

CLAUDE HOWARD JONES, Appellant

NO. 71,127, v. - - - - Appeal from San Jacinto County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant was convicted of capital murder. V.T.C.A., Penal Code, Section 19.03(a)(2). The jury affirmatively answered the statutory punishment issues submitted pursuant to Article 37.071(b), V.A.C.C.P. Appellant was sentenced to death. Article 37.071(e), V.A.C.C.P. In an automatic, direct appeal to this Court, appellant raises nineteen points of error. Appellant also raises four pro se points of error. We will affirm.

In point of error one, appellant contends the evidence is insufficient to corroborate the testimony of the State's accomplice witness under Article 38.14, V.A.C.C.P. An accomplice witness is a discredited witness whose testimony, without corroboration, will not support a conviction. Walker v. State, 615 S.W.2d 728, 731 (Tex.Cr.App. 1981). To determine whether an accomplice's testimony is corroborated we eliminate the accomplice testimony and review the remaining evidence to determine whether it tends to connect appellant to the offense. Edwards v. State, 427 S.W.2d 629, 632 (Tex.Cr.App. 1968); Graham v. State, 643 S.W.2d 920, 924 (Tex.Cr.App. 1983); and, Munoz v. State, 853 S.W.2d 558, 559 (Tex.Cr.App. 1993). Further,

" . . . Corroborative evidence need not establish appellant's guilt of the charged offense nor directly link appellant to the offense, but is sufficient if it 'tends to connect' appellant to the offense. Each case must be considered on its own facts and circumstances -- on its own merit. Apparently insignificant incriminating circumstances may sometimes afford satisfactory evidence of corroboration." Munoz v. State, 853 S.W.2d at 559 (citations omitted).

The evidence at trial shows that on the afternoon of November 14, 1989, Wendy Goodson and her father went to a friend's home located across the street from the victim's liquor store in order to repair the family car. Around 6:30 p.m. a pickup truck pulled

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up to the liquor store and a man got out of the passenger side of the vehicle. Wendy described the man as a white male, with a pretty distinct "pot belly," with light colored hair wearing a light colored shirt and blue jeans. Wendy observed the victim and the man talking outside and then entering into the store. Shortly thereafter, she heard three gunshots. She then asked her father, "if they shot him [the victim]." The man came out of the store and got in the passenger side of the pickup truck and then the truck left.

Leaon Goodson also testified that on November 14, 1989, he and his daughter went to a friend's home to work on the Goodson's vehicle. While working on the vehicle, Leaon Goodson heard three "bangs." His daughter asked, "Daddy, did they shoot him?" Leaon Goodson observed someone cross in front of the store window and a pickup parked in front of the store. He testified that a man wearing a "gray ... tight fitting jogging shirt ..." exited the store and entered the passenger side of the pickup. The truck then drove away.

William Johnson testified that while driving past the victim's store between 6:30 and 6:45 p.m. on that same evening he observed a light blue Ford pickup truck with a white brush guard parked in front. Greg Magee, constable from San Jacinto County, testified that during his investigation of the instant offense he received an anonymous phone call naming Danny Dixon as a possible suspect. Further investigation revealed a Kerry Daniel Dixon and an address. At this address Magee found a Ford pickup truck with a white brush guard. At trial, Johnson identified a photograph of Dixon's truck as the truck which he saw at the victim's store the evening of the murder.

Terry Hardin testified that in November of 1989 she lived with Mark Jordan, the accomplice witness. In October 1989, at Jordan's

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request, Hardin had purchased a Taurus .357 revolver. Hardin witnessed Jordan and Danny Dixon practice shooting the revolver at the old Dodge Cemetery. Hardin had met Dixon through Jordan. She later led Texas Ranger Tommy Walker to the old Dodge Cemetery where bullets were recovered from a pine tree on two separate occasions. These bullets were turned over to the Houston Police Department lab together with bullets recovered from the victim's body and a Taurus .357 which had been recovered from the Trinity River with the help of Dixon.

A ballistics expert, Ray W. Klein, found that three bullets recovered from the tree in the cemetery as well as a bullet taken from the victim's body matched bullets test fired from the recovered revolver. The serial number on the recovered weapon corresponded with the one found on a firearms form which was entered into evidence to show that this was the same Taurus .357 which Hardin had purchased at the request of Jordan.

