

Affirmed and Opinion Filed February 25, 2016



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00606-CR

**FRANK DEONNE MORAN, Appellant
V.
THE STATE OF TEXAS, Appellee**

**On Appeal from the 291st Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1363812-U**

MEMORANDUM OPINION

Before Justices Bridges, Evans, and O'Neill¹
Opinion by Justice Bridges

A jury convicted appellant Frank Deonne Moran of murder and assessed punishment at fifty years' confinement.² On appeal, he argues (1) the evidence is legally insufficient to support his murder conviction as a primary actor or as a party; (2) the trial court erred by giving the jury an *Allen* instruction; (3) the trial court erred by including a definition of reasonable doubt in the jury charge; and (4) the trial court lacked jurisdiction to hear the case. We affirm the trial court's judgment.

¹ The Hon. Michael J. O'Neill, Justice, Assigned

² Moran had prior convictions for unauthorized use of a motor vehicle, theft, failure to identify, and assault family violence.

Background

On December 29, 2013, a group of friends gathered at Quincy Sibley's apartment to watch a Dallas Cowboy football game. The group included Moran, Marcus Davis, who was temporarily living next door to Sibley, Sherrie Moore, Victoria Douglas, Ashleigh Davis, and Deonna Shorty. Ryan Saunders, a lifelong friend of Sibley's, was also watching the game. Witnesses first described the gathering as a "regular day" with everybody having a good time, drinking, laughing, and smoking marijuana. It was common knowledge among those present that Sibley sold marijuana from his apartment, but he was not selling drugs on the night in question.

Shortly after 9 p.m., Sibley sent Moran to the store to buy soda and firewood. It took Moran two trips to retrieve the requested items. When Moran returned the second time, he asked if his "kinfolk," later identified as Dewan Spikes, could come up to the apartment. Sibley thought the request was "kind of crazy" because of how long Moran had been at the apartment before asking if Spikes could come up, but he agreed Spikes could join the group. Moran then sat on the couch to finish watching the football game, and Spikes sat at the kitchen table talking on his phone.

When the game ended, Sibley turned on a movie and returned to the kitchen to make a drink. Moore testified Moran then grabbed Saunders's gun, which had been sitting on the floor by Saunders's chair, pointed it at the group, told everyone to sit down, be still, and shut up. Saunders tried to calm Moran down, but Moran warned him to stop moving towards him. Saunders continued moving forward, and Moran shot him in the torso and neck. Moore then saw Moran reach in Saunders's pocket to get something, but she could not tell what it was.

Sibley testified that when he walked into the kitchen to make himself a drink he heard "a big pop." When he turned around, Spikes was standing up with a gun, ordering him to give him

money, and threatening to shoot. Sibley threw between \$500 and \$1000 at Spikes, and Spikes took off running. Sibley ran to his room and retrieved his .40 caliber Smith & Wesson and chased after the men.

Davis was next door when he heard a gunshot. He looked out the window and saw Moran and Spikes running down the stairs. Davis joined Sibley in the chase, but Moran and Spikes jumped into a car and drove off. When Davis went back to the apartment, he saw Saunders laying on the floor.

Sibley called 9-1-1 and started cleaning up the drugs and paraphernalia before officers arrived. At that time, Sibley thought Spikes shot Saunders because Spikes was the only person Sibley saw with a gun. However, Sibley admitted he was paying more attention to what was happening in the kitchen and he could not see the living room.

Around 10:45 p.m., Officer V. Moreno and his partner Officer Lewis Torres responded to a shooting dispatch call at Sibley's apartment. When they entered the apartment, they saw Saunders laying on the floor in Davis's arms. Saunders died at the scene.

Officers separated the witnesses to talk with them. Sibley told Officer Moreno that Moran and another unknown large black man had been at the apartment at the time of the shooting. Officer Moreno said during his brief interview with Sibley, Sibley "wasn't sure on who exactly shot. He just said Frank Moran was here." Detective Cayce Shelton also interviewed Sibley at the scene and although he could not remember for sure if Sibley said Moran shot Saunders, he knew Sibley at least said Moran was present at the time and that was how Moran became a suspect.

When Sibley testified, he admitted he could not remember if he told officers Spikes shot the gun or if he turned around and saw Spikes holding the gun. However, Sibley later clarified he turned around and saw Spikes holding the gun but did not see him shoot it.

Although the jury was instructed on capital murder, it convicted Moran of the lesser-included offense of murder and sentenced him to fifty years' imprisonment. This appeal followed.

