COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-13-00601-CR

ROGER CLARK — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 235TH DISTRICT COURT OF COOKE COUNTY
TRIAL COURT NO. CR12-00285

MEMORANDUM OPINION[1]

A jury found Appellant Roger Clark guilty of murder and assessed his punishment at ninety years' imprisonment in the penitentiary. In one point, Appellant contends that the evidence is insufficient to support the finding of guilt beyond a reasonable doubt. We affirm.

[1]*See* Tex. R. App. P. 47.4.

THE INDICTMENT

In the indictment, the State alleged that Appellant intentionally or knowingly caused the death of an individual, Patrick Fleitman, by shooting him with a firearm, a deadly weapon, on or about February 15, 2008, in Cooke County, Texas. *See* Tex. Penal Code Ann. § 19.02(b)(1) (West 2011).

APPELLANT'S COMPLAINT

In one point, Appellant contends the evidence is insufficient to prove he was guilty beyond a reasonable doubt. Appellant argues that the only evidence presented connecting him to the offense was unreliable and non-credible hearsay.

STANDARD OF REVIEW

In our due-process review of the sufficiency of the evidence to support a conviction, we view all of the evidence in the light most favorable to the verdict to 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, 99 S. Ct. 2781, 2789 (1979). This standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *Id.* at 319, 99 S. Ct. at 2789; *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App.), *cert. denied*, 136 S. Ct. 198 (2015). The trier of fact is the sole judge of the weight and credibility of the evidence. *See* Tex. Code Crim. Proc. Ann. art. 38.04 (West 1979); *Dobbs v. State*, 434 S.W.3d 166, 170 (Tex. Crim. App. 2014).

Thus, when performing an evidentiary sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *See Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). Instead, we determine whether the necessary inferences are reasonable based upon the cumulative force of the evidence when viewed in the light most favorable to the verdict. *Murray*, 457 S.W.3d at 448. We must presume that the factfinder resolved any conflicting inferences in favor of the verdict and defer to that resolution. *Id.* at 448–49. The standard of review is the same for direct and circumstantial evidence cases; circumstantial evidence is as probative as direct evidence in establishing guilt. *Dobbs*, 434 S.W.3d at 170; *Acosta v. State*, 429 S.W.3d 621, 625 (Tex. Crim. App. 2014).

EVIDENCE

Investigator Burk Finds Fleitman's Body

Jimmy Burk was a sergeant investigator in February 2008. On Saturday, February 16, 2008, sometime after 5:30 p.m., Cook County dispatch notified him of a gunshot victim found on County Road 320 outside of Era, Texas. Someone had reported a body around 5:00 p.m.

When Burk pulled up at the location, he saw Fleitman lying on the sidewalk just off the step-down from the porch in front of the house. By the gaping wound in Fleitman's head and the large amount of brain tissue on the ground, Burk knew he was dead. Fleitman was also shot in the back. The body was already stiff.

Because the largest chunks of brain matter were very close to the head, this indicated to Burk that Fleitman was shot in the head while being down on the ground. Burk explained that if Fleitman had been shot while standing up, the larger chunks would have been expelled further away.

No Evidence of a Robbery or Buglary

Burk found Fleitman's wallet in his back pocket. Fleitman's driver's license was still in the wallet. The front door of the house was open, and the lights inside the house were on. Inside the living room were Fleitman's cell phone and his can of Copenhagen. After going through the house, Burk said there was no indication that there had been a robbery or a burglary. Although it had been raining for a couple days, there was no mud inside the house.

Burk Establishes that Fleitman Had Been in a Relationship with a Woman

Inside a closet Burk found a handwritten love letter addressed to Toni Clayton. Also inside the house was a birth announcement for one of Clayton's children. Inside Fleitman's truck was another undelivered love note to Clayton. After Burk spoke with Clayton, he confirmed that she and Fleitman had had a sexual relationship.

