Affirmed and Memorandum Opinion filed April 27, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-01019-CR

ADRIEN LEE CALDWELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1176578

MEMORANDUM OPINION

Appellant Adrien Lee Caldwell was convicted of capital murder and sentenced to life imprisonment. In five issues, appellant argues that his right to a unanimous jury verdict was violated and that the evidence is legally and factually insufficient to support his conviction. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Members of the Houston Fire Department responded to a fire at the complainant's apartment on the morning of May 25, 2006. A team of firefighters entered the apartment and began searching for survivors. As the smoke cleared after the fire was extinguished, one of the firefighters noticed the complainant's naked and badly burned body lying on top of a mattress that was nearly consumed by the fire. Shortly after the body was discovered, police investigators arrived at the scene and discovered blood around the complainant's head and the remains of a pillow matted in the complainant's hair. A bullet was also recovered on the bedroom floor directly underneath where the complainant's head was resting on the bed.

When firefighters arrived, the complainant's front door was unlocked and showed no signs of forced entry. However, a window panel near the front door was unlocked, and one of the windows was broken and missing its screen. The broken window was close enough to the front door to allow a person to reach through the window and unlock and open the front door. An open knife was discovered on the floor beneath the broken window, and the complainant's father and former live-in boyfriend testified that they had never seen the knife in the apartment. The police were unable to recover any fingerprint or DNA evidence from the knife, front door, or windows. Arson investigators found strips of paper doused with ethanol in the complainant's bedroom, but did not find ethanol elsewhere in the apartment. The investigators concluded that the fire had been intentionally set and originated on the complainant's bed near her abdominal region.

The complainant's ex-boyfriend testified that he and the complainant dated for just over two years and lived together in the complainant's apartment until March 2006, when they broke up and the ex-boyfriend moved to Florida. The complainant then lived alone until her death. She was described as a shy girl who did not socialize often, and who was seeing a psychologist and taking antidepressants because she was having a difficult time getting over the breakup. Her parents spoke with her over the phone nearly every day

because they were worried for her safety and emotional health. The ex-boyfriend stayed in contact with the complainant after moving to Florida, and testified that the complainant wanted to re-start their relationship. The complainant's parents and ex-boyfriend stated that the complainant was not dating anyone at the time of her death. When asked whether the complainant wore clothing when she slept, the ex-boyfriend stated that she never slept naked. The complainant's parents did not know of any relationship between the complainant and appellant, and the police found no link between the two in the complainant's cell-phone, credit card, computer, or e-mail records.

Dr. Steven Wilson, the medical examiner who performed the autopsy of the complainant's body, testified that he found a gunshot entrance wound on the back of the complainant's neck and an accompanying exit wound on her forehead. He concluded that the complainant had been shot in the back of the neck from approximately one-and-a-half inches away, and that this injury caused the complainant's death. The absence of any evidence of smoke inhalation in the complainant's nose or lungs lead Wilson to determine that the complainant had been killed before her body was set on fire. Wilson testified that the complainant's body was nearly completely burned and charred and that the area surrounding the complainant's genitals had suffered some of the most severe burns. The condition of the complainant's body led Wilson to believe a sexual assault may have occurred, so he collected vaginal and rectal smear samples from the body. After testing, the vaginal samples showed the presence of sperm and semen, and the rectal sample showed the presence of semen. Wilson testified that the maximum survival time for sperm in the vagina or rectum is typically between two to four days in live individuals and forty-four to forty-eight hours in deceased individuals. He also stated that "sperm can degrade much more rapidly in the heat." The severity of the complainant's genital burns made it difficult for Wilson to find any external evidence of a sexual assault, but he did discover minor trauma and fresh bruising along the inner surface of the complainant's vaginal opening and along her cervix. Wilson stated this internal trauma could have been caused by "some sort of object or object inserted into the vagina" and that the bruises could

have been present for a "couple of hours, maybe up to a couple of days" before the complainant's death.