Sufficiency of the Evidence

In his first issue, Moran argues the evidence was legally insufficient to support his conviction for murder as the primary actor because there was no scientific evidence identifying him as the shooter. Rather, he claims the only evidence came from Moore's eye witness testimony, and "No reasonable jury could have credited the testimony of such a woman as Sherrie Moore over that of Quincy Sibley."³

In a legal sufficiency review, we view all the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The jury, as the sole judge of witness credibility, is free to believe or disbelieve all or part of a witness's testimony. *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011). Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

Moran was indicted for capital murder. The jury received instructions for capital murder, and the lesser-included offense of murder. The trial court also instructed the jury on law of the parties. The jury found Moran guilty of murder.

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2015). A person acts

³ Moore had outstanding warrants for traffic tickets at the time of the incident and left the apartment before officers arrived. However, Sibley had prior assault and drug possession convictions, and at the time of trial, he was incarcerated on another aggravated assault.

intentionally when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a). A person acts knowingly with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). Intent and knowledge are fact questions for the jury and are almost always proven through evidence of the circumstances surrounding the crime. *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999). A jury may infer intent or knowledge from any facts that tend to prove its existence, including acts, words, and conduct. *Id.*

Moore testified she was in the living room when she saw Moran pick up Saunders's gun. Moran pointed it at the group, told everyone to sit down, be still, and shut up. She said Moran shot Saunders in the torso and neck. Her eyewitness testimony provided legally sufficient evidence for a reasonable jury to conclude Moran murdered Saunders. *See Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971); *Turner v. State*, 751 S.W.2d 240, 242 (Tex. App.—Dallas 1988, pet. ref'd). Although the jury heard Sibley's testimony in which he first believed Spikes was the shooter because he saw Spikes with a gun, Sibley later clarified that he did not see Spikes shoot the gun. Further, Sibley explained he was in the kitchen at the time of shooting and could not see Moran in the living room. Contradictory testimony does not render the evidence insufficient; it simply creates a fact issue for the jury to resolve. *Shah v. State*, 414 S.W.3d 808, 814 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). As the sole judge of the weight and credibility of the witnesses, it was within the province of the jury to resolve any conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the facts. *Adames*, 353 S.W.3d at 860. Viewing the evidence in the light most favorable to the verdict, we conclude a rational jury could have found Moran committed murder as the primary actor. Moran's first issue is overruled.

In his second issue, Moran argues the evidence is legally insufficient to support a conviction for murder as a party because there was no evidence Moran said anything to promote, assist, solicit, encourage, direct, or aid Spikes in the murder. He asserts his silence was probative of his innocence, and witnesses testified prior to the shooting that it was a “regular day.”

A person is responsible for the criminal conduct of another person if “acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.” TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011). When a party is not a “primary actor,” the State must prove conduct constituting an offense plus an act by the defendant done with the intent to promote or assist such conduct. *Beier v. State*, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985). The jury may consider events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996). “Since an agreement between parties to act together in a common design can seldom be proved by words, the State often must rely on the actions of the parties, shown by direct or circumstantial evidence, to establish an understanding or common design to commit the offense.” *Miller v. State*, 83 S.W.3d 308, 314 (Tex. App.—Austin 2002, pet. ref’d).

Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement. *Ransom*, 920 S.W.2d at 302. Mere presence of an accused at the scene of an offense is not alone sufficient to support a conviction under penal code section 7.02(a)(2); “however, it is a circumstance tending to prove guilt which, combined with other facts, may suffice to show that the accused was a participant.” *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. [Panel Op.] 1981) (op. on reh’g). Further, a jury may consider evidence of flight,

although “flight alone will not support a guilty verdict,” but it is also a circumstance from which an inference of guilt may be drawn. *Id.*

The actions by Moran on the night in question supports a conclusion he committed murder as a party. Moran was familiar with the individuals at the party and knew Sibley sold drugs from the apartment, which made it likely that large amounts of cash were inside to steal. When Moran first arrived at the apartment, he left Spikes in the car for a while before asking Sibley if Spikes could come inside. A jury could infer from this behavior that Moran was assessing the situation before inviting Spikes up to commit the offense. Sibley also testified he believed the two men were acting together. The jury could further infer Moran’s guilt as a party to the crime because he ran away from the scene with Spikes. Viewing the evidence in the light most favorable to the verdict, we conclude a rational jury could have found Moran committed murder as a party. Moran’s second issue is overruled.

Allen Instruction

In his third issue, Moran contends the trial court abused its discretion by giving the jury an unduly coercive *Allen* charge after the jury informed the trial court it was deadlocked. The State responds the supplemental instruction was not unduly coercive and, therefore, appropriate.