Hardin described Dixon's truck as a Ford pickup truck with a white brush guard. Hardin testified she met appellant in November of 1989. Appellant was stocky, had a "pot belly", and often wore a grey sweatshirt jacket. On November 14, 1989, Hardin and Jordan were staying at the trailer owned by Jordan's father. Hardin testified she saw appellant and Dixon there on that same evening and that appellant was wearing the grey sweatshirt jacket. Dixon was wearing a striped shirt and driving his Ford pickup with the white brush guard. Between 5:00 and 6:00 p.m., appellant and Dixon left in Dixon's pickup. Dixon and appellant returned around 9:30 p.m. and appellant came inside. Jordan went outside to speak with Dixon. Shortly thereafter, appellant went outside, Jordan came in to retrieve appellant's clothes, and appellant and Dixon left.

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Jordan and Hardin then left to spend the night in a Huntsville motel.

Through the testimony of Flora Carter, the State entered business records demonstrating that a Howard C. Jones was a guest of the Motel 6, in Austin, between November 14 and November 17. The driver's license number on the registration form belonged to appellant. Dr. Aurelio A. Espinola testified he was the Deputy Chief Medical Examiner for Harris County and he performed an autopsy on the victim.¹ Dr. Espinola testified the victim died as a result of three gunshot wounds. Rita Collins, a travel agent in Conroe, testified that, on November 17, Dixon purchased airline tickets to Las Vegas, Nevada for himself, Jordan and appellant.

Steve Robertson testified he was a chemist employed by the Department of Public Safety. Robertson testified that hair samples recovered from the victim's store matched¹ appellant's hair samples but not those of Dixon. Lacy Rogers, Sheriff of San Jacinto County, testified that the distance between Jordan's residence and the victim's store was seven or eight miles. Rogers further testified that, with Dixon's assistance, he recovered the murder weapon, the .357 revolver, from the Trinity River. Rogers testified appellant was arrested for the instant offense on December 2, 1989, in Fort Meyers, Florida.

Eliminating the accomplice testimony and reviewing the remaining evidence shows that in the instant case a "pot-bellied" man, in his 40's, wearing a gray, tight-fitting jogging shirt,

¹ Contrary to the dissenting opinion, the majority does not "deliberately," or in any other way, mischaracterize the facts. The following statements by Mr. Robertson are most revealing:

"That piece still matches the defendant's hair...

* * *

"It didn't match anybody but the defendant."

(emphasis added).

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committed the crime. Hardin testified appellant was in his 40's and had a "pot-belly." She also testified appellant was wearing a "gray sweatshirt jacket" just before the murder. Further, the Taurus .357 which was purchased by Hardin for Jordan was found to be the murder weapon. Appellant was the only person with access to the pistol whose hair sample matched the one discovered at the murder scene. Johnson identified Dixon's truck as closely resembling the one at the victim's store at the time of the murder. Hardin testified that appellant with Dixon driving left Jordan's residence in Dixon's Ford pickup truck with a white grill on the evening of the murder. Jordan's residence and the victim's store were within eight miles of each other. Here, the non-accomplice testimony not only places appellant at the scene at the time of the murder, but it also tends to establish that he was the one who went into the liquor store and killed the victim. After eliminating all the accomplice testimony from the record we determine, in the instant case, the other facts and circumstances in evidence tend to connect² appellant to the offense. *Munoz v. State, supra*. We find this evidence sufficient to corroborate the testimony of Jordan. Point of error number one is overruled.

In point of error two, appellant contends the evidence is insufficient to prove appellant murdered the victim in the course of committing or attempting to commit a robbery. To determine the sufficiency of the evidence to support appellant's conviction, we must determine, after reviewing the evidence in the light most favorable to the verdict, whether any rational juror could have

² The dissenting opinion requires the evidence "tending to connect" the appellant with the offense committed to be proof beyond a reasonable doubt or some similar standard. See Article 38.14, V.A.C.C.P. However, Article 38.14 requires only enough evidence "tending to connect" the appellant with the offense committed. That standard is clearly met here, and this case is clearly distinguishable from *Munoz v. State*, 853 S.W.2d 558, 563-64 (Tex. Cr. App. 1993).

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found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2789 (1979); Butler v. State, 769 S.W.2d 234, 239 (Tex.Cr.App. 1989).