The police investigated the complainant's death for over a year before identifying appellant as a suspect. Police then returned to the area around the complainant's apartment and showed several individuals a photo array containing appellant's picture. Two of the apartment complex's employees remembered seeing appellant at the complex occasionally before the complainant's death. One of the employees recalled seeing appellant standing about two doors down from the complainant's unit and near her windows on one occasion. There was no record of appellant ever renting or occupying a unit at the complex. An employee of an auto-repair shop directly behind the complainant's apartment also recalled seeing appellant in the area a month or two before the incident. Police learned that appellant began training for a new job at a restaurant located one or two blocks from the complainant's apartment a few days prior to the offense. Appellant did not complete any training shifts after May 23, 2006—two days prior to the complainant's death—and he never returned to pick up his paycheck. No one recalled seeing appellant near the complainant's apartment after her death.

A sample of appellant's DNA was sent to an independent forensic analysis company, where it was compared to the male DNA collected from the sperm and semen recovered from the complainant's genitals. The results showed that appellant was a "major contributor" to the male DNA contained in the sperm collected from the vaginal sample. The statistical likelihood of finding another random individual within the African-American population[1] matching the DNA collected from the sample was one in 606.8 quadrillion. Appellant's DNA was also consistent with the male DNA collected from the rectal swab taken from the complainant at all seventeen genetic markers that were tested.

[1] The record establishes that appellant is African-American.

After hearing all of the evidence, the jury convicted appellant of capital murder. The trial court then sentenced appellant to life imprisonment in the Institutional Division of the Texas Department of Criminal Justice. Appellant raises five issues on appeal. In his first issue, he argues that the trial court's refusal to instruct the jury that their verdict must be unanimous violated his constitutional right to a unanimous jury verdict. In his four remaining issues, appellant contends that the evidence is legally and factually insufficient to support his conviction for capital murder.

II. JURY UNANIMITY

In his first issue, appellant argues that his right to a unanimous jury verdict was violated. He alleges that the jury should have been instructed that it must be unanimous in deciding which one of the two disjunctively submitted "offenses" appellant committed. The jury charge provides, in relevant part, as follows:

> Now, if you find from the evidence beyond a reasonable doubt that on or about the 25th day of May, 2006, in Harris County, Texas, the defendant, Adrien Lee Caldwell, did then and there unlawfully, while in the course of committing or attempting to commit the aggravated sexual assault of [the complainant], intentionally cause the death of [the complainant] by shooting [the complainant] with a deadly weapon, namely a firearm; or
>
> If you find from the evidence beyond a reasonable doubt that on or about the 25th day of May, 2006, in Harris County, Texas, the defendant, Adrien Lee Caldwell, did then and there unlawfully, while in the course of committing or attempting to commit the burglary of a habitation owned by [the complainant], intentionally cause the death of [the complainant] by shooting [the complainant] with a deadly weapon, namely a firearm, then you will find the defendant guilty of capital murder, as charged in the indictment.

Appellant contends this charge was improper because some jurors may have found that he committed murder during the commission of aggravated sexual assault while others found that he committed murder during the commission of a burglary.

The Texas Constitution requires a unanimous verdict in felony cases. *See* TEX. CONST. art. V, § 13; *see also* TEX. CODE CRIM. PROC. ANN. art. 36.29(a) (Vernon 2006 & Supp. 2009). This right is not violated when the jury is disjunctively instructed on alternate means or theories of committing the same offense, even where the indictment alleges differing methods of committing the offense in the conjunctive. *See Martinez v. State*, 129 S.W.3d 101, 103 (Tex. Crim. App. 2004); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991). With respect to homicide offenses, different legal theories involving the same victim are simply alternate methods of committing the same offense. *Huffman v. State*, 267 S.W.3d 902, 905 (Tex. Crim. App. 2008). The alternate methods of committing capital murder include the intentional commission of murder in the course of committing or attempting to commit burglary or aggravated sexual assault. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 2003 & Supp. 2009). So long as the same complainant is alleged for the predicate murder, any or all of the alternate methods of committing capital murder as provided in section 19.03 of the Texas Penal Code may be submitted to the jury in the disjunctive without violating the accused's right to jury unanimity. *See Leal v. State*, 303 S.W.3d 292, 297 (Tex. Crim. App. 2009); *Gamboa v. State*, 296 S.W.3d 574, 584 (Tex. Crim. App. 2009). Additionally, a general verdict is proper where the alternate methods of committing the same offense are submitted disjunctively if the evidence is sufficient to support a finding under any of the methods submitted. *See Kitchens*, 823 S.W.2d at 258.

