the Jasuta / Schulman report

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TIBA's Case of the Week

Third Court of Appeals

Case Name: ***State ex rel Stephanie Newell***

- **NATURE OF CASE**: Mandamus Proceedings
- **COUNTY**: Bell
- **C/A CASE No**. 03-25-00096-CV
- **DATE OF OPINION**: April 25, 2025 **OPINION**: Justice Gisela Triana
- **DISPOSITION**: Mandamus Relief Granted
- **TRIAL COURT**: 478th D/C; Hon. Wade Faulkner
- **LAWYERS**: Jessica Freud & Zachary Boyd (Defense); Brendan Guy (State)

(**Background Facts**): The indictment charged Nakealon Mosley with the murder of Francine Martinez. Although the indictment alleged that Mosley committed the offense "individually and as a party with an unknown individual," there was evidence presented at trial that the "unknown individual" was Demetrious Jones, whom the State had also charged with Martinez's murder. The evidence showed that on the night of the murder, someone in a white Chrysler shot Martinez while she was a passenger in another vehicle, that Mosley was in the Chrysler at the time of the shooting, and that in phone calls made from jail, Mosley had named Jones as the shooter and the driver of the Chrysler. Other evidence presented at trial relating to Jones's identity as the "unknown individual" included that officers had performed a digital extraction of a phone belonging to Jones, that in an interview with police, Mosley had named Jones as the driver of the Chrysler, and that the lead detective in the case, when speaking to the grand jury about Mosley's case, had mentioned Jones's name.

[551 **Sufficiency of the Evidence / Variance**]: After the close of evidence, defense counsel moved for a directed verdict on the ground that "the jury has no evidence before it regarding an unknown person that was not known to the grand jury at the time" of the indictment or that "the grand jury use[d] due diligence to try and ascertain or properly indict an unknown person." After hearing from both sides, the trial court took the issue under advisement then recessed for the weekend. On Saturday night, the trial court sent an email to the parties informing them that it was "granting the defense's request for a directed verdict as to party liability" and that it would not include an instruction on party liability in the jury charge. The district court added that it would

"follow up with written findings of fact and conclusions of law." In response, the State sent the court an email asking it to reconsider its ruling and informing it that if the court did not submit an instruction on party liability to the jury, the State intended to seek a writ of mandamus. On Monday morning, the district court announced that although it had reconsidered its ruling, its ruling would remain the same. The district court also reiterated that it would not be submitting the issue of party liability to the jury. This mandamus proceeding followed.

Holding (**Mandamus Law**): To obtain mandamus relief in a criminal case, a relator must establish two things. First, she must show that she has no adequate remedy at law to redress her alleged harm. ***In re State ex rel. Ogg***, 692 S.W.3d 481 (Tex.Cr.App. 2024)(see ☙, Vol. 32, No. 30; 08/05/2024), citing ***In re State ex rel. Young***, 236 S.W.3d 207 (Tex.Cr.App. 2007)(see ☙, Vol. 15, No. 38; 10/01/2007). The first requirement is satisfied either when there is no remedy at law or the remedy, "though it technically exists, 'may nevertheless be so uncertain, tedious, burdensome, slow, inconvenient, inappropriate, or ineffective as to be deemed inadequate.'" ***In re State ex rel. Weeks***, 391 S.W.3d 117 (Tex.Cr.App. 2013)(see ☙, Vol. 21, No. 3; 01/21/2013), quoting ***Greenwell v. Court of Appeals for Thirteenth Jud. Dist.***, 159 S.W.3d 645 (Tex.Cr.App. 2005)(see ☙, Vol. 13, No. 6; 02/14/2005). Second, she must show that the act she seeks to compel is "ministerial" rather than discretionary. *** "This second requirement is satisfied if the relator can show she has a clear right to the relief sought -- that is, when the facts and circumstances dictate but one rational decision under unequivocal, well-settled, and clearly controlling legal principles."

