Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00780-CR

Faustino **VASQUEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR5917
Honorable Raymond Angelini, Judge Presiding[1]

Opinion by: Marialyn Barnard, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: December 6, 2017

AFFIRMED

A jury found appellant Faustino Vasquez guilty of the offense of murder. After Vasquez pled true to the enhancement paragraphs, the trial court sentenced him to life in prison. On appeal, Vasquez contends the trial court erred by refusing to include a jury instruction on manslaughter in its jury charge. We affirm the trial court's judgment.

[1] The Honorable Kevin M. O'Connell is the presiding judge of the 227th District Court, Bexar County, Texas. The Honorable Raymond Angelini, retired, was sitting by assignment.

BACKGROUND

Vasquez, who goes by the nickname Casper, his wife Kimberly,[2] and several friends were celebrating his birthday at a nightclub. According to Kimberly, toward the end of the night, security officers told her they had "kicked [Vasquez] out" of the club and she and the others in the group needed to leave as well. One of the security officers testified Vasquez and another man were asked to leave, and Vasquez asked him to advise Kimberly and the rest of the group. The security officer testified he told Kimberly and her group if they did not leave, Vasquez was going to leave without them. The evidence suggests Vasquez and the rest of the group were asked to leave based on either a conflict between a large group of men and Vasquez and one of his friends, or a conflict that arose on the dance floor.

Regardless of how the conflict arose, Vasquez left the club. When Kimberly and the rest of her group left the nightclub, she saw Vasquez driving her car, a Crown Victoria, around from the back of the club where they had parked. Kimberly got into the car. Instead of leaving, Vasquez drove the car to the front of the club and got out. When Vasquez exited the car, he was holding a .380 handgun. Armed, Vasquez walked to the back of the car. Kimberly testified, "[s]hots were fired." Immediately after the shots were fired, Vasquez got back into the car and they "took off." Although Kimberly stated she did not see who fired the shots, several witnesses — Alejandro Rodriguez (club security officer), Genevieve Rosas (club patron), Felicia Mireles (girlfriend of Vasquez's friend, Fabian Gonzales), Rafael Charley (friend of Vasquez) — identified Vasquez as the shooter. One person was struck by the shots fired by Vasquez. Pete Gonzales, the victim, owned and operated the nightclub.

[2] At the time of the events underlying Vasquez's conviction, Vasquez and Kimberly were married. They subsequently divorced.

The medical examiner testified Mr. Gonzales was shot twice — once in the elbow and once in the right shoulder. The bullet that struck his shoulder perforated Mr. Gonzales's lung, heart, and upper stomach, coming to rest on the left side of his chest. The medical examiner concluded "gunshot wounds to the body" caused Mr. Gonzales's death. She testified that because there was no soot or "powder grain tattooing" on the victim, the shots were fired from a distance of more than three or four feet — she could not be more specific.

After the shooting, police and EMS arrived. Witnesses described the shooter to Officer Thomas F. Smith of the San Antonio Police Department, telling him the shooter went by the street name Casper. After some research, Officer Thomas learned the suspected shooter was Vasquez.[3] SAPD Detective Bryan Baldwin was assigned as the lead detective. Detective Baldwin viewed the scene and ultimately went to the hospital where the victim was taken. Once there, he learned Mr. Gonzales had died.

Just hours after the shooting, having been advised that witnesses at the scene identified the shooter as Casper a/k/a Vasquez, Detective Baldwin showed photo arrays to Felicia Mireles and Rafael Charley that included a picture of Vasquez. Both chose Vasquez's picture from the array, identifying him as the shooter. Another detective, Juan Espinoza, showed a photo array to nightclub security officer Roy Medlin a few days after the shooting. He too picked Vasquez's photograph from the array and identified him as the shooter. Detective Baldwin obtained an arrest warrant for Vasquez.

Ultimately, SAPD Detective John Sharp received information that Vasquez was in Converse, Texas. United States Marshals arrested Vasquez in Converse as Detective Sharp and

[3] Kimberly testified Vasquez's real name is Celestino Vasquez, stating Faustino Vasquez is "an alias he used years ago." However, because the judgment identifies the defendant as "Faustino Vasquez," we use that name in the style of our opinion.

others looked on. Vasquez was charged with murder. In the indictment, the State alleged Vasquez: (1) intentionally or knowingly caused the death of Mr. Gonzales by shooting him with a deadly weapon, namely a firearm; or (2) with the intent to cause Mr. Gonzales serious bodily injury, committed an act clearly dangerous to human life that caused Mr. Gonzales's death by shooting him with a deadly weapon, namely a firearm. *See* TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (West 2011). After considering the evidence and the court's charge, a jury found Vasquez guilty of murder. Thereafter, Vasquez timely perfected this appeal.

