Affirmed and Majority and Dissenting Opinions filed February 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00492-CR

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ALEXANDER CHAVEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 777,626

M A J O R I T Y O P I N I O N

Alexander Chavez appeals his conviction by a jury for the offense of murder. The jury assessed punishment at forty-eight years confinement. In four points of error, appellant contends: (1) the trial court erred in sustaining the State's first objection to appellant testifying that he had heard that the complainant or his companions were armed with a firearm; (2) the trial court erred in sustaining the State's second objection to appellant testifying that he had heard that the complainant or his companions were armed with a firearm; (3) the evidence was legally insufficient to support appellant's conviction for murder, where the state never rebutted

appellant's assertion of self-defense beyond a reasonable doubt; and (4) the evidence was factually insufficient to support appellant's conviction for murder, where the State never rebutted appellant's assertion of self-defense beyond a reasonable doubt. We affirm the judgment of the trial court.

I. BACKGROUND

On the evening of September 12, 1996, appellant and two of his friends were drinking at the apartment of Lisa Gonzales. Lisa had two female friends with her. Around midnight, Lisa's ex-boyfriend, Angel, arrived at the apartment with some friends. Soon afterwards, Angel and Lisa walked outside while appellant and his two friends remained in the apartment. Sarah Kersetter, a friend of Lisa's, observed appellant pull a kitchen knife from a drawer and walk out of the apartment.

The individuals then gathered outside the apartment. Lisa and Angel began to argue near the back of a white car containing five or six of Angel's friends. During the argument, Angel hit Lisa and knocked her to the ground. Upon seeing this, appellant and his two friends began to throw bottles at the car. The driver, Paul Gutierrez, got out of the car and told the attackers, "We ain't got no problem." However, as Paul stood next to his car, appellant and his friends attacked him. Meanwhile, Angel got into the driver's seat of the car and drove away, leaving Paul behind. Paul attempted to protect himself against the attack, but appellant repeatedly stabbed him with the kitchen knife. No one ever observed Paul with a weapon. Robert Gonzales, Lisa's father, eventually broke up the fight. Appellant discarded the knife into a bayou. Paul Gutierrez died from multiple stab wounds.

II. FIRST AND SECOND POINTS OF ERROR

Appellant complains in his first two points of error that the trial court erred in sustaining the State's hearsay objections. These objections related to whether appellant heard that Paul or his friends carried weapons. We disagree.

A trial court is given wide discretion in determining the admissibility of evidence. *See Harwood v. State*, 961 S.W.2d 531, 536 (Tex. App.–San Antonio 1997, no pet.); *Breeding v. State*, 809 S.W.2d 661, 663 (Tex. App.–Amarillo 1991, pet. ref'd). We review the trial court's exclusion of evidence under an abuse of discretion standard of review. *See Breeding*, 809 S.W.2d at 663. A trial judge has not abused her discretion unless she has "acted arbitrarily and unreasonably, without reference to any guiding rules or principles." *Id*.

During the defense's case-in-chief, the appellant was asked:

> Q: Let's go back to the point where you're coming out of the breezeway and you're in line with Lisa, April, Saul, you and Sarah and Roy. Was there some remark about a gun?
> MS. HERRING: Objection, Your Honor. That's hearsay.
> THE COURT: Sustained.
> MS. HERRING: Please ask the jury to disregard it.
> THE COURT: Disregard.
> Q: Did you have a reason to think that you might be killed?
> MS. HERRING: That's a back door effort of getting out the answer of his prior question because it's based on hearsay.
> THE COURT: Sustained.

Appellant argues that his answers to these questions would have demonstrated to the jury that he acted in self-defense.

As the State correctly notes, appellant did not properly preserve error for appellate review. He offered no bill of exceptions showing what the witness's answer would have been. *See Passmore v. State*, 617 S.W.2d 682, 685 (Tex. Crim. App. 1981); *Stewart v. State*, 995 S.W.2d 187, 192 (Tex. App.–Fort Worth 1999, no pet.); *see also Smith v. State*, 737 S.W.2d 910, 915 (Tex. App.–Fort Worth 1987, pet. ref'd).

