Opinion issued October 23, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00927-CR

DONNEL RAYMUND POLK, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 184th District Court
Harris County, Texas
Trial Court Cause No. 1103159

MEMORANDUM OPINION

A jury convicted appellant, Donnell Raymund Polk, of the murder of Christopher Ball, as proscribed by TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (Vernon 2003), and the trial court assessed punishment at 45 years' confinement. In two

points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction of murder. We affirm.

Background

In the early morning hours of January 20, 1997, 30-year-old Christopher Ball was working as a doorman at The Trap, an after-hours club in northwest Houston. The club was located in a strip center and was open nightly from 8:00 pm to 5:00 am. Isaac Batiste, a former classmate of Ball, arrived at the club around 4:30 am on the night of the shooting. After recognizing Ball, Batiste had a short conversation with him at the club's entrance before entering the building.

Ten to 15 minutes later, Batiste returned towards the entrance, where he noticed Ball face-to-face with appellant. Batiste walked between the men and towards the parking lot outside. Though Batiste did not hear their entire conversation, he saw Ball throw his hands up and say, "I don't know what you are talking about." Batiste then saw appellant turn his back toward Ball and reach across the front of his body, under his left arm. Batiste was immediately startled by the sound of a gunshot. On looking back, Batiste saw appellant's face and noticed a handgun in appellant's right hand. Batiste immediately fled to the parking lot, where he called 911 and watched as appellant entered the passenger side of a vehicle and quickly drove away.

Meanwhile, Ball was clutching his chest and exclaiming that he had been shot. Club patrons watched as Ball stumbled around before dropping to his knees. Darrell

Dunham, the owner of the club, soon helped Ball into a car and drove him to a nearby hospital. Ball was rushed into surgery, but died approximately five hours later, having lost so much blood from the single shot to his upper abdomen.

A police officer who investigated found scant physical evidence at The Trap because there was little blood from the gunshot, but a bullet-shell casing was recovered on the ground near the doorway of the club on the day after the shooting. The casing indicated that the bullet was from a semiautomatic pistol. Police and Batiste also later learned that a photographer had taken a photograph of appellant on the night Ball was killed. The photographer, Dennis Hanks, frequently took photographs of club patrons who posed before various painted backdrops. In the photograph taken of appellant, he had posed with a female and had brandished a bandana, money, and a handgun.

Sufficiency Challenges

Appellant contends that the evidence is both legally and factually insufficient to support his conviction. A person commits the offense of murder if (1) he intentionally or knowingly causes the death of another or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of another. TEX. PENAL CODE ANN. § 19.02(b)(1), (2). Appellant claims that the evidence does not support either of these alternatives regarding Ball's death. Focusing on the element of intent, appellant emphasizes that Ball did not die at the

scene, that he was not facing Ball at the time of the shooting, and that no evidence shows that he was pointing the gun at the victim. Appellant concedes, however, that he knew the danger of firing a gun wildly and disregarded the risk. For the reasons that follow, we reject appellant's contentions.

Legal Sufficiency

In his first point of error, appellant contends that the evidence is legally insufficient to support his conviction for murder. In reviewing the legal sufficiency of the evidence, we must view 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 offense beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Drichas v. State,* 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The standard is the same for direct and circumstantial evidence cases. *King v. State,* 895 S.W.2d 701, 703 (Tex. Crim. App. 1995).

In reviewing for legal sufficiency, we do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992); *Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1991). Instead, our duty is to determine whether both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in the light most favorable to the verdict. *See Adelman*, 828 S.W.2d at 422. In conducting our review, we resolve any

inconsistencies in the evidence in favor of the verdict. *Matson,* 819 S.W.2d at 843. Because the jury is in the best position to determine reliability of available testimony and evidence, we must defer to assessments by the jury that depend on credibility determinations. *See Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). In this case, the jury could have found the requisite element of intent in a number of ways, and the evidence is legally sufficient to support each of them.

Proof of a mental state like intent most always depends on circumstantial evidence. *Smith v. State*, 56 S.W.3d 739 745 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Intent is determined from the totality of circumstances, which may include the words, acts, and conduct of the accused. *Griffin v. State*, 614 S.W.2d 155, 159 (Tex. Crim. App. 1981); *Banks v. State*, 471 S.W.2d 811, 812 (Tex. Crim. App. 1971). The jury, who alone determines intent, may infer intent to kill from use of a deadly weapon. *Smith*, 56 S.W.3d at 745. A pistol is a deadly weapon per se, and intent to kill is presumed from its use. *Williams v. State*, 567 S.W.2d 507, 509 (Tex. Crim. App. 1978); *Smith*, 56 S.W.3d at 745. Accordingly, the jury could have reasonably found from appellant's undisputed use of a pistol that he intended to kill Ball.