ANALYSIS

On appeal, Vasquez raises a single issue, contending the trial court erred in refusing to include a manslaughter instruction in the court's jury charge. Vasquez argues manslaughter is a lesser-included offense of murder and because the record contains more than a scintilla of evidence from which a jury could have rationally concluded that if Vasquez was guilty, he was guilty only of manslaughter, not murder, he was entitled to the instruction.

Appellate courts engage in a two-step analysis in determining whether a trial court was required to give a requested instruction on a lesser-included offense. *Bullock v. State*, 509 S.W.3d 921, 924 (Tex. Crim. App. 2016); *Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011). In the first step, we must determine whether the requested instruction "pertains to an offense that is a lesser-included offense of the charged offense, which is a question of law." *Bullock*, 509 S.W.3d at 924. Because it is a question of law, we conduct a de novo review. *Rice v. State*, 333 S.W.3d 140, 144 (Tex. Crim. App. 2011). An offense is a lesser-included offense of the charged offense if it is within the proof necessary to establish the offense charged. *Bullock*, 509 S.W.3d at 924; *see* TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006).

In this case, we first hold that manslaughter is a lesser-included offense of murder as charged in count one of the indictment — Vasquez intentionally or knowingly caused the death of

Mr. Gonzales by shooting him with a deadly weapon, namely a firearm. Manslaughter differs from murder only with regard to the culpable mental state — manslaughter requires that the defendant acted recklessly, whereas murder requires that the defendant acted intentionally or knowingly. *Compare* TEX. PENAL CODE ANN. § 19.04(a) (stating that person commits manslaughter if he recklessly causes death of individual) *with id.* § 19.02(b)(1) (stating that person commits murder if he intentionally or knowingly causes death of individual); *see Arnold v. State*, 234 S.W.3d 664, 671 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (stating that only difference between murder under section 19.02(b)(1) and manslaughter is mental state required). Thus, manslaughter is a lesser-included offense of murder under section 19.02(b)(1). *See* TEX. CODE CRIM. PROC. ANN. art. 37.09(3) (stating offense is lesser-included offense if "it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission."); *Arnold*, 234 S.W.3d at 671 (stating that "it is well-established that manslaughter is a lesser-included offense of murder" as set out in section 19.02(b)(1) of Texas Penal Code) (citing *Girdy v. State*, 213 S.W.3d 315, 318–19 (Tex. Crim. App. 2006)).

Likewise, we hold manslaughter is a lesser-included offense of murder as charged in count two of the indictment —with intent to cause serious bodily injury, Vasquez committed an act clearly dangerous to human life by shooting a gun that caused the death of Mr. Gonzales. In *Cavazos v. State*, the Texas Court of Criminal Appeals, applying the functional-equivalence test, determined the elements of manslaughter are functionally the same or less than those required to prove murder under section 19.02(b)(2) of the Penal Code. 382 S.W.3d 377, 384 (Tex. Crim. App. 2012). In *Cavazos*, the indictment alleged the defendant intended to cause serious bodily injury and committed an act clearly dangerous to human life by shooting a firearm. *Id.* The court noted the only difference between murder as alleged in the indictment and the offense of manslaughter was that manslaughter included recklessness, which the court held is "a conscious disregard of a

substantial and unjustifiable risk regarding circumstances or results surrounding the conduct." *Id.* The commission of an act clearly dangerous to human life — shooting with a firearm — is the circumstance surrounding the conduct, which is the same under either murder or manslaughter. Thus, the only difference between the two is intent versus recklessness. *Id.* As such, the court held manslaughter was a lesser-included offense of murder. *Id.* We hold *Cavazos* is on point.

Here, the indictment alleged Vasquez, with intent to cause serious bodily injury, committed an act clearly dangerous to human life by shooting a gun that caused the death of Mr. Gonzales. *See* TEX. PENAL CODE ANN. § 19.02(b)(2). Thus, as in *Cavazos*, the only difference between manslaughter and murder as charged pursuant to section 19.02(b)(2), is the requisite mental state — intent versus recklessness. *See Cavazos*, 382 S.W.3d at 384; *compare* TEX. PENAL CODE ANN. § 19.04(a) (stating that person commits manslaughter if he recklessly causes death of individual) *with id.* § 19.02(b)(2) (stating that person commits murder if he intends to cause serious bodily injury and commits act clearly dangerous to human life that causes death of individual). Accordingly, we hold manslaughter is a lesser-included offense of murder as charged in count two of the indictment. *See Cavazos*, 382 S.W.3d at 384.

