United States Court of Appeals
for the Fifth Circuit

No. 23-40399

A True Copy
Certified order issued Jul 26, 2023

Clerk, U.S. Court of Appeals, Fifth Circuit

IN RE RAYMOND RAMIREZ,

Movant.

Motion for an Order Authorizing
the United States District Court
for the Southern District of Texas
to Consider a Successive 28 U.S.C. § 2254 Application

UNPUBLISHED ORDER

Before SMITH, SOUTHWICK, and WILSON, *Circuit Judges*.

PER CURIAM:

Raymond Ramirez, Texas prisoner # 903886, was convicted in 2000 of capital murder and sentenced to life in prison. Ramirez moves for authorization to file a second or successive 28 U.S.C. § 2254 application to challenge his conviction and sentence. He seeks to argue that he is innocent because the victim died from multiple blunt-force injuries rather than homicidal violence and that Ramirez received ineffective assistance of counsel.

A prisoner seeking to file a second or successive habeas application must apply for leave to do so from this court. *See* 28 U.S.C. § 2244(b)(3)(A). This court may authorize the filing of a successive § 2254 application only if the applicant makes a *prima facie* showing that either (1) his claim relies on a

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new rule of constitutional law that was "made retroactive to cases on collateral review by the Supreme Court" and was previously unavailable or (2) "the factual predicate for the claim could not have been discovered previously through" due diligence, and the underlying facts, if proven, "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2), (3)(C). Ramirez fails to make the requisite showing.

Moreover, we do not recognize freestanding claims of actual innocence. *In re Swearingen*, 556 F.3d 344, 348 (5th Cir. 2009). Nor do we recognize actual innocence as a gateway for authorization to file a second or successive application. *McQuiggin v. Perkins*, 569 U.S. 383, 396–97 (2013); *Jackson v. Lumpkin*, 25 F.4th 339, 341–42 (5th Cir. 2022).

IT IS ORDERED that the motion for authorization to file a successive § 2254 application is DENIED.

We note that Ramirez has previously attempted to challenge his murder conviction by arguing that the victim died because she was run over by a car rather than from homicidal violence. We WARN Ramirez that any further attempts to attack his conviction that are repetitive, do not meet the criteria set forth in § 2244 for filing a successive § 2254 application, or are otherwise abusive pleadings will result in the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on his ability to file pleadings in this court and any court subject to this court's jurisdiction.

Opinion issued April 5, 2001

In The
Court of Appeals
For The
First District of Texas

NO. 01-00-00108-CR

RAYMOND RAMIREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Cause No. 10350

OPINION

A jury found appellant, Ramond Ramirez, guilty of capital murder, and the trial court assessed punishment at confinement for life. We affirm.

Appendix B

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FACTS

On Monday, December 7, 1997, Robert Allen Warren and three co-workers found the body of the decedent, 17-year-old Marisol Castillo, floating face up in a ditch near Lake Wallisville in Chambers County. The body was clothed, and there were bruises and cuts on her arms and face and blood seeping from a head wound.

Tonya Castillo, the victim's sister, testified that she last saw Marisol on November 30th, at the home of Nicholas ["Nick"] Acosta, Marisol's boyfriend. Marisol told Tonya that she planned to stay at Nick's house for the weekend, and Tonya left. The next morning the police told her that her sister had been discovered dead.

Marisol's 15-year-old cousin, Priscilla Cantu, was also at Nick's house the evening of Sunday, November 30th. Priscilla testified that Marisol was sad and crying that night, and that she was out on the front porch when appellant drove up to the house at about 1:00 or 2:00 a.m. Marisol asked appellant if he had any cigarettes, and he told her to check in his car. Pricscilla went inside to use the restroom, and when she returned, appellant and Marisol were sitting in his car. Although Marisol did not tell Priscilla where they were going, Priscilla thought they were going to get some cigarettes. Marisol was not crying, yelling, screaming, or putting up any kind of a fight when she left with appellant. Priscilla did not think that Marisol knew

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appellant before she left with him. Priscilla spent the entire night at Nick's house, as did Nick and another girl, Lavon. Marisol and appellant never returned.

