

Affirmed and Memorandum Opinion filed May 20, 2010.



In The

Fourteenth Court of Appeals

NO. 14-08-01147-CR

WILLIAM BRIAN VAN BUREN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 1113384**

M E M O R A N D U M O P I N I O N

Appellant, William Brian Van Buren, appeals his murder conviction for which he was sentenced to 15 years in prison. In his sole issue, appellant contends that the evidence is factually insufficient to support the jury's verdict. We affirm.

BACKGROUND

On April 18, 2007, Aaron Masters, the complainant, was shot multiple times during a dice game outside a Houston apartment complex. He later died from the gunshot wounds. Appellant was arrested months later for the complainant's death. Appellant pleaded not guilty and was tried before a jury. At appellant's murder trial, the

State presented eyewitness testimony from Grant Turner, Clifton Nicholson, and Reginald Hutchins.

Grant Turner

Turner, a long-time friend of the complainant, testified that on the day of the murder, he and a few other individuals, including appellant, were playing dice and gambling. Hours into the game, Turner heard gunshots; he immediately looked around and observed appellant pointing a gun at the complainant. Turner observed appellant fire five or six shots at the complainant. As appellant was firing the gun, Turner and the other individuals attempted to hide and flee for safety. Turner later learned that the complainant had been fatally shot.

Clifton Nicholson

Nicholson, a friend of the complainant, testified that he also participated in the dice game on the day of the complainant's murder. Nicholson testified that during the game, there was a short break wherein he observed appellant walk to and from his vehicle parked on the street. Shortly after appellant returned to the game, he and the complainant laid larger wages on each play. On one particular high-stakes play, the complainant won, and appellant retrieved a gun from his waistband. As the complainant attempted to retrieve his winnings, appellant began shooting at the complainant.

Nicholson testified that the complainant attempted to hide behind another person and push appellant off the porch where the game was being played. However, the complainant was unsuccessful. The complainant then fled to an adjacent field, but he got stuck in mud. Appellant walked towards the complainant as he struggled to run away and continued to fire directly at the complainant. Appellant then walked calmly to his vehicle and drove away.

Reginald Hutchins

Hutchins, another life-long friend of the complainant, was present during the latter part of the dice game. During the game break, Hutchins observed appellant walk to and from his parked vehicle. When appellant returned to the porch, Hutchins sat next to appellant, and the men resumed the game. Appellant and the complainant were laying larger bets, and on the last play between appellant and the complainant, the complainant won. Appellant tapped Hutchins on his side, signaling Hutchins to move. Hutchins complied: he stepped back and observed appellant retrieve a gun from his clothing. Appellant pointed the gun at the complainant, who tried to hide behind another individual. Appellant continued to point the gun at the complainant, aiming to get an accurate shot. The complainant attempted to wrestle the gun from appellant, and there was a slight struggle between the two men. However, the complainant was unsuccessful, and he attempted to flee by foot. The complainant got trapped in mud as he was fleeing; appellant slowly followed the complainant and fired multiple shots at him. Appellant then calmly walked to his vehicle and drove away.

Murder Weapon And Photo-Spread Identification

Officer J.C. Padilla of the Houston Police Department testified that he assisted in the investigation of the complainant's murder. Officer Padilla testified that the murder weapon was not retrieved from the scene of the murder. Subsequent investigatory efforts lead officers to the weapon weeks after the murder: it was recovered at another Houston apartment complex, miles away from the murder scene. The State introduced the murder weapon and the shell casings retrieved from the scene of the murder. A ballistics expert testified that the casings retrieved from the scene of the murder had been fired from the weapon later recovered by law enforcement. The State also introduced photo-spread evidence: Turner and Leroy Butler—also present during the shooting—positively identified appellant as the shooter in a photo spread prior to trial.

The jury ultimately found appellant guilty of murder, and he was sentenced to 15 years in prison. On appeal, he challenges the factual sufficiency of the evidence to support the jury's verdict.

