Affirmed and Opinion filed June 29, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00903-CR

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ANTHONY DEWAYNE WILLIAMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 765,807

O P I N I O N

Anthony Dewayne Williams appeals his conviction by jury for the felony offense of murder. The jury assessed punishment at thirty-five years in the Texas Department of Criminal Justice, Institutional Division. In four points of error, appellant asserts that (1) the trial court erred in admitting photographs of the scene, (2) the trial court erred in refusing to change the wording of the jury charge, (3) the evidence presented at trial was factually insufficient, and (4) the evidence presented at trial was legally insufficient. For the reasons stated below, we affirm the judgment of the trial court.

BACKGROUND

At the time Derrick Brown was killed, he had a two-week old son by appellant's sister, Sylvia Williams. On the afternoon of October 17, 1997, appellant went over to the Browns' apartment with Sylvia and John Shirden, Sylvia's ex-boyfriend with whom she had recently reunited. Derrick was sitting on the steps outside the apartment with his girlfriend, Felicia. A tense confrontation concerning Derrick and Sylvia's baby took place outside the Browns' apartment. Appellant warned Derrick not to hurt the baby and also not to hassle John. Although appellant claimed that Derrick had threatened to hurt the baby in the past, the other witnesses at trial testified that Derrick was a peaceful person and would not hurt his infant son. Even appellant's own mother testified that she told him to "quit messing with Dee" because "Dee doesn't bother anybody." Sometime during the confrontation, appellant exhibited a pistol. Appellant shot the pistol in the air as he left.

Later that afternoon Derrick went to the corner store with his best friend, appellant's half brother Mike Harris. On the way back from the store, Derrick and Mike heard another confrontation taking place in the vicinity of the Williams' patio. The fight involved Derrick's step-sisters, Tracy and Eukeesha, and one of the Williams' cousins, Theresa Bailey. Derrick was concerned about his sisters, and Mike was also concerned, because he had two children by Eukeesha. Mike and Derrick headed toward the patio area to see what was happening.

The witnesses gave varying accounts of what happened next. However, they all agree that appellant shot Derrick without serious provocation, and none saw Derrick with a weapon. Beverly Marks testified that she saw appellant and John run toward Mike and Derrick as they rounded the corner from the store. She saw appellant pull a gun out and start shooting. She counted at least five shots, and thought that Derrick had been hit three times.

Derrick's father only heard the shots and saw his son fall to the ground. He also saw appellant running away after he shot Derrick. Derrick's stepmother heard appellant say "What's up now?" as Derrick and Mike arrived at the patio. She also saw appellant shoot Derrick. John Shirden testified that Derrick and Mike came up behind him and appellant, and he saw appellant stumble. Shirden testified that he assumed that Derrick hit appellant. He testified that appellant shot Derrick and that Derrick did not have a weapon.

Finally, Mike Harris testified that as he and Derrick were headed toward the argument by the patio, Derrick rushed at appellant with his hands in a fighting stance. He testified that Derrick swung at appellant, at which time appellant started shooting.

Appellant ran from the scene, pursued by the security officer for the apartment complex. Appellant eventually returned to the scene where he was arrested for shooting Derrick. Once in the patrol car, appellant claimed that a man by the name of "Crockett" shot Derrick. Appellant later led the police to where he hid the firearm. Testing confirmed that the weapon was the same one used to shoot Derrick. Derrick died from a single gunshot wound to the chest.

POINT OF ERROR ONE

By point of error one, appellant asserts that the trial court abused its discretion in allowing the State to introduce certain photographs at the guilt/innocense phase of the trial. Appellant specifically complains of State's Exhibits 2, 3, 5, 11, and 12. State's Exhibit 2 showed Derrick's face. Exhibit 3 showed his full body at the scene of the shooting. Exhibit 5 showed the bullet injury itself. Exhibits 11 and 12 showed appellant at the scene of the shooting.

Appellant claims that the photographs are repetitious and cumulative and that their admission constituted an abuse of discretion, citing *Emery v. State*, 881 S.W.2d 702, 710-11 (Tex. Crim. App. 1994); *Allridge v. State*, 850 S.W.2d 471, 494 (Tex. Crim. App. 1991); and *Madden v. State*, 799 S.W.2d 683, 696 (Tex. Crim. App. 1990).