Appellant contends that an offer of proof was not necessary under Texas Rule of Evidence 103(a) because the substance of the evidence was apparent from the context of the question asked. It is true that one can deduce from the questions asked that appellant attempted to show that he feared for his safety before he stabbed Paul Gutierrez. In fact, defense attorney

went on to ask, without objection, whether appellant felt he was in "serious danger" and whether he felt "they were about to inflict serious bodily injury" on him. Both these questions were answered in the affirmative. However, neither of these questions reveal who made the remark about the gun, nor do they explain whether a gun was actually present. Further, the record does not indicate whether appellant's response would have fallen within a hearsay exception. The state of the record allows us to do nothing more than speculate as to what harm occurred. Therefore, appellant has not met his burden to present a record sufficient to show error requiring reversal.

But even if we find that appellant's answers to his attorney's subsequent questions provide the substance of his excluded evidence, we must still rule against appellant. Such a finding would lead us to the conclusion that any error in excluding the evidence would have had no impact on the outcome of the trial since comparable evidence of appellant's trepidation had already been admitted without objection. Under this analysis, any error would be harmless. *See* TEX. R. APP. P. 44.2; *Burks v. State*, 876 S.W.2d 877, 898 (Tex. Crim. App.1994); *Johnson v. State*, 925 S.W.2d 745, 749 (Tex. App.–Fort Worth 1996, pet. ref'd). Appellant's first and second points of error are overruled.

III. THIRD POINT OF ERROR

In point of error three, appellant argues that the evidence is legally insufficient to support appellant's conviction for murder. Specifically, he argues that the state never rebutted appellant's assertion of self-defense beyond a reasonable doubt. We disagree.

The State has the burden of persuasion in disproving evidence of self-defense. *See Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App.1991); *Wilkerson v. State*, 920 S.W.2d 404, 406 (Tex. App.–Houston [1st Dist.] 1996, no pet.). This is not a burden of production, i.e., one which requires the State affirmatively to produce evidence refuting the self-defense claim. The State only has to prove its case beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 913-914; *Juarez v. State*, 961 S.W.2d 378, 384 (Tex. App.–Houston

[1st Dist.] 1997, pet. ref'd); *Wilkerson*, 920 S.W.2d at 406. A person commits the offense of murder if he intentionally causes the death of an individual. *See* TEX. PEN. CODE ANN.§ 19.02(b)(1) (Vernon 1994). If the issue of the existence of self-defense is submitted to the jury, the court shall charge the jury that if it believes that the defendant was acting in self-defense or has a reasonable doubt thereof, it must acquit the defendant. *See* TEX. PEN. CODE ANN. § 2.03(d) (Vernon 1994); *Saxton*, 804 S.W.2d at 913-14; *Russell v. State*, 834 S.W.2d 79, 81-82 (Tex. App.–Dallas 1992, pet. ref'd). The jury charge included a proper definition of self-defense and properly instructed that a reasonable doubt on the issue of self-defense mandates acquittal.

When reviewing the legal sufficiency of the evidence, the appellate court will look at all of the evidence in a light most favorable to the verdict. *See Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App.1993); *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App.1984). In so doing, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App.1989). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App.1986). The appellate court is not to reevaluate the weight and credibility of the evidence, but only ensure that the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App.1988). The jury is free to believe or disbelieve any witness. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App.1986).

The evidence viewed in the light most favorable to the verdict supports the guilty verdict for murder. According to the testimony of four witnesses, appellant and his friends attacked Paul Gutierrez without provocation. The record shows that Paul Gutierrez did not have a weapon. Sarah Kerstetter stated that she saw appellant's friends holding Paul while appellant stabbed him. The statements of Robert and Lisa Gonzales show that Paul was trying to stop the

confrontation. April White testified that appellant admitted to her that he stabbed Paul Gutierrez.

Viewing this evidence in the light most favorable to the verdict, it is sufficient for a rational trier of fact to disbelieve appellant's self-defense testimony and to find beyond a reasonable doubt that appellant committed murder. Accordingly, we overrule appellant's third point of error.