Bradley Moon, an investigator for the Chambers County Sheriff's Department, testified that he met with Blanca Aguilar, appellant's former wife, on December 3, 1997, at the sheriff's department. Blanca had driven a 1983 Mercury car to the sheriff's department, which was seized and inventoried. A blood-stained piece of cardboard was discovered in the trunk. There were also bloodstains on the rear taillights and the inside of the trunk lid. The police also discovered some spatters of blood in the passenger area of the car. DNA tests showed the blood was Marisol Castillo's. Moon obtained the pants appellant was wearing the night Marisol was killed from appellant's mother-in-law. The pants also had Marisol's blood on them.

Blanca Aguilar testified that in the early morning hours of December 1, 1997, around 4:00 or 4:30 a.m., appellant came home with blood all over the car. He asked for towels or something to wipe the car, and Blanca handed him a towel or wipes. Blanca saw thick blood all over the car, and blood inside the trunk. When she asked what had happened, appellant told her that his brother and a friend of his brother had borrowed the car, gotten into a fight, and beat up some guy. Blanca noticed blood on the passenger side of the car, and the interior windows. Appellant was very nervous, and when he later received a phone call from Marisol's boyfriend, Nick, appellant

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acted as if he wanted to immediately end the phone call.

Appellant's mother-in-law, Elvia Smith, testified that appellant and her daughter, Blanca, went to a dance on Saturday, November 29, 1997. When Smith got home, Blanca was there, but appellant was not. Appellant was gone all day Sunday, and did not return until 4:30 Monday morning.

Appellant woke Smith up by pounding on the door to let him in. Smith joined Blanca outside, where she saw appellant wiping blood from the back of his car. Appellant told Smith that his brother had borrowed the car, and he and a few friends had beaten up a guy.

About 30 to 40 minutes later, Smith got in the car to drive appellant to work. Appellant was very quiet and not acting like himself. As she drove appellant to work in Mont Belvieu, appellant asked Blanca for a napkin and wiped a few spots off the inside of the window. The car had a strong odor that Smith had never noticed before.

On Tuesday night, a person named Nick called appellant. While on the telephone with Nick, appellant seemed shocked and nervous.

Dr. Paul Schroeder, of the Harris County Medical Examiner's Office, performed an autopsy on the body of Marisol Castillo on December 2, 1997. He testified that there was a prominent laceration over the right eye that involved the bridge of the nose, which was fractured, along with the frontal sinus. There was also

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a large laceration at the the jaw area, along with a large l-shaped contusion. Inside the nose, Dr. Schroeder discovered a frothy material, which he usually associated with a drug death or a drowning.

There was a large discoloration of the left side of the head and a pattern-like contusion below it. A very well-demarked line at the jaw indicated that she may have been struck with something with a sharp margin. There was also some swelling to the left ear, which indicated that the victim may have lived for some time after the injury occurred. There were also three or four areas of blunt trauma to the top of the head.

Dr. Schroeder discovered cuts to the victim's mouth, which were consistent of being struck in the mouth, and several fractured teeth. There was also some foam deeper in the mouth. There were marks on the victim's neck, which were consistent with strangulation, as well as several defensive marks. There were also some marks on the thighs consistent with dragging. Blunt trauma marks on the back of the victim's hands were most likely defensive wounds.

Dr. Schroeder testified that the numerous injuries to the victim's head caused her brain to swell and herniate, or protrude, through the opening at the base of her skull. He further testified that such a herniation would cause a sudden death when the victim's respiratory system shut down. He did not believe, however, that death

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was immediate because it would take a certain amount of time for the brain to swell that much. Dr. Schroeder testified, "[B]ecause I could not within a certainty assign a cause of death as to the blunt trauma which caused the brain swelling or as to whether she may have drowned, I just described it as homicidal violence and let the report speak for itself." However, he was of the opinion that she was alive when she went into the water, and stated that she would have died from the brain trauma alone.

SUFFICIENCY OF THE EVIDENCE

In four points of error, appellant contends the evidence is legally and factually insufficient to show that he committed the crime charged in the indictment. We apply the usual standards of review for factual and legal sufficiency of the evidence. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979) (legal sufficiency); *King. v. State,* 29 S.W.3d 556, 563 (Tex. Crim. App. 2000) (factual sufficiency).

The indictment in this case alleged that appellant did:

> intentionally cause the death of an individual, namely, MARISOL CASTILLO, by beating her about the head, face, and/or neck or by choking her, and the defendant was then and there in the course of committing and attempting to commit the offense of kidnapping Marisol Castillo . . .