FACTUAL SUFFICIENCY

In his sole appellate issue, appellant contends that the evidence is factually insufficient to sustain the jury's verdict.¹ In a factual sufficiency review, we review all the evidence in a neutral light, favoring neither party. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We then ask (1) whether the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and manifestly unjust, or (2) whether, considering the conflicting evidence, the jury's verdict is against the great weight and preponderance of the evidence. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006); *Watson*, 204 S.W.3d at 414–17. 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. *Watson*, 204 S.W.3d at 417. If an appellate court determines that the evidence is factually insufficient, it must explain in exactly what way it perceives the conflicting evidence greatly to preponderate against conviction. *Id.* at 414–17; *Rivera-Reyes v. State*, 252 S.W.3d 781, 784 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The reviewing court's evaluation should not intrude upon the factfinder's role as the sole judge of the weight and credibility given to any witness's testimony. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000).

¹ Because a factual sufficiency review begins with the presumption that the evidence supporting the jury's verdict is legally sufficient, and because appellant challenges only the factual sufficiency of the evidence, appellant effectively concedes the evidence is legally sufficient to sustain his conviction. See *Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996); *Newby v. State*, 252 S.W.3d 431, 435 n.1 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd).

Here, appellant challenges the sufficiency of the evidence to support his murder conviction. A person commits murder if he intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *See* Tex. Penal Code Ann. § 19.02(b) (Vernon 2003). 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. *Id.* § 6.03(a). A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. *Id.* § 6.03(b). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.*

Appellant contends that the evidence is factually insufficient because: (1) the State's eyewitnesses gave inconsistent and unreliable testimony; (2) there was no fingerprint evidence linking appellant to the murder weapon or shell casings recovered from the murder scene; and (3) the photo-spread evidence was inconsistent. While appellant is correct that there was no fingerprint evidence linking him to the gun and there were a few inconsistencies in the State's evidence, there is ample evidence supporting the jury's verdict. Three eyewitnesses—Nicholson, Turner, and Hutchins—testified that appellant shot the complainant after appellant lost a bet during a dice game. Each eyewitness identified appellant at trial as the shooter. Although these eyewitnesses were friends of the complainant, the jury was the ultimate judge of their credibility. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999); *see also Bargas v. State*, 252 S.W.3d 876, 888 (Tex. App.—Houston [14th Dist.] 2008, no pet.). Apparently, the jury chose to believe the eyewitnesses' testimony identifying appellant as the shooter, and we must give due deference to the jury's credibility determinations. *See Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008) (concluding that the jury is in the best position to evaluate the witnesses' credibility and to weigh the evidence).

Appellant also contends that each of the eyewitnesses had different versions of the events surrounding the murder. However, a jury is free to accept one version of the facts and to reject another, or to reject any part of a witness's testimony. *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). Furthermore, a verdict is not manifestly unjust merely because the jury resolved any conflicting views of the evidence in favor of the State. *See Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997).

Appellant further contends that the photo-spread evidence was insufficient because (1) some of the eyewitnesses were unable to identify appellant as the shooter, (2) Butler originally was unable to identify appellant as the shooter, and (3) Turner made the photo-spread identification just a week before trial. We cannot order a new trial simply because there are conflicts in the State's evidence; such conflicts call for reversal only if there is insufficient testimony to support the conviction. *See Wyatt v. State*, 23 S.W.3d 18, 30 (Tex. Crim. App. 2000). Here, both Butler and Turner identified appellant as the shooter in the photo spread. Additionally, three eyewitnesses identified appellant at trial as the shooter. The evidence of pre-trial and trial identifications is sufficient to support the jury's verdict. Furthermore, any evidence contrary to these four identifications could have been disregarded by the jury. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998) (stating that reconciliation of any conflicts in the evidence is within the exclusive province of the jury).

After reviewing all of the evidence in a neutral light, we cannot conclude that appellant's murder conviction is clearly wrong or manifestly unjust or the great weight and preponderance of the evidence contradicts the jury's verdict. Accordingly, we hold

that the evidence is factually sufficient to support the judgment of conviction and overrule appellant's sole issue. We affirm the trial court's judgment.

/s/

Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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