Texas Rule of Evidence 403 provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Thus, to be admissible a photograph must possess some probative value and that probative value may not be substantially outweighed by its inflammatory nature. *See Rojas v. State*, 986 S.W.2d 241, 249 (Tex. Crim. App. 1998). Several factors may be considered in determining whether the danger of unfair prejudice substantially outweighs the probative value of photographs, including the number of exhibits offered, their gruesomeness, their detail, their size, whether they are black and white or color,

whether they are close-up, whether the body is naked or clothed, and the availability of other means of proof and the circumstances unique to each individual case. *See id.*; *Emery v. State*, 881 S.W.2d 702, 710 (Tex.Crim.App.1994). The admissibility of photographs is within the sound discretion of the trial judge. *See Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995)

Three of the photographs showed the victim at the crime scene (State's Exhibits 2, 3, and 5). Testimony describing the wounds the victim received and the general condition of the body at the time it was discovered by police is admissible evidence; thus, photographs portraying the same are also admissible unless their probative value is outweighed by any prejudicial effect. *See Ramirez v. State*, 815 S.W.2d 636, 646-647 (Tex. Crim. App. 1991). Only two of the photographs show the wound inflicted on the victim. Neither of those pictures was gruesome. The body was not naked and the photographs were not taken in conjunction with an autopsy. Because the photographs depicted the wounds inflicted upon the victim, the location and position in which he was discovered, and were the subject of testimony at trial, their probative value is not outweighed by the possible prejudicial effect. *See Jones v. State*, 843 S.W.2d 487, 500 (Tex. Crim. App. 1992); *Schielack v. State*, 992 S.W.2d 639, 641 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd).

Two of the photographs depicted appellant at the crime scene (State's Exhibits 11 and 12). Testimony at trial established that the apartment's security officer recognized appellant based on the clothing he was wearing at the time of the shooting. The photographs of appellant at the scene support this testimony.

With respect to appellant's claim that the photographs were inadmissible because they were needlessly cumulative, we note that appellant does not explain which photographs were cumulative, in precisely what manner they were cumulative, or why their presentation was needless. The photographs are plainly not cumulative of one another.

The photographs of the victim are not particularly gruesome and are plainly probative of the manner of the victim's death. The photographs of appellant corroborated the security officer's testimony. This Court is convinced that the probative value of the photographs was not outweighed by any prejudicial effect they might have had. Therefore, the trial court acted within its discretion in admitting the photographs. Point of error one is overruled.

POINT OF ERROR TWO

By point of error two, appellant claims that the trial court erred in denying his objection to the wording of the jury charge. Appellant objected at trial to the portion of the charge which addressed self-defense. The relevant portion of the charge is set forth below:

> ...but you further find from the evidence, or you have a reasonable doubt thereof, that, viewed from the standpoint of the defendant at the time, from the words or conduct, or both, of Derrick Lyn Brown it reasonably appeared to the defendant that his life or person was in danger and there was created in his mind *a reasonable expectation or fear of death or serious bodily injury* from the use of unlawful deadly force at the hands of Derrick Lyn Brown...

Appellant's complaint relates to the emphasized portion of the charge. Appellant argued at trial, and now on appeal, that the phrase should have read "a reasonable expectation *of* fear of death or serious bodily injury."

In *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984), the court held that if the accused made a proper objection in the trial court to the error in the charge, then reversal is required when it is shown that there was some harm to the accused. However, we find that in the instant case, there was no error in the charge. A person is justified in using deadly force against another if a reasonable person in the actor's situation would not have retreated. *See* TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2000). Further, such force is only justified when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of aggravated kidnaping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. *See id.* The trial court's charge adequately explained this concept to the jury. The choice of words employed in this jury charge is typical for an instruction on self defense. *See generally Sanders v. State*, 632 S.W.2d 346, 348 (Tex. Crim. App. 1982) (The right of self-defense attaches when an accused finds himself in a situation causing him to have a reasonable expectation or fear of death or serious bodily injury.); *Jordan v. State*, 782 S.W.2d 524,527 (Tex. App.–Houston [14th Dist.] 1989); MCCLUNG, P.J., JURY CHARGES FOR TEXAS CRIMINAL PRACTICE, *Apparent Danger With*

Deadly Force, at 322 (rev. ed. 1981). We find no merit in the second ground of error, and it is overruled.