Appellant contends because a large sum of money was found in a bank bag under the cash register in the store there is a "reasonable hypothesis" the victim had emptied the register into the bank bag prior to appellant's arrival. However, the murder occurred between 6:00 and 6:30 p.m. and the victim normally closed the store at 10:00 p.m.. Gayle Curry, a part-time employee at the liquor store, testified the cash register always contained at least \$900.00 and it was the victim's practice to keep extra money in a bank bag under the cash register. Curry further testified it would be unusual to find the cash register empty during business hours. The record supports a finding that appellant actually took money out of the register, and the jury was entitled to reject as unreasonable the alternative hypothesis that appellant took no money. Furthermore, the evidence is sufficient to show appellant caused the victim's death in the course of committing or attempting to commit robbery. Appellant and a co-conspirator obtained a revolver and drove to a liquor store. The co-conspirator waited in the pickup while appellant, with the revolver, entered the liquor store, and shot the victim three times. The murder took place during business hours and the cash register was empty. We hold, on this evidence, a rational juror could conclude appellant had the intent to take the victim's property before he murdered the victim. See Nelson v. State, 848 S.W.2d 126, 131-32 (Tex.Cr.App. 1992). Point of error two is overruled.

In point of error number three, appellant contends the trial court erred in allowing testimony of hearsay statements between appellant's co-defendants. Co-defendant, Mark Jordan, testified

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that appellant told co-defendant, Danny Dixon: (1) appellant killed the victim; (2) appellant had gone into the store; (3) there had been three gunshots; and (4) appellant had gone back into the store, after first coming out, to get a bottle of liquor. The State contends the statements were made in the course of, and in furtherance of, a conspiracy, and are not hearsay under Texas Rules of Criminal Evidence 801(e)(2)(E). When two or more people take part in the commission of a felony, evidence of conspiracy is admissible even though the substantive crime of conspiracy is not charged. *Meador v. State*, 812 S.W.2d 330, 332 (Tex.Cr.App. 1991). Statements by a co-conspirator, made during the course and in furtherance of the conspiracy, are not hearsay and are admissible against any co-conspirator. *Tex.R.Crim.Evid.* 801(e)(2)(E); see also *Meador v. State*, supra.

In the instant case, the statements were made in the course of the conspiracy. The statements in the instant case were made within two or three hours of the murder and directly related to the events that occurred. Based upon the information provided in the statements, the co-conspirators took several actions in concert. Appellant, Dixon and Jordan left the residence where they had been staying. Appellant took a bus to Austin and stayed in a motel. Jordan and Hardin checked into a motel in Huntsville. Upon appellant's return the three men traveled to Las Vegas. While appellant traveled to Florida, Dixon returned to Texas, retrieved the revolver and threw it into the Trinity River. Relying on *Deeb v. State*, 815 S.W.2d 692, 696 (Tex.Cr.App. 1991), appellant contends the conspiracy was complete when the victim was shot. A conspiracy is not complete until all the acts contemplated by the conspirators are completed. *Bates v. State*, 587 S.W.2d 121, 132 (Tex.Cr.App. 1979); *Brown v. State*, 576 S.W.2d 36, 41 (Tex.Cr.App. 1978). After Jordan's conversation with Dixon, the co-conspirators

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took several concerted actions in the course of the conspiracy, including the disposal of the murder weapon and their flight to another jurisdiction to avoid detection and capture. Under these facts, we find the conspiracy was on-going at the time the statements were made. See *Callaway v. State*, 818 S.W.2d 816, 831 (Tex.App. -Amarillo, 1991).

Rule 801(e)(2)(E) further requires co-conspirator statements be made "in furtherance of" the conspiracy. See *Williams v. State*, 790 S.W.2d 643, 645 (Tex.Cr.App. 1990). As discussed above, the conspiracy in the instant case had not terminated when Jordan made the statements to Dixon. Jordan's statements to Dixon relayed the events that transpired at the liquor store and put Jordan on notice that the robbery had escalated to murder. Furthermore, this information gave Dixon the opportunity to retrieve the murder weapon and quickly leave the Dodge area to elude his arrest. The actions taken by the co-conspirators after the murder were dictated by the information in the statements. Therefore, the statements furthered the conspiracy. ". . . When a conspirator provides information to his coconspirators necessary to keep them abreast of the conspiracy's current status, such statements are properly admitted as coconspirator declarations." *United States v. Pool*, 660 F.2d 547, 562 (5th Cir. 1981). Point of error three is overruled.