Burk Theorizes that Fleitman was Waiting to Meet Someone to Go Out With on Friday Night

In the bathroom sink was beard-type hair that suggested Fleitman had been cutting or shaving his facial hair. Burk said that the grooming was consistent with Fleitman's clothing; Burk explained, "He was cleaned up like he

was going to go out." With the door open, Burk thought that somebody pulled up, and Fleitman went outside and stepped down off the front porch to meet whoever arrived.

Burk Theorizes that the Murder Occurred Before Fleitman Went Out for the Evening, Not After He Went Out

Burk learned that Fleitman's father later found the keys to Fleitman's truck in the ignition. Fleitman's truck was out of both power and fuel and was sitting facing the garage. The truck had been left idling because it was cold. Burk said, "[H]e was fixing to leave at some point in his truck, so he was going to go out."

Burk said that if Fleitman was going to meet someone, whoever he was going to meet should have discovered his body Friday night by 11:00 p.m., not around 5:00 p.m. on Saturday. Burk testified that in the local environment, and specifically at a bar named the Spur, people typically went out later—around 9:00 or 10:00 p.m. The last phone call Fleitman made was around 6:35 p.m. on Friday, February 15, 2008. The Spur stopped serving alcohol at 1:30 a.m. and made everyone leave at 2:00 a.m. Burk said Fleitman was known to drink beer, so if Fleitman had left at closing time and gone home, Fleitman would have had alcohol in his system. From the autopsy report, Burk knew that Fleitman had no alcohol in his system.

Burk Determines Clayton's Husband was Working

Burk determined that Clayton was married. Burk thought her husband might be a suspect, but he determined that her husband was working the night of

the offense. After talking with several people, Burk determined that Clayton's husband drove a truck and was gone quite a bit, which gave Clayton opportunities to have affairs.

Clayton Had a Sexual Relationship With Appellant

Burk first came up with Appellant's name from talking with Clayton. She mentioned that Appellant knew Fleitman.

Burk said Appellant was interviewed on February 18, 19, and 20, 2008. Appellant also gave a written statement in May 2013. Appellant admitted having a sexual relationship with Clayton.

Clayton Wanted to Break Off Her Relationship With Fleitman; Fleitman Sent Clayton Flowers on Valentine's Day, and Clayton Enlisted Appellant's Help

Burk explained that Clayton indicated that Fleitman had become a problem for her and would not leave her alone. On Valentine's Day, Fleitman sent flowers to Clayton's house, "which did not go over well," so Clayton asked Appellant "to deal with it" so Fleitman would leave her alone. Appellant admitted talking to Fleitman.

A Witness Claimed to Have Seen the Murder

Nathaniel Carnes hung out with Appellant and was dating Appellant's stepdaughter. Carnes was in prison for sexual assault of an underage girl.

Burk had several interviews with Carnes. Burk testified that initially Carnes denied knowing anything about Fleitman's murder. However, Carnes later told Burk that Carnes went out with Appellant and witnessed Appellant murder

Fleitman. Carnes's description of the scene matched the physical evidence. Carnes knew the shot sequence, where Fleitman was lying, and the type of clothing Fleitman was wearing. Carnes said Appellant shot Fleitman in the back, walked over to him, and then shot him in the head, which fit what Burk saw in the physical evidence. Carnes described the weapon as a break-over type, single-shot sawed-off 12-gauge shotgun. Burk testified that Fleitman was shot with a slug and with buckshot, both of which were 12-gauge ammunition. Carnes told Burk that Carnes was supposed to distract Fleitman, that Fleitman came out of the house, out onto the porch, and down onto the sidewalk.

Burk checked Carnes's time sheet where Carnes worked and determined that he usually got off around midnight, but on Friday, February 15, 2008, he got off at 10:05 p.m. Burk estimated that the drive time from where Carnes worked to Fleitman's house was about ten to fifteen minutes, which meant that Carnes and Appellant could have arrived at Fleitman's house between 10:20 and 10:30 p.m. By comparison, Clayton's husband's records showed he was working at that time that night.