In this case, appellant was charged conjunctively in a two-paragraph indictment. The first paragraph alleged that appellant intentionally caused the complainant's death while in the course of committing and attempting to commit aggravated sexual assault against the complainant. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). The second paragraph alleged that appellant intentionally caused the complainant's death while in the course of committing and attempting to commit burglary of the complainant's apartment. *See id.* Because the complainant was the sole victim named for the predicate murder and the indictment alleged alternate methods of committing capital murder under section 19.03

of the Texas Penal Code, the State's theories were simply alternate methods of committing the same offense. *See Gamboa*, 296 S.W.3d at 583; *Huffman*, 267 S.W.3d at 905. Thus, the trial court's failure to include an instruction that the jury must agree on the alternate methods of committing capital murder did not violate appellant's right to a unanimous jury verdict. *See Leal*, 303 S.W.3d at 297; *Gamboa*, 296 S.W.3d at 584. We therefore overrule appellant's first issue.

III. SUFFICIENCY OF THE EVIDENCE

In his four remaining issues, appellant challenges the sufficiency of the evidence. Appellant contends in his second and third issues that the evidence is legally and factually insufficient to show that he caused the complainant's death. Appellant argues in his fourth issue that the evidence is factually insufficient to show he committed the offense of burglary, and appellant argues in his fifth issue that the evidence is factually insufficient to show he committed the offense of aggravated sexual assault.

To convict appellant of capital murder as charged in the indictment, the State was required to prove beyond a reasonable doubt that appellant intentionally or knowingly caused the complainant's death while in the course of committing or attempting to commit burglary of the complainant's apartment or the aggravated sexual assault of the complainant. *See* TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03(a)(2) (Vernon 2003 & Supp. 2009). The evidence in a capital murder prosecution need only be sufficient to establish one of the underlying felonies alleged in the indictment. *See Russeau v. State*, 171 S.W.3d 871, 877 (Tex. Crim. App. 2005); *Matamoros v. State*, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995). Because, as discussed below, we find the evidence is legally and factually sufficient to establish that appellant intentionally caused the complainant's death during the course of committing aggravated sexual assault, we need not discuss appellant's fourth issue regarding the sufficiency of the evidence related to burglary.

A. Standards of Review

In conducting a legal sufficiency review, 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 crime beyond a reasonable doubt. *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). We do not ask whether we believe the evidence at trial established guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). We may not re-weigh the evidence and substitute our judgment for that of the trier of fact. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). In our review, we accord great deference "'to the responsibility of the trier of fact [to fairly] resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996) (quoting *Jackson*, 443 U.S. at 319). We presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we defer to that resolution. *Id.* at 133 n.13

In evaluating the factual sufficiency of the evidence, we view all the evidence in a neutral light and will set aside the verdict only if we are able to say, with some objective basis in the record, that the conviction is clearly wrong or manifestly unjust because the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 414–17 (Tex. Crim. App. 2006). We cannot order a new trial simply because we disagree with the jury's resolution of a conflict in the evidence, and we do not intrude on the fact-finder's role as the sole judge of the weight and credibility of witness testimony. *See id.* at 417; *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The fact-finder may choose to believe all, some, or none of the testimony presented. *Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Bargas v. State*, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, no pet.). In our review, we discuss the evidence appellant contends is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App.

2003). We must explain in exactly what way we perceive the conflicting evidence to greatly preponderate against conviction if we determine the evidence is factually insufficient. *Watson*, 204 S.W.3d at 414–17.

B. Analysis

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. *See* TEX. PENAL CODE ANN. § 19.02(b)(1). The intent to commit a crime is almost always proven through evidence of the circumstances surrounding the crime. *Childs v. State*, 21 S.W.3d 631, 635 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). The intent to kill may be inferred by the use of a deadly weapon, and the use of a deadly weapon in a deadly manner provides an almost conclusive inference showing the intent to kill. *Godsey v. State*, 719 S.W.2d 578, 580–81 (Tex. Crim. App. 1986); *Arnold v. State*, 234 S.W.3d 664, 672 (Tex. App.—Houston [14th Dist.] 2007, no pet.). A firearm is statutorily defined as a deadly weapon. *See* TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (Vernon 2003 & Supp. 2009). The evidence shows that the complainant's death resulted from a gunshot wound to the back of her neck while she was lying face-down on her bed. From this, the jury could properly infer that the individual who shot the complainant intentionally or knowingly caused her death. *See* TEX. PENAL CODE ANN. § 19.02(b)(1); *Godsey*, 719 S.W.2d at 580–81; *see also Childs*, 21 S.W.3d at 635 ("[W]here a deadly weapon is fired at close range, and death results, the law presumes an intent to kill.").