In points of error four through fifteen appellant challenges the constitutionality of Article 37.071(g), V.A.C.C.P. In points of error four and five, appellant contends the trial court should have instructed the jury on the consequences of their failure to agree on the statutory punishment issues. We have held a trial court need not instruct a jury on the consequences of their failure to agree on the statutory punishment issues. See *Hathorn v. State*, 848 S.W.2d 101, 125 (Tex.Cr.App. 1992); *Draughon v. State*, 831

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S.W.2d 331, 337 (Tex.Cr.App. 1992); *Sterling v. State*, 830 S.W.2d 114, 121 (Tex.Cr.App. 1992). Points of error four and five are overruled.

Points of error six through fourteen challenge the constitutionality of Article 37.071(g) with respect to: equal protection, trial by an impartial jury, effective assistance of counsel, and prohibition of cruel and unusual punishment. Although appellant sets forth each contention in a separate point of error, he simply quotes the constitutional provision he contends was violated and references us to his argument in point of error five (contending that Article 37.071(g) violates due process). When appellant provides no argument or authority as to the protection provided by the Constitution, we consider the point inadequately briefed and will not address it. *Goodwin v. State*, 799 S.W.2d 719, 723-724, fn. 1 (Tex.Cr.App. 1990), citing *McCambridge v. State*, 712 S.W.2d 499, 501-502, fn.9 (Tex.Cr.App. 1986); see also, *Teague v. State*, 864 S.W.2d 505, 509 (Tex.Cr.App. 1993); *Heitman v. State*, 815 S.W.2d 681, 690, fn. 23 (Tex.Cr.App. 1991). Appellant's points of error six through fourteen are overruled.

In point of error fifteen, appellant contends Article 37.071(g) conflicts with Articles 36.13 and 36.14, V.A.C.C.P. Appellant contends since Article 36.13 requires the jury be governed by the law provided by the trial court, and Article 36.14 requires the trial court to instruct the jury on all law applicable to the case, the jury must be instructed on the law concerning the jury's failure to agree on a statutory punishment issue. We do not find a "direct conflict" between Articles 36.13, 36.14 and Article 37.071(g), supra. Articles 36.13 and 36.14 do not contemplate the jury will receive an instruction on every rule or statute governing procedure which may become applicable. *Davis v. State*, 782 S.W.2d 211, 221 (Tex.Cr.App. 1989). Point of error fifteen is overruled.

Records redacted

The attached document has been redacted due to the presence of personal information regarding jurors. According to the Texas Code of Criminal Procedure, Article 35.29, information collected by the court or by a prosecuting attorney during the jury selection process about a person who serves as a juror, including the juror's home address, home telephone number, social security number, driver's license number, and other personal information, is confidential and may not be disclosed by the court, the prosecuting attorney, the defense counsel, or any court personnel except on application by a party in the trial or on application by a bona fide member of the news media acting in such capacity to the court in which the person is serving or did serve as a juror. On a showing of good cause, the court shall permit disclosure of the information sought. (Acts 1993, 73rd Leg., ch. 371, § 1, eff. Sept. 1, 1993) The Texas Court of Criminal Appeals has verified that juror information is to be withheld from the public according to the statute cited above.

Unique identification number or other filing information:

71127, Claude Howard Jones, Execution case files, Records, Texas Court of Criminal Appeals.

Description:

Information from juror voir dire.

July 8, 2004
Nancy Enneking
Texas State Library and Archives Commission

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In point of error sixteen, appellant contends the evidence at trial was insufficient to support the jury's answer to the first statutory punishment issue. We must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have affirmatively found special issue one beyond a reasonable doubt and with the expectation death would result. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *Dunn v. State*, 819 S.W.2d 510, 513 (Tex.Cr.App. 1991). The record reflects appellant, armed with a handgun, entered the victim's store shortly before witnesses heard gunfire. Two shots were fired close together and a third shot followed. Dr. Espinola testified the first shot struck the victim in the back. The second shot was from a distance of 18 to 24 inches. The third shot entered the victim's abdomen as he sat on the floor. We find the evidence sufficient to support the jury's affirmative finding to special issue one. *Johnson v. State*, 853 S.W.2d 527, 531 (Tex.Cr.App. 1992); *Westley v. State*, 754 S.W.2d 224, 229-30 (Tex.Cr.App. 1988). Point of error sixteen is overruled.

In point of error seventeen, appellant contends the trial judge erred in sustaining the State's challenge for cause to veniremember [REDACTED]. [REDACTED] testified:

"Q: And you understand that the weight or the measure or the way that you test this evidence is based on the phrase beyond a reasonable doubt?