Having determined manslaughter is a lesser-included offense of murder under either count of the indictment, we proceed to the second step of the lesser-included offense analysis and determine whether the evidence warrants an instruction on the lesser-included offense of manslaughter. *See Bullock*, 509 S.W.3d at 924–25; *Cavazos*, 382 S.W.3d at 385. This inquiry also requires a de novo review because it is a mixed question of law and fact that does not turn on credibility or demeanor. *See Hall v. State*, 158 S.W.3d 470, 473 (Tex. Crim. App. 2005) (holding that in reviewing of entire record to determine whether defendant is entitled to lesser-included offense instruction, appellate court cannot consider "whether the evidence is credible, controverted, or in conflict with other evidence."); *see also, e.g.*, *State v. Bolles*, No. PD-0791-16,

2017 WL 4675659, at *4 (Tex. Crim. App. Oct. 18, 2017) (holding that appellate court conducts de novo review of mixed questions of law and fact that do not depend on credibility or demeanor of witnesses); *Furr v. State*, 499 S.W.3d 872, 886 (Tex. Crim. App. 2016) (same).

The second step requires the reviewing court to determine whether there is evidence in the record that supports submission of the lesser-included-offense instruction to the jury. *Bullock*, 509 S.W.3d at 924–25. A defendant is entitled to a lesser-included-offense instruction "when there is some evidence in the record that would permit a jury to rationally find that, if the defendant is guilty, he is guilty only of the lesser-included offense." *Id.* at 925; *Cavazos*, 382 S.W.3d at 385. In other words, the evidence must establish the lesser-included offense "is a valid, rational alternative to the charged offense." *Bullock*, 509 S.W.3d at 925; *see Cavazos*, 382 S.W.3d at 385. The strength or weakness of the evidence is irrelevant; rather, the question is whether any evidence raises the issue that the defendant was guilty only of the lesser offense. *Cavazos*, 382 S.W.3d at 384–85.

There are two ways that evidence may indicate that a defendant is guilty of only the lesser offense: (1) evidence is presented that negates other evidence establishing the greater offense; or (2) evidence is presented showing the defendant's awareness of the risk is subject to two different interpretations. *Id.* at 385. However, the reviewing court must examine all of the admitted evidence, not just that presented by the defendant; particular pieces of the record "cannot be plucked out of the record and examined in a vacuum." *Bullock*, 509 S.W.3d at 925. Anything more than a scintilla of evidence is sufficient; however, "it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense" for the fact finder to consider before a lesser-included-offense instruction is warranted. *Id.* We may not consider the credibility of the evidence or whether it conflicts with other evidence, but the evidence must still be directly germane

to the lesser-included offense and must rise to a level that a rational jury could find that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.*; *Cavazos*, 382 S.W.3d at 385. "Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense." *Cavazos*, 382 S.W.3d at 385.

Here, Vasquez first contends he negated the mens rea element of murder, arguing there is no evidence he intended to kill Mr. Gonzales or knew his conduct was reasonably certain to cause his death. *See* TEX. PENAL CODE ANN. § 6.03(a), (b) (defining when a person acts intentionally or knowingly). In support of his contention, Vasquez points to evidence showing he fired only three shots, only one of the three shots was fatal, at least one shot ricocheted off the trunk of vehicle from which Vasquez fired, and given the entry point of the fatal shot, the victim must have been standing at a particular angle, which is something outside of Vasquez's control. Vasquez also points out the shots were fired in rapid succession, at night, over the trunk of a car at a time when he was "pretty drunk," and there was no evidence he had any specialized firearm training. Vasquez further suggests that his distance from the victim negated intent or knowledge. Finally, Vasquez points out that witness Rafael Charley testified Vasquez fired "downwards." Vasquez contends all of this evidence, when considered together, is evidence from which the jury could have rationally concluded Mr. Gonzales "died quite simply of [a] fluke round that was not intended to kill or injure anyone." Based on the foregoing, Vasquez contends he negated the mens rea for murder and produced more than a scintilla of evidence that he acted recklessly, entitling him to a lesser-included-offense instruction on manslaughter. We disagree.