A person commits the offense of aggravated sexual assault if the person (1) intentionally or knowingly causes the penetration of the anus or sexual organ of another person by any means and without that person's consent and if (2) the person causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode. *See* TEX. PENAL CODE ANN. § 22.021(a) (Vernon 2003 & Supp. 2009); *Curtis v. State*, 205 S.W.3d 656, 662 (Tex. App.—Fort Worth 2006, pet. ref'd). The State presented evidence that one of the windows near the complainant's front door was broken near the time of her death. A knife was found next to the broken

window, and there is evidence that this knife did not belong to the complainant. The complainant was found lying naked on her bed after being shot in the head, and her genitals were extensively burned. According to the complainant's family, the complainant was a shy and depressed young woman who did not have a boyfriend or socialize often prior to her death. There was no evidence that she was sexually active with anyone prior to her death, but an examination of her body showed recent internal trauma of her genitals. After considering this evidence, the jury could reasonably infer that an individual broke into the apartment, intentionally committed sexual assault, and then killed the complainant and burned her body in an attempt to destroy any evidence of the assault. *See Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007) (recognizing that juries may draw multiple reasonable inferences "as long as each inference is supported by the evidence presented at trial"); *see also Childs*, 21 S.W.3d at 635 (allowing jury to infer intent from circumstantial evidence).

The State was also required to prove beyond a reasonable doubt that appellant committed the charged offense. *See Roberson v. State*, 16 S.W.3d 156, 167 (Tex. App.—Austin 2000, pet. ref'd). Identity may be proved by direct or circumstantial evidence, and through inference. *See Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). Our standard of review is the same for both direct and circumstantial evidence. *Kutzner v. State*, 994 S.W.2d 180, 184 (Tex. Crim. App. 1999). Indeed, circumstantial evidence alone may be sufficient to support a finding of guilt. *Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). Each fact need not point directly and independently to appellant's guilt, so long as the cumulative effect of all the incriminating facts is sufficient to support the conviction. *See Hooper*, 214 S.W.3d at 13. DNA evidence coupled with reasonable inferences drawn from circumstantial evidence will support a conviction. *See Hinojosa v. State*, 4 S.W.3d 240, 245–46 (Tex. Crim. App. 1999) (finding defendant's capital murder conviction was supported by circumstantial evidence implicating defendant and DNA evidence showing an exceptional likelihood that someone other than defendant killed the victim); *Roberson*, 16 S.W.3d at

167–68 (finding circumstantial evidence sufficient to sustain appellant's conviction for aggravated sexual assault even though victim could not identify her assailant and the only direct evidence linking appellant to the charged offense was appellant's DNA).

Appellant contends that his DNA could have survived for up to four days before the complainant's death following a consensual sexual encounter between the two and that "evidence of some sexual encounter between the parties does not provide sufficient legal evidence that the appellant caused the complainant's death."[2] There is no evidence supporting appellant's contention that he and the complainant had consensual sex prior to the complainant's death. The complainant's parents were in nearly constant contact with the complainant and knew of no relationship between the complainant and appellant. Additionally, the police were unable to find any evidence of a relationship between the two. The only evidence of a link between appellant and the complainant is appellant's DNA, which was a major contributor to DNA contained in the sperm and semen collected from the complainant's genitals. Although appellant argues this sperm and semen could have survived for several days following a sexual encounter, Wilson testified the sperm and semen could have degraded much sooner than that because the complainant's body had been exposed to extreme heat after being set on fire. Wilson further stated that biological fluids present in deceased individuals have a significantly shorter survival time than normal. The complainant's apartment also showed signs of recent forced entry, as one of the windows next to the front door was broken when firefighters arrived. No one recognized the knife found under the broken window. The complainant's body was discovered in the nude, but her ex-boyfriend testified that she never slept without clothing. Although Wilson discovered signs of recent trauma to the complainant's internal genitalia,

[2] An innocent but unlikely explanation for the presence of physical evidence does not necessarily render the evidence legally insufficient. *See Phelps v. State*, 594 S.W.2d 434, 436 (Tex. Crim. App. [Panel Op.] 1980) (holding that a plausible explanation for defendant's fingerprints at a crime scene did not make the evidence insufficient). Further, this alternate hypothesis does not render the evidence factually insufficient and, while relevant, is not determinative in our factual sufficiency review. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999); *Herrero v. State*, 124 S.W.3d 827, 835 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

the severe burns surrounding the complainant's genitals made it difficult for him to find external signs of trauma consistent with sexual assault.