"[REDACTED]: (Witness nods affirmatively.)

"Q: And you understand that you decide for yourself what that means?

"[REDACTED]: Yes.

"Q: Can you kind of tell me what it means to you? What is beyond a reasonable doubt?

"[REDACTED]: Well, beyond a reasonable doubt, if-
-they will have to prove to me
whoever is trying to convict or such

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as him, he would have to prove beyond a reasonable doubt. I wouldn't have any doubt in my mind. I would--it would have to be with no doubt whatsoever.

"Q: Now, you understand that the law doesn't say that's the way it has to be?

"[REDACTED]: No, but I feel that's the way it should be."

When examined by the State, [REDACTED] stated, "I would have to feel in myself that I was satisfied beyond all doubt." In *Crane v. State*, 786 S.W.2d 338 (Tex.Cr.App. 1990), we stated: "[t]he State is entitled to have the trial court exclude for cause any prospective juror who would hold the State to a more stringent burden of proof than that required by law." *Crane v. State*, 786 S.W.2d at 345 (citations omitted). A juror who would require proof beyond all doubt holds the State to a burden greater than is required by law. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex.Cr.App. 1992); *Jacobs v. State*, 787 S.W.2d 397, 404 (Tex.Cr.App. 1990); *Wilkerson v. State*, 726 S.W.2d 542, 545 (Tex.Cr.App. 1986). Veniremember [REDACTED] was properly excluded for cause. Point of error seventeen is overruled.

In points of error eighteen and nineteen, appellant contends the trial judge erred in overruling appellant's challenges for cause to veniremembers [REDACTED] and [REDACTED]. During their respective examinations, both [REDACTED] and [REDACTED] indicated that evidence of voluntary intoxication had little mitigating effect. V.T.C.A., Penal Code, Section 8.04(b) provides:

"(b) Evidence of temporary insanity caused by intoxication may be introduced by the actor in mitigation of the penalty attached to the offense for which he is being tried."

Appellant contends the veniremembers held a bias against Section 8.04(b), and therefore should have been excused for cause. V.T.C.A., Penal Code, Section 35.15(c)(2). Appellant questioned the veniremember's views on a crime committed while the actor was

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intoxicated. Each veniremember answered, in their opinion, voluntary intoxication had little mitigating effect. However, each veniremember indicated they would consider all mitigating evidence in light of the trial judge's instructions concerning mitigating evidence; the law does not require a veniremember give any specified weight to a particular piece of evidence. See Cuevas v. State, 742 S.W.2d 331, 346 (Tex.Cr.App. 1987), cert. denied, 485 U.S. 1015 (1988); Cordova v. State, 733 S.W.2d 175, 189 (Tex.Cr.App. 1987). Points of error eighteen and nineteen are overruled.

Appellant filed a pro se brief in addition to the brief filed by his counsel of record. We have held there is no right to hybrid representation and are not obliged to consider appellant's pro se brief. Scarbrough v. State, 777 S.W.2d 83, 92 (Tex.Cr.App. 1989); Stephens v. State, 677 S.W.2d 42, 45 (Tex.Cr.App. 1984). However, in the interest of justice, we will address appellant's pro se points of error. Appellant's pro se points of error one, two and three are cumulative of points of error four through fifteen raised by appellant's counsel and addressed earlier in this opinion.

In his fourth pro se point of error, appellant contends his trial counsel was ineffective for failing to attack the constitutionality of Article 37.071 (g), V.A.C.C.P., and the failure to request the jury be instructed that a single "no" vote on either of the statutory punishment issues would result in the imposition of a life sentence. Appellant's pro se point of error four is simply another variation of those issues raised in points of error four through fifteen. As we previously stated, Article 37.071(g) is a procedural matter and is not relevant to the jury's determination of the statutory punishment issues. Accordingly, we hold counsel's performance was not deficient. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); see also Ex Parte

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Menchaca, 854 S.W.2d 128, 131 (Tex.Cr.App. 1993); Hernandez v. State, 726 S.W.2d 53, 56-57 (Tex.Cr.App. 1986). Appellant's pro se points of error one, two, three and four are without merit and are overruled.

The judgment of the trial court is affirmed.