The jury could have also have reasonably found appellant guilty of murder even if he did not intend to kill Ball because intent to cause serious bodily injury, when coupled with a clearly dangerous act that results in death, will suffice to

establish the offense of murder. *See* TEX. PENAL CODE ANN. § 19.02(b)(2); *Rodriguez v. State*, 146 S.W.3d 674, 676 n.3 (Tex. Crim. App. 2004). The act of shooting a gun in an individual's direction presents sufficient evidence for a jury to find that a defendant intended to cause serious bodily harm by committing a clearly dangerous act. *Gallegos v. State*, 76 S.W.3d 224, 228 (Tex. App.—Dallas 2002, pet. ref'd); *see Robinson v. State*, 945 S.W.2d 336, 343 (Tex. App.—Austin 1997, pet. ref'd). The jury could have rationally determined that appellant's act of reaching across his body to fire a gun in Ball's direction at close range was a clearly dangerous act meant to seriously injure Ball. Because appellant's act resulted in Ball's death, it is of no consequence that Ball did not die immediately at the scene of the shooting. *See* TEX. PENAL CODE ANN. § 19.02(b)(2).

For these reasons, we hold that the evidence is legally sufficient to support the jury's finding that appellant had the requisite intent to commit murder. Accordingly, we reject his legal sufficiency challenge, and his first point of error.

Factual Sufficiency

In his second point of error, appellant contends that the evidence is factually insufficient to support his conviction for murder. When conducting a factual-sufficiency review, we view all of the evidence in a neutral light. *Cain*, 958 S.W.2d 408 . We will set the verdict aside only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust, or (2) the verdict is against the great weight

and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot say that a conviction is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the jury's resolution of that conflict. *Id*. Before finding that the evidence is factually insufficient to support a verdict under the second prong of Johnson, we must be able to say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id*.

In conducting a factual-sufficiency review, we must also discuss the evidence that the appellant contends most undermines the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003). The fact-finder alone determines what weight to place on conflicting testimony because that determination depends on the fact-finder's evaluation of witnesses' credibility and demeanor. *Cain*, 958 S.W.2d at 408–09. As the sole determiner of the credibility of the witnesses, the fact-finder may choose to believe all, some, or none of the testimony presented. *Id*. at 407 n.5.

The State presented eyewitness testimony from Batiste, who was standing near appellant and Ball during this incident. After the verbal confrontation, Batiste saw Ball throw his hands up and exclaim, "I don't know what you are talking about."

While still standing within a few feet of Ball, appellant turned his back toward Ball and reached across his own chest. Batiste testified that he immediately heard a gunshot and, upon looking back, saw a gun in appellant's hand. After the shot was fired, Batiste saw appellant running to a nearby car that drove away.

The State also produced testimony from Hanks, who earned part of his livelihood by taking photographs at area nightclubs. Hanks testified that he photographed appellant, who brandished a handgun while posing for the photograph inside The Trap on the night Ball was shot. Hanks stated that he thought the gun was real, and not a toy or prop, and he produced at trial the photograph taken of appellant that night. Batiste corroborated that the man pictured with the gun was appellant, and both Batiste and Hanks identified appellant in court. Testimony from Houston Police Department (HPD) Homicide Investigator R. Swainson showed that Batiste was able to identify appellant from a photospread.

The State also offered expert testimony from M. Lyons, a firearms examiner for HPD. Lyons stated that, from his examination of the evidence, he could not rule out the possibility that the bullet casing found at scene the next day came from the gun appellant brandished in the photograph taken the previous night.

Appellant disputes the factual sufficiency of the evidence on the grounds that (1) the evidence shows that he was not facing Ball and (2) there was no evidence that appellant was pointing the gun at Ball. Therefore, appellant contends, the evidence

is factually insufficient to support the intent element of his conviction for murder, though the evidence might support a lesser offense. Appellant relies on cases that involve reckless use of firearms, but which, in contrast to this case, also involved evidence that affirmatively rebutted intent to kill. *See Guzman v. State*, 188 S.W.3d 185, 193–94 (Tex. Crim. App. 2006). There is no corresponding evidence in the record of this case that rebuts appellant's intent to kill. Moreover, the jury charge in this case included instructions on the lesser charges of manslaughter and criminally negligent homicide, which the jury necessarily rejected by finding appellant guilty of murder offense.

Batiste observed that appellant and Ball had been face to face and that he saw appellant reach across his own body. Within seconds, Batiste heard a shot and turned back, when he saw appellant's face and saw the gun in appellant's hand. Appellant and Ball were at close range, and Batiste heard Ball repeatedly shouting that he had been shot. Batiste also saw appellant flee immediately and enter a car departing from the club parking lot. Given these circumstances, there is no objective basis in the record from which we may conclude that the lack of testimony that appellant was facing Ball or pointing the gun at Ball so weakens the evidence supporting the jury's finding appellant guilty of murder that the jury's verdict is clearly wrong and manifestly unjust. *See Watson*, 204 S.W.3d at 417.

We therefore hold that the evidence is factually sufficient to support appellant's conviction, and we overrule appellant's second point of error.

Conclusion

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Nuchia and Higley.

Do not publish. TEX. R. APP. P. 47.2(b).