AFFIRM; and Opinion Filed January 11, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00279-CR

RICHARD LOUIS BUTLER, JR., Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2
Dallas County, Texas
Trial Court Cause No. F15-75937-I

MEMORANDUM OPINION

Before Justices Lang, Fillmore, and Myers
Opinion by Justice Fillmore

A jury convicted Richard Louis Butler, Jr. of murder and assessed punishment of twenty-seven years' imprisonment. In his first two issues, Butler contends this Court should use a factual sufficiency standard in reviewing whether the record supports the jury's implied finding that he was not acting in self-defense, and the evidence is legally and factually insufficient to support the jury's rejection of his self-defense claim. In his third issue, Butler argues the evidence is factually insufficient to support the jury's finding he was not acting under sudden passion due to an adequate cause at the time of the murder. We affirm the trial court's judgment.

Background

On September 7, 2015, Sergeant Calvin Johnson of the Dallas Police Department was working an off-duty job at the Cliff Manor Apartments. Sergeant Johnson arrived at the apartments

between 8:00 and 8:30 p.m., and parked his squad car in a location from which he could watch the front of the building and, through a wrought iron fence, the east side of the property, where "everyone congregate[d] inside the property." Approximately an hour after he arrived, Sergeant Johnson heard gunshots and saw people running. Prior to the gunshots, Sergeant Johnson had not "heard anything uncommon," and nobody had tried to "get his attention." Butler met Sergeant Johnson at the gate of the apartments, and said he shot Jesse Willis.

Dewayne Bishop, the police liaison assigned to the Dallas Housing Authority, testified there are cameras mounted on the outside of the building at the Cliff Manor Apartments. The cameras are analog, meaning the recordings show frames rather than continuous motion, and there is no audio on the recordings. One of the cameras recorded the events that occurred at the rear of the apartments on September 7, 2015, and the recording was played for the jury. Bishop testified the recording shows people sitting at the tables outside the apartment building and gathered around a pickup truck in the parking lot. Willis appears in the scene, bends over briefly, and then walks toward the truck. Another man, later identified only as "D-Mack," also approaches the truck. Butler, who is sitting in the back of the truck, stands up and shoots Willis. In the video, Bishop never saw Willis step up onto the truck.

The truck belonged to Butler, and the group gathered around it on September 7, 2015, included LaDonna Smith, Renee Gaston, Catherine Cox, Richard Carl Cole, and Haven Vaughn, who all lived in the apartments. Angela Mrewa, who was also a resident of the apartments, was sitting at one of the tables and could see Butler's truck. As set out below, Mrewa, Smith, Gaston, Cox, and Vaughn all testified fairly consistently about the events that occurred on September 7, 2015.[1]

[1] However, each of these witnesses did not testify as to all of the recounted facts.

Willis was not a resident of the Cliff Manor Apartments, but was often at the apartments caring for his father. According to Cox, Willis was a "bully." Further, Cox was familiar with Willis's reputation "as a peaceable person in the community," and that reputation was "bad." At some point on September 7, 2015, Willis spoke to Mrewa, and she could tell "his mind was on something that wasn't good."

The evening of September 7, 2015, people were sitting on the tailgate of Butler's truck and in chairs around the truck, and were standing beside the truck. Butler was sitting on the wheel cover in the bed of the truck. The group was listening to music and having drinks. Several of the people gathered at the truck knew that Sergeant Johnson was parked on the other side of the fence.

Willis walked over to the truck, and said he should report them for smoking marijuana. Cox told Willis to "get your snitching ass on." Butler asked Willis to leave them alone. Willis became very angry, and said, "You always got something to say." Butler said he did not have a "beef" with Willis, he just wanted Willis to leave them alone. Willis said he was tired of Butler and would come back "in a minute" in "beast mode." Smith understood that term to mean Willis was "coming back angry," and Gaston believed Willis was coming back to hurt somebody.

After Willis left, Butler said he needed to use the restroom and went into the building. When he returned, he climbed into the back of the truck, and said he was glad Willis was gone "because if he come back, I got something for him." Butler told Vaughn he had retrieved his gun "because this guy is just wanting to do me in." Butler also said that if Willis came back "picking on" or "trying to fight" him, he was "going to let [Willis] have it." Cox told Butler that was not right or necessary, and Butler needed to "let it go." Vaughn told Butler he did not need a gun. Butler put the gun down in the bed of the truck by the wheel cover.

Willis changed into a muscle shirt, came out of the apartment building, and stopped to tie his shoes. He then approached Butler's truck, while D-Mack approached the truck from the other

side. Cox saw a third man coming out of the building, and thought the three men were coming to "jump" Butler. Mrewa heard D-Mack telling Willis to "leave it alone," and Mrewa started telling D-Mack that "ya'll just need to go home, you know, get dressed, go to the club, gone [sic] on where you're going." Willis came to the side of the truck and asked Butler to fight. Cox asked Willis to leave them alone. Vaughn testified Willis said, "Why don't you shut up, bitch." Butler told Willis to "stop cussing around the ladies," and asked Willis to leave the truck two or three times. Willis started walking around the end of the truck, and moved as if he was going to step up onto the truck. Butler stood up and shot at Willis three times. The first shot hit Willis. Willis grabbed his chest and started running toward the gate.