Appellant Denied Owning a Shotgun but was Seen Purchasing Shotgun Shells Shortly Before the Murder and was Seen with a Shotgun on the Night of the Murder

Justin Patterson, another investigator who worked on Appellant's case, testified that he asked Appellant pointblank if he owned a shotgun. Appellant denied owning one.

However, Patterson testified that Wal-Mart had a video of Appellant purchasing shotgun slugs with cash on February 11, 2008. Patterson testified that moments later Appellant purchased other items with a debit card.

Appellant's father, Ronald Clark, testified that he saw Appellant with a 12-gauge shotgun on the night of the murder. Clark testified that Appellant left that evening saying he was going to the store, but Appellant was gone longer than it took to go to the store, and when Appellant returned, he did not have anything from the store. Clark could tell Appellant was nervous and could see that Appellant had a 12-gauge shotgun. Appellant told Clark, "If anybody asked, to tell them I was here."

Clark said Appellant took the gun to his bedroom. When Appellant was arrested, Melinda (Appellant's wife) and her mother came by and took the gun to East Texas.

Melinda asked Clark to get rid of some shells, but not wanting to get involved, he declined. Clark testified that Melinda then took the shells down to a field and tossed them.

Patterson testified that the police found a bandolier with shotgun rounds in Appellant's bedroom. The rounds were for a 12-gauge shotgun.

Fleitman Told a Friend on Februrary 15, 2008, that He was Meeting Up with Appellant that Night to Go to the Spur

Chad Fitts testified that he knew Fleitman. He saw Fleitman every day, and they would usually have lunch together.

Fitts stated that a couple of weeks before Fleitman's death, Clayton started distancing herself from Fleitman. Fitts described Fleitman as fairly upset about it because he still loved Clayton.

Fitts said that he and Fleitman had lunch on February 15, 2008. Fleitman told Fitts that he had sent Clayton flowers the day before on Valentine's Day, which Fitts described as really strange because he was aware that Clayton had made it very clear to Fleitman that she did not want a relationship anymore.

Fitts testified that Fleitman indicated that he was planning on going to the Spur that Friday evening with Appellant. Fleitman told Fitts that he was certain Appellant would show up because Appellant had stood him up the weekend before.

Fleitman's Father

Fleitman's father testified that the last time he spoke to Fleitman was just before 5:00 p.m. on February 15, 2008. Fleitman told his father that he was going to the Spur and meeting a friend.

DISCUSSION

Appellant argues that no murder weapon was found, that no fingerprints were found at the scene, that none of Fleitman's DNA was found on Appellant or any of his belongings, that no footprints or tire tracks were taken from the scene, and that there was no testimony identifying any particular vehicle at or near the crime scene that weekend. Appellant contends that the only evidence connecting him to the offense was the inadmissible hearsay of Carnes.

Appellant argues that Carnes himself never testified and that Carnes, as a convicted felon, was completely lacking in credibility.

The determination of the probative value of particular items of evidence is the responsibility of the trier of fact. *Fernandez v. State*, 805 S.W.2d 451, 456 (Tex. Crim. App. 1991). This includes the probative value of unobjected-to hearsay. *See id.* What weight to give evidence—even that of a convicted felon—is within the sole province of the trier of fact. *See Short v. State*, 995 S.W.2d 948, 952 (Tex. App.—Fort Worth 1999, pet. ref'd). Once the trier of fact had made its decision regarding the probative value of the evidence, an appellate court does not have the power to reevaluate the probity of an individual item of evidence during its review of the sufficiency of the evidence. *Fernandez*, 805 S.W.2d at 456. An appellate court determines only whether any rational trier of fact could have, based on the evidence admitted at trial, found the essential elements of the offense beyond a reasonable doubt. *Id.*