An *Allen* charge refers to a type of charge given to juries that seem to have reached an impasse in their deliberations. *See Allen v. United States*, 164 U.S. 492, 501–02 (1896). The primary inquiry to determine the propriety of an *Allen* charge is its coercive effect on juror deliberations. *Howard v. State*, 941 S.W.2d 102, 123 (Tex. Crim. App. 1996), *overruled on other grounds by Easley v. State*, 424 S.W.3d 535 (Tex. Crim. App. 2014).

The trial court received a note from the jury stating, “We the jury are deadlocked and see no reasonable resolution, no path to resolution, because different opinions are entrenched. Those positions have not changed since yesterday.” Defense counsel objected to the prepared *Allen*

charge and asked for a mistrial. The trial court overruled the objection and requested mistrial.

The following supplemental charge was read to the jury:

Members of the jury, in answer to the above note, your foreperson has advised the Court in writing that you are apparently unable to reach a unanimous verdict. I advise you as follows:

If this jury, after a reasonable length of time, finds itself unable to arrive at a unanimous verdict, it will be necessary for the Court to declare a mistrial and discharge the jury.

The indictment will still be pending, and it is reasonable to assume that the case will be tried again before another jury at some future time. At any such -- sorry, any such future jury will be impaneled in the same way this jury has been impaneled, and will likely hear the same evidence which has been presented to this jury. The questions to be determined by that jury will be the same as the questions confronting you, and there is no reason to hope that the next jury will find those questions any easier to decide than you have found them.

With this additional instruction, you are requested to continue with your deliberations, in an effort to arrive at a verdict which is acceptable to all members of the jury.

Moran specifically argues the instruction was coercive because it failed to include language, which he asserts is “now universal,” encouraging the jury to deliberate in an effort to arrive at a verdict “which is acceptable to all members of the jury *if you can do so without doing violence to your conscience.*” While such language is common in *Allen* charges, Moran has not cited any case law to support his claim that the absence of such language transforms a normally acceptable charge into one that is coercive. Rather, the charge informed the jury of the consequences of not reaching a verdict and requested continued deliberations “in an effort to arrive at a verdict which is acceptable to all members of the jury.” A supplemental charge that suggests all jurors reevaluate their opinions in the face of disparate viewpoints cannot be said to be coercive on its face. *Howard*, 941 S.W.2d at 123. Furthermore, the trial court did not convey its own opinions on the case, did not suggest to the jury that one side or the other possesses superior judgment, and did not tell the jury to distrust their judgment. *See West v. State*, 121

S.W.3d 95, 109 (Tex. App.—Fort Worth 2003, pet. ref'd). Accordingly, the *Allen* charge was not coercive. We overrule Moran's third issue.

Inclusion of a Reasonable Doubt Definition

In his fourth issue, Moran argues the trial court abused its discretion by defining reasonable doubt in the jury charge. Specifically, he argues the court's charge erroneously stated, "It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all reasonable doubt concerning the defendant's guilt." He asserts this sentence was an impermissible definition of reasonable doubt.

A review of the record reveals the complained-of statement does not appear in the charge. Rather, the jury was charged, "The prosecution has the burden of proving the defendant guilty and it must do so by proving each element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant." Because the purportedly-objectionable language does not appear in the charge, Moran has presented nothing for our review. *See, e.g., Hernandez v. State*, No. 07-96-0251-CR, 1997 WL 181250, at *5 (Tex. App.—Amarillo Apr. 15, 1997, pet. ref'd) (not designated for publication) (appellant presented nothing for review because charge did not include the alleged improper language). His fourth issue is overruled.

Jurisdiction of Trial Court

Finally, Moran argues the trial court lacked jurisdiction because the case was originally presented for indictment in a different trial court, and there were no written orders transferring the case to the court that tried the case and rendered judgment. We have repeatedly rejected this argument, and he acknowledges authority is against him. *See, e.g., Bourque v. State*, 156 S.W.3d 675, 678–79 (Tex. App.—Dallas 2005, pet. ref'd); *Carson v. State*, No. 05-14-00376-CR, 2015 WL 3549779, at *6 (Tex. App.—Dallas June 8, 2015, pet. ref'd) (mem. op., not designated for publication). We again reject this argument. We overrule Moran's fifth issue.

Conclusion

The judgment of the trial court is affirmed.

/David L. Bridges/

DAVID L. BRIDGES

JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

FRANK DEONNE MORAN, Appellant

No. 05-15-00606-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 291st Judicial District
Court, Dallas County, Texas

Trial Court Cause No. F-1363812-U.

Opinion delivered by Justice Bridges.

Justices Evans and O'Neill participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered February 25, 2016.