Holding (**Merits**): We conclude that the State has no adequate remedy at law and that the first requirement for mandamus relief is satisfied in this case. *** [The] District court denied the State an instruction on the law of parties because the State had alleged that Mosley had acted as a party with "an unknown individual," an allegation that the district court concluded "must be supported by sufficient proof." The district court further concluded that "[w]here this allegation becomes an issue at trial, the proof must show that the grand jury used due diligence to ascertain the unknown name." The district court found that "[i]n this case, the [unknown name] allegation . . . became an issue at trial," but "[t]he State offered no evidence that the grand jury used due diligence to ascertain the unknown name." *** The district court's conclusions were based on the due-diligence rule, a rule for reviewing the sufficiency of the evidence in cases where the State has alleged an "unknown" matter. *** However, the due-diligence rule is no longer good law, as explained by the court of criminal appeals in ***Sanchez v. State***, 376 S.W.3d 767 (Tex.Cr.App. 2012) (see ☙, Vol. 20, No. 20; 05/21/2012). *** Relying on ***Hicks v. State***, 860 S.W.2d 419 (Tex.Cr.App. 1993), the intermediate Court of Appeals held that "the trial court committed reversible error by permitting the jury to convict Appellant on theories not supported by the evidence," i.e., the theories alleging an "unknown" manner and means of committing the offense. *** The Court of Criminal Appeals reversed, explaining that ***Hicks*** was no longer "viable" after its decision in ***Malik v. State***, 953 S.W.2d 234 (Tex.Cr.App. 1997)(see ☙, Vol. 5, No. 36; 09/15/1997) *** The district court similarly erred here. Rather than relying on the "defunct" due-diligence rule in concluding that Mosley was entitled to a directed verdict on party liability and that the State was not entitled

to a jury instruction on the law of parties, the district court should have evaluated the sufficiency of the evidence against a hypothetically correct jury charge. At this point it is well-established that "[s]uch a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *** The alleged offense in this case is murder. The identity of a party to a murder is not a statutory allegation that defines the offense . . .. Instead, the identity of a party to a murder is a non-statutory allegation. "[I]n contrast to our treatment of statutory allegations, for non-statutory allegations we tolerate some variation in pleading and proof." ***Johnson v. State***, 364 S.W.3d 292 (Tex.Cr.App. 2012)(see ☙, Vol. 20, No. 12; 03/26/2012). *** Following this reasoning, we conclude that in a murder prosecution, the identity of a party is not the focus or gravamen of the offense. In this case, the indictment alleged that Mosley killed Francine Martinez, "individually and as a party with an unknown individual." Whether this individual was unknown or known to the grand jury has "nothing to do with the allowable unit of prosecution for murder," i.e., that the victim was killed. On this record, we cannot conclude that this variance "showed an entirely different offense" or prejudiced Mosley's substantial rights by failing to adequately inform him of the charged offense or subjected him to the risk of being prosecuted later for the same crime. Accordingly, any variance between the pleading and the proof was not material and Mosley was not entitled to a directed verdict on party liability. Consequently, the State was entitled to an instruction on the law of parties because such an instruction was supported by the evidence. *** We lift our temporary stay of the trial-level proceedings and direct the district court to include an instruction on the law of parties in the court's charge to the jury.

Ed Note: The Court of Appeals rejected the defense argument that the State has "unclean hands "because it filed this mandamus petition to "try to force a mistrial in the court below," finding that the was "nothing in the record to suggest that the State filed this mandamus petition to secure a mistrial in the court below. Rather, the State was attempting to receive an instruction on the law of parties, an instruction to which it was entitled based on the evidence presented at trial. Moreover, before filing its mandamus petition, the State asked the district court to reconsider its ruling. The State sought mandamus relief only after the district court announced that its ruling would not change, which suggests that the State was hoping to avoid having to file a mandamus petition."

Sidebars

(**David A. Schulman**) Friend and occasional commentator, **Stan Schneider**, has indicated he finds this decision problematic, asking "*What happens to the jury chosen during the delay? How can an accused get a fair trial when the State delays the presentation of evidence or arguments for months or years as it argues the law? What happens if jurors die or become disabled during the delay? Should additional voir dire of the jury be permitted to determine if the jurors have observed or experienced anything during the delay*?" I recall that we had a similar conversation when ***Weeks*** was delivered. Although I was inclined to agree with

Stan then and did worry about mid-trial appeals by the State, the reality is that, in the dozen years since ***Weeks***, this phenomenon hasn't become a problem. It is, perhaps, that it will not become a problem. I do envision, however, a case in which the questions Stan asks might lead to significant problems. Time will tell.

(**John G. Jasuta**) Whether or not this has been a problem, the potential is certainly there Remember this only applies to the State. The defendant can appeal. Hah!