All of Burk's testimony regarding what Carnes told him came in without objection. Inadmissible hearsay admitted without objection is not denied probative value merely because it is hearsay. *Id.* at 455–56. We must consider it when performing our sufficiency review. *See Poindexter v. State*, 153 S.W.3d 402, 406–09 (Tex. Crim. App. 2005) (holding that once a trier of fact has weighed the probative value of otherwise inadmissible hearsay evidence, an appellate court cannot deny that evidence probative value or ignore it in its sufficiency review), *overruled on other grounds by Robinson v. State*, 466 S.W.3d 166, 173

n.32 (Tex. Crim. App. 2015) (holding that appellate courts should disregard a trial court's findings of fact and conclusions of law even when they support a trial court's judgment).

Furthermore, according to Burk, Carnes stated that he was at the scene for the purpose of distracting Fleitman. If that is the case, Carnes was more than a witness; he was a party. *See* Tex. Penal Code Ann. § 7.02(a)(2) (West 2011). As a party, Carnes's statements were against his interest and were, therefore, admissible. *See* Tex. R. Evid. 803(24); *see also State v. Ambrose*, 487 S.W.3d 587, 593 (Tex. Crim. App. 2016) (stating that if an accomplice to the offense testifies for the State, the accomplice's testimony must be corroborated by non-accomplice evidence that tends to connect the accused to the offense).

Regardless, as the finder of fact, the jury decided whether to believe Burk's testimony that he met with Carnes and, further, whether to believe Burk's testimony regarding what Carnes told him. *See Fernandez*, 805 S.W.2d at 456. Whether to believe Carnes notwithstanding the fact he was a felon was also the jury's prerogative. *See Short*, 995 S.W.2d at 952. As an appellate court we do not have the power to step in and reevaluate the probity of particular evidence. *See Fernandez*, 805 S.W.2d at 456.

The other evidence circumstantially pointed consistently to Appellant. There was evidence that Fleitman anticipated meeting Appellant on the night of February 15, 2008. This meant that Appellant could approach Fleitman after dark without alarming him. Furthermore, if Appellant had met Fleitman as

planned, Appellant should have seen his body on the front sidewalk that night and—one would think—reported it to the police immediately. Appellant did not. No one made a call about Fleitman's body until the next day around 5:00 p.m.

"Motive is a significant circumstance indicating guilt." *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). Appellant was having sexual relations with Clayton, and Fleitman had sent Clayton flowers on Valentine's Day. Clayton wanted Fleitman to leave her alone, and when he did not, she asked for Appellant's help. The evidence showed that robbery and burglary were not the motive. Although motive is not an element of the offense, motive can put the events into a comprehensible context.

Attempts to conceal incriminating evidence are also a circumstance of guilt. *Id.* Appellant tried to conceal incriminating evidence. Appellant denied having a shotgun. Despite claiming not to have a shotgun, Appellant purchased shotgun shells with cash only days before the murder. Clark, Appellant's father, saw him with a shotgun on the night of the offense.

Appellant instructed Clark to lie about where Appellant was on the night of the murder. Clark knew his son left on the pretext of going to the store. Appellant wanted Clark to say Appellant was home.

After Appellant was arrested, his wife removed the shotgun from his room. Later she disposed of some shotgun shells. This suggests Appellant's wife was trying to eliminate incriminating evidence against her husband.

Viewing the evidence in the light most favorable to the verdict, we hold that a rational trier of fact could have, based on the evidence admitted at trial, found beyond a reasonable doubt that Appellant intentionally or knowingly caused the death of Fleitman by shooting him with a firearm, a deadly weapon, on or about February 15, 2008. *See Jackson*, 443 U.S. at 319; *Fernandez*, 805 S.W.2d at 456. We overrule Appellant's sole point.

CONCLUSION

We hold that the evidence was sufficient and affirm the trial court's judgment.

/s/ Anne Gardner
ANNE GARDNER
JUSTICE

PANEL: LIVINGSTON, C.J.; GARDNER and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: October 20, 2016