an instruction on the law of parties). Lamb’s third issue is overruled.

V

Finally, Lamb complains the State improperly argued outside the record during closing argument when the prosecutor stated: “And just to make sure nobody else can talk to [Green], he ships her to Dallas.” Defense counsel did not object. Lamb contends the State argued facts outside the record because although Green testified it was not her decision to go to Dallas, she was prohibited from testifying as to what compelled her to go.

Lamb acknowledges that error based on improper argument is generally waived on appeal if counsel failed to timely object at trial. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (absent an objection, all improper jury argument is waived); *Campos v. State*, 946 S.W.2d 414, 417–18 (Tex. App.—Houston [14th Dist.] 1997, pet. ref’d). Lamb argues, however, that “this Court may consider the trial as a whole and all other failures of counsel when determining the cumulative error.” Assuming the argument was improper, Lamb does not specify what exactly we should consider concerning the “trial as a whole.” Furthermore, we have determined Lamb did not receive ineffective assistance of counsel based on the complaints he has raised in this appeal. Accordingly, we decline Lamb’s invitation to consider cumulative error despite trial counsel’s failure to object to an allegedly improper closing argument. Lamb’s fourth issue is overruled.

* * *

For the foregoing reasons, we affirm the trial court’s judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown

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