POINT OF ERROR THREE

In his third point of error, appellant argues that the evidence was factually insufficient to sustain a conviction for murder where the state failed to prove that he shot the gun with the intent to kill Derrick Brown. We disagree.

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. *See 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. This standard affords the appropriate deference to the jury's verdict and prevents the reviewing court from substituting its judgment for that of the jury. *See Santellan*, 939 S.W.2d at 164. If there is sufficient competent evidence of probative force to support the trial court's finding, a factual sufficiency challenge cannot succeed. *See D.R.H. v State*, 966 S.W.2d 618, 622 (Tex. App.–Houston [14th Dist.] 1998, no pet.).

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct

or cause the result. *See* TEX. PEN. CODE ANN. § 6.03(a) (Vernon 1994). Intent is a fact issue for the jury to resolve. *See Robles v. State*, 664 S.W.2d 91, 94 (Tex. Crim. App. 1984); *Barcenes v. State*, 940 S.W.2d 739, 744 (Tex. App.–San Antonio 1997, pet. ref'd). Proof of a culpable mental state generally relies upon circumstantial evidence. *See Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991); *Dillion v. State*, 574 S.W.2d 92, 94 (Tex. Crim. App. 1978). Intent can be inferred from the acts, words, and conduct of the accused, and is to be resolved by the trier of fact from all the facts and surrounding circumstances. *See Hernandez*, 819 S.W.2d at 809-810; *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982). The testimony demonstrates that the evidence is factually sufficient to support the jury's verdict. During the first altercation between appellant and Derrick, appellant shot his gun in the air to intimidate Derrick. During the second altercation, appellant pointed a gun at Derrick and shot several times, killing him. Derrick was unarmed when appellant shot him. When he was questioned by the police, appellant at first lied about who shot the victim. The bullet that killed Derrick matched the gun hidden away by appellant.

From these facts, the jury could infer that appellant intended to kill or cause serious bodily injury to Derrick. Accordingly, the verdict was not contrary to the great weight of the credible evidence. We find that the evidence supporting the judgment was not so weak as to be manifestly unjust and clearly wrong. Therefore, we hold that the evidence is factually sufficient to support the judgment. Point three is overruled.

POINT OF ERROR FOUR

In his fourth point of error, appellant argues that the evidence was legally insufficient to sustain a conviction for murder. Appellant argues that his conviction rests solely on circumstantial, and sometimes conflicting, evidence. Further, he argues that none of the evidence establishes the essential element of intent. Consequently, appellant reasons that the jury should only have been instructed on the offenses of involuntary manslaughter and criminally negligent homicide. We disagree.

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, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989).

This court shall not 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 appellate court is to ask itself whether the trier of fact, acting rationally, could have found the evidence sufficient to establish the element beyond a reasonable doubt. *See Blankenship v. State*, 780 S.W.2d 198, 206-07 (Tex. Crim. App. 1989) (opinion on reh'g); *Facundo v. State*, 971 S.W.2d 133, 134 (Tex. App.–Houston [14th Dist.] 1998, pet. ref'd); *Muniz*, 851 S.W.2d at 246.

The evidence detailed above is sufficient for the jury to have found beyond a reasonable doubt that appellant intentionally shot and killed Derrick Brown. As to the conflicts in testimony, 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 jury as the trier of fact is responsible for resolving any conflicts and inconsistencies in the evidence. *See Bowden v. State*, 628 S.W.2d 782, 784 (Tex. Crim. App. 1982). Even where there is no conflict, the jury may give no weight to some evidence, and thereby reject part or all of a witness' testimony. *See Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987). In the instant case, the inconsistencies in the witnesses' testimonies were trivial, at best. The testimony was uncontroverted that appellant had an argument with Derrick earlier in the day, that appellant fired his gun in Derrick's presence during that argument, that appellant later shot and killed Derrick, and that Derrick was unarmed. As discussed under point of error three, a rational jury could have inferred intent from appellant's actions. Accordingly, viewed in the light most favorable to the jury's verdict, the evidence is legally sufficient to support appellant's conviction.

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 June 29, 2000.

Panel consists of Justices Amidei, Anderson, and Frost.

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