As noted above, as a reviewing court we must consider all of the evidence, not just that favorable to Vasquez's "fluke" theory. *See Bullock*, 509 S.W.3d at 925. Nor can we consider the evidence in a vacuum. *Id.* Moreover, mere speculation is insufficient — there must be

"affirmative evidence" that Vasquez acted recklessly, and did not intend to kill Mr. Gonzales or have knowledge that his conduct was reasonably certain to cause Mr. Gonzales's death. *See* TEX. PENAL CODE ANN. § 6.03(a), (b); *Cavazos*, 382 S.W.3d at 385.

With regard to Mr. Vasquez's assertion that there is evidence he shot "downwards," we find this contention is taken out of context. Rafael Charley, a friend of Vasquez's, used the word "downwards" when asked by the State whether Vasquez was "shoot[ing] wildly, like shoot[ing] up in the air or anything like that?" Mr. Charley further testified Vasquez jumped out of the driver's seat of the car and started shooting; he saw the gun in Vasquez's hand. He said Vasquez was holding the gun as if he was shooting at something, and although he did not see what he was shooting at, he saw Mr. Gonzales fall down. According to Mr. Charley, Vasquez fired four times and he watched him shoot four times in the same general area. He testified Vasquez pointed and shot.

Several additional witnesses testified about the shooting. Security officer Alejandro Rodriguez testified he, the club doorman, and the victim were standing together outside the nightclub — "within an arm's reach" of each other — when he heard a "pop" and then saw a muzzle flash coming from a Crown Victoria, which was identified by another witness as the car driven by Vasquez. He stated someone was shooting at them. Mr. Rodriguez and the doorman took cover, checking to see if they had been shot. He identified Vasquez as the man who was shooting at them from the Crown Victoria. Mr. Rodriguez testified the gun was pointed straight out in front of Vasquez — not toward the sky or down at the ground.

Another witness, Genevieve Rosas, testified the driver of the Crown Victoria, who she identified as Vasquez, "got out . . . looked towards where the [Mr. Gonzales]" was standing, "went back into his car, got a gun, and pointed at [Mr. Gonzales] [and] started shooting." Ms. Rosas testified Vasquez pointed the gun directly at Mr. Gonzales and started shooting. When asked if it

looked like Vasquez was aiming the gun anywhere other than at Mr. Gonzales, Ms. Rosas said, "No. He got out specifically to look directly at [Mr. Gonzales], and then he went back into his car to get the gun and he just started shooting at him." Thereafter, Vasquez got back into the Crown Victoria and drove off.

Additionally, when asked, witness Felicia Mireles, stated that as he was shooting, Vasquez had his arm straight out and pointed at a height where he could hit people. She specifically testified she saw Vasquez fire the gun "more than twice." Ms. Mireles stated Vasquez never shot up into the air, down to the side, or down the road — he kept the gun pointed straight ahead.

With regard to Vasquez's "fluke" theory, the medical examiner testified the victim was struck not once, but twice on his right side — a bullet entered above Mr. Gonzales's elbow, fracturing the bones around the elbow joint including the radius, ulna, and humerus, and a bullet entered the back of Mr. Gonzales's shoulder, perforating his lung, heart, and upper stomach. The medical examiner could only opine that the shots were made from more than three or four feet away, and although there was testimony suggesting the shots were taken from a distance, there was no specific testimony or evidence about the exact distance from which the shots were taken. In fact, testimony from Mr. Rodriguez made it seem as if he and the victim were not far from the vehicle from which Vasquez was shooting.

In sum, the evidence shows Vasquez fired a handgun three or four times at several people, who were at an undetermined distance from him. The shots he fired struck the victim not once, but twice. Numerous witnesses stated Vasquez was shooting at something, not just wildly shooting — one witness stated he was pointing the gun toward Mr. Gonzales while he was shooting, and at a height were he could hit someone. We hold, much as the court did in *Cavazos* that "pulling out a gun, pointing it at someone, pulling the trigger " three or four times, and subsequently fleeing the scene "does not rationally support an inference" that Vasquez acted recklessly at the moment

he fired the shots at Mr. Gonzales. *See Cavazos*, 382 S.W.3d at 385. Based on all of the evidence in the record, we hold the facts did not raise manslaughter as a valid, rational alternative to murder. Accordingly, Vasquez was not entitled to a lesser-included-offense instruction on manslaughter.

CONCLUSION

We hold the trial court did not err in refusing Vasquez's request for a lesser-included-offense instruction on manslaughter. Although manslaughter is a lesser-included offense of murder as it was charged in the indictment, Vasquez failed to meet the second step of the analysis because there is no evidence that would permit a jury to find that if he is guilty, he is guilty only of the lesser offense of manslaughter. Accordingly, we overrule Vasquez's sole issue and affirm the trial court's judgment.

Marialyn Barnard, Justice

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