McCormick, Presiding Judge

(Delivered December 14, 1994)
En Banc
Do Not Publish

Clinton and Overstreet, JJ., concur in the result

No. 71,127

CLAUDE HOWARD JONES
Appellant,

vs.
THE STATE OF TEXAS, Appellee
APPEAL FROM

SAN JACINTO
County

JUDGMENT AFFIRMED

OPINION BY

McCORMICK,
Presiding Judge

IN BANC
CLINTON & OVERSEER, ET AL., CONCUR IN
DO NOT PUBLISH THE RESULT

FILED IN
COURT OF APPEALS

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Thom.

CLAUDE HOWARD JONES, Appellant

NO. 71,127

v.

Appeal from SAN JACINTO County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION

Because appellant's conviction was based upon accomplice witness testimony, the State was required to corroborate that testimony with other non-accomplice evidence which tended to connect appellant to the commission of the charged offense. Tex. Code Crim. Proc. Ann. art. 38.14. In his first point of error appellant challenges the sufficiency of the non-accomplice evidence to corroborate the accomplice testimony. In overruling the point of error, the majority states appellant's hair sample "matched" the hair fragment discovered at the murder scene, majority op. ___, slip op. pg. 4, and that Danny Dixon's truck was identified as the truck at the victim's store at the time of the instant offense. Majority op. ___, slip op. pg. 2. The majority concludes, "the non-accomplice testimony not only places appellant at the scene at the time of the murder, but it also tends to establish that he was the one who went into the liquor store and killed the victim." Majority op. ___, slip op. pg. 5. For the following reasons, I believe the evidence is insufficient to corroborate the accomplice witness testimony.

I.

The Hair Sample Analysis

Steve Robertson, a chemist employed by the Texas Department of Public Safety, testified he specialized in trace evidence such as paint, fibers, hair, glass, and shoe prints. In his explanation of hair analysis, Robertson stated:

Then we take a hair that we want -- that we're worried about and we compare that hair to this person's hair. If that hair falls within the range of the characteristics that that person has, then that could be that person's hair or it could be another person that has hair with similar characteristics.

Technology has not advanced where we can tell you that this hair came from that person. Can't do that. We can tell you that this hair matches this person in all characteristics and could be his.

JONES (Dissenting Opinion)

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Immediately following this description, the following exchange occurred between Robertson and the State:

- Q. Okay. What you basically explained to us are the limitations of hair comparisons there.
- A. Yes, sir. You can't identify this hair as coming from a person.
- Q. Okay. What is the significance of hair comparison?
- A. By the same token, if we select two people at random and compare their hair, we can probably tell them apart. Now, it's impossible to put a percentage or a statistical study on these variations because each hair in your head varies a little bit. How do you put a number on something like that? You can assign a number to the hairs in your head, a value, and see how much variation there is. Plus, from one person to the next, you may have overlapping characteristics.

So, I can't -- I can't tell you, you know, this hair occurs in 10 percent of the population. Nobody can tell you that. All I can tell you is that this hair -- I can't tell this hair from this person's hair. That means that this hair could have come from another person with hair just like that. It's the best we can do with hair comparison.

In connection with the instant offense, Robertson compared a hair fragment recovered from the victim's store with hair samples from the victim, appellant, Danny Dixon and law enforcement officials known to have entered the victim's store. Moreover, the record is silent as to when the hair fragment may have been left at the store and Robertson did not analyze hair samples from other persons who had access to the store.² Based on this comparison, Robertson testified:

One of the hairs recovered at the crime scene is a fragment about an inch long of a human head hair. That human head hair fragment, I can distinguish everybody's hair from that except [appellant's] hair. Therefore, it is my opinion that that hair fragment came from [appellant] or another individual who has hair like his. I can tell you that it does not match any of the other people's hair that is submitted.

² William Johnson testified that he stopped by the victim's store between 3:30 and 4:00 p.m. on the date of the offense. During Johnson's visit with the victim, at least three other individuals entered the store.

JONES (Dissenting Opinion)

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On cross-examination, Robertson testified as follows:

Q. Yes, sir. Now, there apparently -- there is one hair that was provided to you from the crime scene that you have examined which you have determined possibly could have come from the defendant; is that correct?

A. Yes, sir.

Q. You are not telling the jury for certain that it came from the defendant, are you?

A. No, sir.

* * *

Q. Let me ask you one more time your conclusion in this case. In your report, you stated it was your opinion that the hair fragment could have come from the suspect or from another individual with similar hair.

A. Yes, sir.

On re-direct examination, Robertson stated that the hair fragment "didn't match anybody but the defendant."