A. Kidnapping

In his first two points if error, appellant contends the evidence is legally and

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factually insufficient to show that he kidnapped, or attempted to kidnap, Marisol Castillo. Specifically, appellant alleges that the undisputed evidence shows that Marisol voluntarily left with appellant, and that he was not holding her against her will when he placed her in his trunk, but was merely moving her already dead body.

In this case, the State was required to prove that appellant murdered Marisol Castillo in the course of committing or attempting to commit kidnapping. TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1994). A person commits kidnapping "if he intentionally or knowingly abducts another person." TEX. PENAL CODE ANN. § 20.03(a) (Vernon 1994). "Abduct" means to restrain a person with the intent to prevent his liberation by either (1) secreting or holding him in a place where he is not likely to be found, or (2) using or threatening to use deadly force. TEX. PENAL CODE Ann. § 20.01(2) (Vernon Supp. 2001). A kidnapping becomes a completed offense, rather than mere preparation, when (1) a restraint is accomplished, and (2) there is evidence that the actor had the specific intent to prevent liberation by secretion or the use or threatened use of deadly force. *Santellan v. State*, 939 S.W.2d 155, 162 (Tex. Crim. App. 1977). "Restrain" means to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person. TEX. PENAL CODE ANN. § 20.01(1) (Vernon Supp. 2001). "Restraint is 'without consent' if it is accomplished

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by . . . force, intimidation, or deception[.]" TEX. PENAL CODE ANN. § 20.01(1)(A) (Vernon Supp. 2001).

Appellant argues that he did not restrain Marisol at the time she got into the car with him because the uncontradicted evidence shows that she entered the car willingly. Further, he argues that he did not restrain her when he placed her in the trunk because she was already dead, and he was merely moving the body.

In *Santellan v. State*, the defendant also argued that one cannot kidnap a corpse. 939 S.W.2d at 162. The Court of Criminal Appeals held that there was sufficient evidence to show a kidnapping because there was evidence from which the jury could have concluded that the victim was alive when the defendant loaded her unconscious body into his car. *Id.* at 163.

In *Mason v. State*, the defendant also argued that he did not "abduct" his wife, but that it was his intent to conceal a murder victim's body, not a living person. 905 S.W.2d 570, 575 (Tex. Crim. App. 1995). The court held that Mason committed a kidnapping when he hogtied and gagged his wife, placed her in the trunk of his car where she could not escape or be seen, and took her to the river where he killed her. *Id.*

In this case, Dr. Schroeder testified that swelling near the victim's ear indicated she did not die immediately upon being beaten. She died when her brain swelled to

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such a degree that it herniated into the opening around her spinal column. This could have taken as long at 30 minutes. Dr. Schroeder also testified that he believed the victim was alive when she was placed in the water. From this evidence, the jury could have reasonably concluded that the victim was still alive when appellant placed her in the trunk of his car. The discovery of blood on the inside lid of the trunk could suggest that the victim made some effort to get out of the trunk; thus, again showing that she was alive when he placed her in the trunk.

Accordingly, we conclude that the evidence is legally sufficient to show that appellant kidnapped Marisol Castillo.

Finding the evidence legally sufficient, we proceed to appellant's factual sufficiency claim. Appellant points out that Dr. Schroeder was not able to tell exactly when Marisol died, and suggests that she "might nonetheless have been dead by the time her body was placed in the trunk of appellant's automobile."

As we discussed earlier, there was evidence that Marisol lived for some time after being beaten, and Dr. Schroeder believed that she was alive when placed in the water. There is little, if any, evidence to show that she was already dead when appellant locked her in the trunk. Furthermore, there is evidence that Marisol may have been held against her will in the passenger section of the car before appellant placed her in the trunk because blood was seen on the interior of the car on the

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passenger side. Therefore, we cannot say that the State's evidence was so obviously weak, or so overwhelmed by contrary evidence as to undermine convidence in the jury's determination. *King*, 29 S.W.3d at 563.

We overrule points of error one and two.

B. Death by Beating or Choking

In points of error three and four, appellant contends the evidence is legally and factually insufficient to show that he caused the death of Marisol Castillo by beating her about the head, face and/or neck, or by choking her. Specifically, appellant contends that the evidence shows that Marisol drowned.