Thus, the jury was presented with evidence showing that (1) someone broke into the complainant's apartment, (2) the complainant was shot while lying on her bed and then set on fire, (3) the fire originated near the complainant's genitals, (4) the complainant's internal genitalia showed signs of recent trauma, (5) the severity of the genital burns hampered efforts to find evidence of sexual assault, and (6) although there was no evidence of a relationship between appellant and the complainant, sexual or otherwise, appellant's DNA was a major contributor to the DNA found in the sperm and semen collected from the complainant's genitals. Based on this evidence, the jury could have reasonably concluded that appellant broke into the complainant's apartment, sexually assaulted the complainant, and then killed the complainant and burned her body to hide evidence of the crime. *See Guevara*, 152 S.W.3d at 49 (stating circumstantial evidence alone may be sufficient to establish guilt); *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993) ("[I]t is not necessary that every fact point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances."); *see also Hinojosa*, 4 S.W.3d at 245.

Appellant also argues that the State failed to prove he was involved in the complainant's murder because there was no evidence—fingerprint, blood, ballistics, or otherwise—showing he was at or near the complainant's apartment when she was killed. The State is not required to produce physical evidence linking the accused to an offense. *See Lancon v. State*, 253 S.W.3d 699, 706–07 (Tex. Crim. App. 2008) (determining lack of physical evidence alone did not render evidence factually insufficient where other evidence linked appellant to murder, attempted murder, and deadly conduct). Multiple witnesses recalled seeing appellant in the area near the complainant's apartment, including the area just outside her apartment, before the offense. None of these witnesses recalled seeing appellant near the scene after the complainant's death. Additionally, appellant

failed to continue his training for a new job after the murder, and did not return to his place of employment to pick up his paycheck. This constitutes sufficient circumstantial evidence that, when considered with the State's DNA evidence and the manner in which the complainant was killed, supports a reasonable jury inference that appellant was present at the complainant's apartment when the offense occurred.

In sum, the State presented sufficient evidence from which the jury could reasonably infer appellant's involvement in the offense. *See Hooper*, 214 S.W.3d at 13; *Roberson*, 16 S.W.3d at 168. Taken as a whole, the evidence "support[s] the jury's conclusion that appellant, as opposed to some unidentified 'suspect' also sharing the same DNA profile," sexually assaulted and killed the complainant. *Hinojosa*, 4 S.W.3d at 245; *see also Guevara*, 152 S.W.3d at 49 (stating a conviction may be upheld so long as it is supported by the cumulative effect of all the incriminating facts); *Swearingen v. State*, 101 S.W.3d 89, 96–98 (Tex. Crim. App. 2003) (finding the evidence legally and factually sufficient to convict defendant of capital murder after considering all the circumstantial evidence presented). The jury could have reasonably concluded that appellant intentionally caused the complainant's death while committing, or attempting to commit, the offense of aggravated sexual assault. Accordingly, the relevant elements of capital murder are supported by the evidence. *See* TEX. PENAL CODE ANN. § 19.03(a)(2).

After viewing the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could find that appellant intentionally committed each of the elements of capital murder beyond a reasonable doubt. *See Salinas*, 163 S.W.3d at 737. Additionally, after conducting a neutral review of the entire record, we cannot say that the evidence preponderates against conviction or that appellant's conviction is clearly wrong or manifestly unjust. *See Watson*, 204 S.W.3d at 414–17. Accordingly, we find that the evidence is legally and factually sufficient to support appellant's conviction. We overrule appellant's second, third, and fifth issues.

IV. CONCLUSION

Finding no reversible error, we affirm the trial court's judgment.

/s/ Leslie B. Yates
Justice

Panel consists of Justices Yates, Frost, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).