Taken in context, Robertson's statements that the hair sample "matched" appellant mean that Robertson was able to exclude all other known hair samples except that of appellant. However, the statement should not be taken out of context, as the majority attempts, to mean that Robertson categorically stated that the hair sample from the victim's store came from appellant. Majority op. ___, slip op. pg. 4, n. 1. To the contrary, Robertson testified appellant had "head hair that doesn't match" the hair sample from the victim's store. Moreover, Robertson testified that it was possible the victim may have had hair, other than that submitted to Robertson, that matched the sample from the victim's store.³

This hair analysis evidence is similar to the non-accomplice evidence in Munoz v. State, 853 S.W.2d 558 (Tex.Cr.App. 1993), where the only evidence that tended to connect the defendant to the offense was a wrapper from a "Bic" cigarette lighter found in the defendant's vehicle. We held the wrapper was insufficient corroboration because it was only similar to those sold by the

³ Initially Robertson labeled the hair fragment as "not suitable for comparison." Robertson explained that a hair fragment "has less value" than an entire strand of hair when making a comparison.

JONES (Dissenting Opinion)

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victim. Munoz, 853 S.W.2d at 563-564. Because the hair sample evidence establishes only a similarity, it is insufficient to tend to connect appellant with the commission of the offense.

II.

There Was No Identification of Dixon's Truck

William Johnson testified he stopped at the victim's store between 3:30 and 4:00 p.m. on the date of the offense. Johnson was going deer hunting and stopped to visit the victim who was the uncle of Johnson's wife. During their visit at least three other individuals entered the store. Johnson left the store but drove by the store later that day, between 6:30 and 7:00 p.m. Johnson saw the victim's car at the store and observed a vehicle that "looked like a light blue Ford pickup" with a "white brush grill on it" parked behind the store. Johnson made these observations while traveling at night at a speed of 50 to 55 miles per hour. Johnson later received a call and returned to the store and gave a statement to one of officers investigating the offense. Prior to trial, Johnson was shown several photographs of pickups with brush guards.

During trial, Johnson testified as follows:

Q. I want to show you what's been marked as State's Exhibit No. 17 and see if you can identify that please, sir.

A. Yes, sir. That's it -- that's what --

Q. Does it contain your signature?

A. Yes, sir.

Q. And does it contain the date and time on it?

A. Yes.

Q. Okay. And you have seen this before; is that correct?

A. Yes.

[Exhibit 17 admitted into evidence without objection]

Q. Mr. Johnson, your initials are by the No. 3 on this exhibit; is that correct?

A. Yes.

JONES (Dissenting Opinion)

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- Q. Now, what about this exhibit is familiar to you?
- A. Well, you know, the bumper was made out of flat iron.
- Q. Okay.
- A. You know, what I noticed when I went by it.
- Q. And the color of the bumper?
- A. It was snow white.
- Q. Okay. Now, you initialed No. 3. Are you saying that that bumper closest resembles the bumper that you saw that night?
- A. Yeah.
- Q. It's on -- what color is the vehicle that the No. 3 exhibit, the white bumper, is on?
- A. Looks like tan or yellow.
- Q. Okay. Are you just saying that you picked this one out because the bumper only?
- A. The bumper was the same, you know, flat iron that it was made out of.

Johnson also testified a local business, Champion Paper Company, used pickups with the same type of bumper or brush guard. On cross-examination Johnson stated the truck he saw behind the victim's store looked like a Champion work truck because it had the same kind of grill or brush guard.

Taking Johnson's testimony out of context, the majority states, "At trial, Johnson identified a photograph of Dixon's truck as the truck which he saw at the victim's store the evening of the murder." Majority op. ___, slip op. pg. 2. But see, Majority op. ___, slip op. pg. 5 ("Johnson identified Dixon's truck as closely resembling the one at the victim's store at the time of the murder."). When read accurately, the record establishes that Johnson testified only that the brush guard on Dixon's pickup closely resembled the brush guard he observed on the truck behind the victim's store. This brush guard was also similar to the brush guards on other pickups in the community.

At trial, Johnson identified the exhibit, not Dixon's truck. State's Exhibit 17 contained the photographs Johnson had been shown prior to trial. Johnson was familiar with the exhibit because he

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had viewed it prior to trial and initialed the third photograph as being the one that closely resembled the truck seen on the date of the offense behind the victim's store. Johnson did not identify Dixon's truck and the testimony cannot be fairly read to say that Johnson made such an identification.

III.