The evidence, considered in the light most favorable to the verdict, shows that the victim had suffered a severe beating, her blood was found on appellant's clothes and in his car, and he was the last person to be seen with her. Dr. Schroeder testified that blunt trauma to the head caused the victim's brain to herniate into the opening to the spinal column, thus shutting down her respiratory system. Accordingly, there was legally sufficient evidence to conclude that appellant beat the victim about the head, and that the head wounds ultimately led to her death.

We turn now to appellant's factual sufficiency claim, and consider all the evidence. Dr. Schroeder testified that he could not determine, with certainty, whether the cause of death was from the blunt trauma that caused the brain swelling or

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whether the victim drowned. There was evidence of bubbles in the nasal cavity, which suggested drowning, and he believed that the victim was still alive when she was placed in the water. Even though Dr. Schroeder testified that the water may have been a "contributing factor," he also testified that the injuries to her brain would still have caused her death.

A rational jury could have determined that the beating caused Marisol's brain to swell, thus causing her respiratory system to shut down, and that the fact that she was in the water at the time this happened contributed to, but did not cause, her death. Thus, we cannot say that the State's evidence was so obviously weak, or so overwhelmed by contrary evidence as to undermine convidence in the jury's determination. *See King*, 29 S.W.3d at 563.

We overrule points of error three and four.

LESSER-INCLUDED OFFENSE

In point of error five, appellant contends the trial court erred by refusing to include a charge on the lesser-included offense of manslaughter.

To establish that he was entitled to a lesser-included-offense instruction, appellant must establish that (1) manslaughter, criminally negligent homicide, or aggravated assault is a lesser-included offense of capital murder and (2) there was evidence that, if guilty of an offense, appellant was guilty only of the lesser-included

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offense. *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). Manslaughter is a lesser-included offense of murder and, therefore, of capital murder. *Cardenas v. State*, 30 S.W.3d 384, 392-93 (Tex. Crim. App. 2000); *Jackson v. State*, 992 S.W.2d 469, 475 (Tex. Crim. App. 1999). The first prong of *Rousseau* is thus satisfied. *See Rousseau*, 885 S.W.2d at 672.

We must next determine whether the record contains evidence that appellant is guilty of only manslaughter. *Rousseau*, 855 S.W.2d at 673. We examine all of the evidence for any that would support a verdict of guilt only on the lesser charge. *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994). Manslaughter requires a finding that appellant *recklessly* caused the death of Marisol Castillo. *See* TEX. PENAL CODE ANN. § 19.04 (Vernon 1994) (emphasis added). A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. TEX. PENAL CODE ANN. § 6.03(C) (Vernon 1994). "If a defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing he is guilty only of a lesser included offense, then a charge on a lesser included offense is not required." *Bignall*, 887 S.W.2d at 24 (citation omitted).

In this case, appellant presented no evidence in his own behalf. Rather, he

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argues that the jury could have found that he acted recklessly, based on the following evidence: (1) that there was no motive for killing the victim; (2) that the victim left with him voluntarily; (3) that there was evidence he and the victim were using cocaine; and (4) that he returned home to his wife and mother-in-law even though there was blood all over his car and clothes.

However, none of these items of evidence raise the issue of an unintentional killing or a reckless killing. The medical evidence shows that the victim was bludgeoned about the head and died when her brain swelled so much that it shut down her respiratory system. There is nothing in the record to suggest that the beating was anything other than an intentional act. Thus, there is no evidence that, if believed, shows that if appellant is guilty, he is guilty of only of manslaughter.

Accordingly, we overrule point of error five.

MISSING EXHIBIT

In point of error six, appellant contends that we must reverse and remand for a new trial because State's exhibit 32, a cassette recording of a police interview with appellant, is not a part of the record on appeal. However, the record in this case was supplemented on September 25, 2000, with State's exhibit 32. Because the cassette tape is now a part of the record on appeal, we overrule point of error six as moot.

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CONCLUSION

We affirm the judgment.

Lee Duggan, Jr.[1]
Justice

Panel consists of Justices Taft, Brister, and Duggan.

Do not publish. TEX. R. APP. P. 47.

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[1] The Honorable Lee Duggan, Jr., retired justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

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