IV. FOURTH POINT OF ERROR

In point of error four, appellant asserts that the evidence is factually insufficient to support his conviction for murder, where the State never rebutted appellant's assertion of self-defense beyond a reasonable doubt.

In reviewing the factual sufficiency of the evidence to support a conviction, we must look to all of the evidence "without the prism of 'in the light most favorable to the verdict.'" *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996) (citing *Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.–Austin 1992, pet. ref'd, untimely filed)). However, our review is not unfettered, for we must give "appropriate deference" to the fact finder. *Id*. at 136. We may not impinge upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App.1997); *Dimas v. State*, 987 S.W.2d 152, 155 (Tex. App.–Fort Worth 1999, no pet.). The jury, as fact finder, was the judge of the facts proved and of reasonable inferences to be drawn therefrom. *See Kirby v. Chapman*, 917 S.W.2d 902, 914 (Tex. App.–Fort Worth 1996, no pet.). The weight given to contradictory testimonial evidence is within the sole province of the jury, because it turns on an evaluation of credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App.1997). Thus, we must defer to the fact finder's weight-of-the-evidence determinations. *See id*. at 408. Consequently, we may set aside a verdict for factual insufficiency only when that verdict is so against the great weight and

preponderance of the evidence so as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d. at 134-35.

We have summarized all of the relevant evidence under point of error three. Based on this evidence, the guilty verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. The testimony of the witnesses supported the verdict. Appellant's self-defense testimony was not corroborated, and the jury chose not to believe appellant. Therefore, we hold that the evidence is factually sufficient to support the judgment. We overrule appellant's point of error four and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed February 10, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).

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D I S S E N T I N G O P I N I O N

Few things in law are as plain as the nose on a judge's face. We have one here. I must dissent on the first two issues, which would in turn render the other issues moot.

Appellant's only defense was self defense. He admittedly stabbed the complainant who died from the wound. Appellant's advocate ask him whether he had reason to believe he might be killed. The government objected and the trial court erroneously sustained the objection. Plain as a nose was the obvious answer, Yes, as well as the clear exceptions to the hearsay rule, TEX. R. EVID. 803 (3)–state of mind or emotion–and TEX. R. EVID. 803(1)–present sense impression. When the nose thus protrudes, the rules of evidence do not require a bill of

exception. *See* R 103 (a)(2) TEX. R. EVID. Lest we forget this black letter law provides: (2) Offer of Proof. If the ruling excludes evidence, the substance was made known to the court *"or was apparent from the context within which questions were asked."* Not once but twice did the government and trial judge tandem to exclude the very essence of appellant's defense. At the point where the fight is coming out the breeze way, appellant's counsel asks: Was there a remark about a gun? Objection, hearsay. Sustained. Not true and not the law. Again the nose, protruding like Pinocchio's, plainly demonstrates: 1. this is a present sense impression and state of mind exception; and 2 the answer was Yes. I agree there are three possible answers: yes, no or I don't know. If we assume, as the law says we must, that defense counsel was effective, then the latter two possibilities are eliminated. We know this because effective counsel would not ask a question that would hurt his client (no) and would not ask a question expecting a negative or neutral response (I don't know.) And because appellant was graciously allowed to testify that he thought he was in serious danger and felt they would inflict serious bodily injury, it once again becomes apparent the question about the gun had to be answered in the affirmative.

The harm is likewise patent. Appellant was required under his self defense theory to show why he had a "reasonable apprehension of fear." The government, undaunted by the trial judge, allowed no evidence of the basis for reasonable apprehension: 1. the gun, and 2. a *reason to believe* he might be killed. Thus deprived of any rational basis for self defense, it is no wonder appellant now serves 48 years in the penitentiary. That is a lot of harm, substantial harm.

Justice demands first and foremost a system of procedural safeguards, including the rules of evidence. When these safeguards are violated or disregarded, there can be no justice. Cannot our system afford to let Alexander Chavez put on his evidence, his defense? Then if the jury convicts, it does so by the rule of law. And if the jury acquits, it does so after

hearing both sides, not just what the government will allow.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed February 10, 2000.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).