Other Non-Accomplice Evidence

Two other witnesses, Wendy and Leason Goodson, actually saw the person who caused the victim's death, but their testimony did little more than establish the commission of the crime. Neither Wendy nor Leason identified appellant as the person who entered the victim's store immediately prior to the murder. They could not identify a photograph of appellant in a sweatshirt, as either the person who entered the store or the sweatshirt that was worn by the person who entered the store. The majority concludes that because Hardin testified that appellant wore a grey sweatshirt jacket on the date of the offense, appellant was necessarily the man seen by the Goodsons. However, the majority fails to acknowledge that the Goodsons could not identify appellant as the man seen entering the victim's store. Further, they could not identify Dixon's pickup as the vehicle parked at the victim's store. Finally, neither Goodson described the pickup truck at the victim's store as having a white brush guard.

While there was other evidence that appellant was staying approximately seven miles from the victim's store and that appellant was in a pickup truck similar to the pickup at the victim's store at the time of the offense, "the mere presence of the appellant with [an accomplice] before or after the commission of the offense is not, in itself, sufficient corroboration." Cox v. State, 830 S.W.2d 609, 611 (Tex.Cr.App. 1992). See also, Cockrum v. State, 758 S.W.2d 577, 581 (Tex.Cr.App. 1988); and, Mitchell v. State, 650 S.W.2d 801, 808 (Tex.Cr.App. 1983).

The majority also notes that appellant had "access" to the revolver. Majority op. ___, slip op. pg. 5. Apparently the

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majority draws this conclusion from the fact that one of appellant's roommates, Jordan, owned the gun. While there was ballistics evidence which established Jordan's revolver as the murder weapon, there is no non-accomplice evidence that appellant ever possessed the revolver. For non-accomplice evidence to be sufficient corroboration, it must relate to a material matter and tend directly and immediately, not merely remotely, to connect the accused with the offense. Holladay v. State, 709, S.W.2d 194, 200 (Tex.Cr.App. 1986).

There is also evidence that appellant left San Jacinto County and traveled to Austin, Las Vegas, Nevada and Fort Meyers, Florida. However, the record does not demonstrate that appellant had any previous ties to San Jacinto County. Indeed, the evidence indicates that appellant was rather nomadic and had been staying with Jordan for only two weeks. The record is silent as to where appellant resided prior to the his stay with Jordan. Although, evidence of "flight" may serve to corroborate accomplice testimony, Gosch v. State, 829 S.W.2d 775, 779-782 (Tex.Cr.App. 1991); and, Passmore v. State, 617 S.W.2d 682, 685 (Tex.Cr.App. 1981), I cannot conclude, based on the record before me, that appellant's departure was indeed "flight."

IV.

Conclusion

The Constitution vests this Court with exclusive jurisdiction of death penalty cases. Tex.Const. art. V, § 5. Therefore, when society attempts to extract the ultimate punishment we are duty bound to review the conviction and sentence to insure that they comport with the law. At the very least, a condemned man is entitled to an accurate recitation of the evidence that gave rise to his capital murder conviction and sentence. Today, the majority

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shirks that responsibility by either carelessly reading the record or deliberately mischaracterizing the record.⁴

While it is true that an accurate recitation of the non-accomplice evidence casts suspicion upon appellant, a mere suspicion is insufficient to meet the requirements of art. 38.14. Munoz, 853 S.W.2d at 564. See also, Adams v. State, 685 S.W.2d 661, 668 (Tex.Cr.App. 1985); Gardner v. State, 730 S.W.2d 675, 678-679 (Tex.Cr.App. 1987); and, Forbes v. State, 513 S.W.2d 72, 75-76 (Tex.Cr.App. 1974).

Because the non-accomplice evidence, when accurately recited, is insufficient to corroborate the accomplice witness testimony, I respectfully dissent.

BAIRD, Judge

Miller, J., joins this opinion.

(Delivered December 14, 1994)

En Banc

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⁴ The author of the majority opinion has previously been chastised for citing testimony out of context and in a less than complete fashion. Ex parte Brandley, 781 S.W.2d 886, 888, n. 1.

No. 71,127.....

CLAUDE HOWARD JONES
Appellant,

vs.
THE STATE OF TEXAS, Appellee

APPEAL FROM

SAN JACINTO
County

DISSENTING OPINION

OPINION BY

BAIRD

Judge

En banc
Miller, J., joins this opinion.

FILED IN
COURT OF APPEALS

DEC 14 1994

Thomas Lowe, Clerk

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