Butler also testified about the events leading up to the shooting. According to Butler, he had prior interactions with Willis. Although he characterized these interactions as "minor stuff," he also stated Willis was disrespectful and rude, and characterized one of the interactions as "provocation." On September 7, 2015, a number of people gathered at his truck, and were drinking and smoking marijuana. Willis came up to the truck, and Cox asked him to leave. Willis said, "Bitch, you will not tell me what to do, you don't own this truck, you don't own this area." Butler asked Willis to leave because "he's known for disrespecting women." There were some "words" between them, and Willis said, "I'm going to turn beast mode on you." To Butler, that meant Willis was going to "tear his head off," "beat him to a pulp," and "stomp him to death." After Willis left, Butler went into the building to use the restroom.

According to Butler, he always had his gun "in his waist" at nighttime because the Cliff Manor Apartments was a dangerous place. Butler did not recall telling the police that he got the gun after Willis left the truck. Butler put his gun "inside his tire wheel," and told Vaughn he "had something" for Willis if he came back. Butler saw Willis coming out of the building and "going down towards his ankles." Although Butler thought Willis was tying his shoes, he was also

concerned he might have an "ankle gun." Butler also saw D-Mack, who was not his friend and had no reason to be coming to his truck, and a third man who was associated with Willis, and was afraid the three men were acting together.

Butler asked Willis to leave, and Willis responded that, if Butler continued to disrespect him, he would kill Butler. Butler again asked Willis to leave. Willis put his right foot on the tailgate of the truck, and Butler shot Willis because he thought he was going to "turn beast mode" on him. According to Butler, he was hospitalized for two days due to high blood pressure, had been released the day before the shooting, and was not healthy enough to be in a fight. He believed that, if he was in a fight, "that could have burst a vessel" in his leg that went to his heart. He thought this could cause a heart attack because something similar happened to a friend of his. He was also concerned that Willis going "beast mode" on him could cause paralysis or death.

Butler testified he hated it when men disrespect women, and Willis disrespected Cox. Butler described himself as a "protector" when he was around "loved ones and friends." He had "control of that parking lot," and should not have to be afraid of someone who did not live in the apartments. The jury heard Butler's statement to the police following the shooting that sometimes you have to take care of yourself and "make some examples." This could mean there are "going to be casualties, going to be death."

In the guilt-phase charge, the trial court instructed the jury on the law pertaining to self-defense and that, if the jury found Butler was acting in self-defense, it was required to acquit him. The jury found Butler guilty of murder. In the punishment-phase charge, the trial court instructed the jury on the law regarding sudden passion. In response to a special issue, the jury found Butler was not under the immediate influence of sudden passion arising from an adequate cause at the time of Willis's death. The jury sentenced Butler to twenty-seven years' imprisonment.

Self-Defense

Butler does not challenge the sufficiency of the evidence to support the jury's finding of the essential elements of murder beyond a reasonable doubt.[2] Instead, in his first two issues, he challenges the sufficiency of the evidence to support the jury's rejection of his self-defense claim, and argues we should employ a factual sufficiency standard in reviewing whether the record support the jury's implied finding he was not acting in self-defense.

Appropriate Standard of Review

We first consider Butler's second issue in which he argues we should use a factual sufficiency standard in reviewing whether the record supports the jury's rejection of his claim of self-defense. In *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010) (plurality op.), the court of criminal appeals explained there was no longer a meaningful distinction between the legal-sufficiency standard set out in *Jackson v. Virginia*, 443 U.S. 307 (1979), and the factual sufficiency standard set out in *Clewis v. State*, 922 S.W.2d 126 (1996). The court held "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt," and overruled "[a]ll other cases to the contrary, including *Clewis*[.]" *Id.* at 912.

Three years later, the court of criminal appeals explained the *Clewis* factual sufficiency standard was still applicable to sufficiency reviews of an affirmative defense. *Matlock v. State*, 392 S.W.3d 662, 664, 667 (Tex. Crim. App. 2013); *see also Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015) (applying factual sufficiency review to jury's rejection of affirmative defense). The court distinguished *Brooks*, noting the *Jackson v. Virginia* "constitutional standard

[2] As charged here, a person commits murder if he (1) intentionally or knowingly causes the death of an individual, or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (West 2011).

of review applies to the elements of an offense that the State must prove beyond a reasonable doubt, but it does not apply to elements of an affirmative defense that the defendant must prove by a preponderance of the evidence." *Matlock*, 392 S.W.3d at 667.

Self-defense, however, is classified as a defense, with burdens at trial that alternate between the defense and the State, not an affirmative defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003) (explaining that self-defense is "classified as a defense, as opposed to an affirmative defense"); *Saxton v. State*, 804 S.W.2d 910, 912 n.5 (Tex. Crim. App. 1991) (noting that self-defense is a defense to prosecution under section 2.03 of the penal code).[3] Therefore, the *Clewis* factual-sufficiency standard does not apply when we conduct a review of the sufficiency of the evidence to support the jury's implied rejection of a defendant's claim of self-defense. *Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) ("Because the State bears the burden of persuasion to disprove a section 2.03 defense by establishing its case beyond a reasonable doubt, we review both legal and factual sufficiency challenges to the jury's rejection of such a defense under the *Jackson v. Virginia* standard."); *see also Brooks*, 323 S.W.3d at 912.[4] Accordingly, we resolve Butler's second issue against him.

Sufficiency of the Evidence

In his first issue, Butler complains the evidence is insufficient to support the verdict because a rational jury could not have rejected his claim of self-defense. When an appellant challenges the legal sufficiency of the evidence to support the jury's implicit rejection of his self-defense claim we review all the evidence in the light most favorable to the verdict, and determine whether "any rational trier of fact would have found the essential elements of murder beyond a

[3] *See also Swe v. State*, No. 05-16-00810-CR, 2017 WL 3015855, at *4 n.2 (Tex. App.—Dallas July 17, 2017, no pet.) (mem. op., not designated for publication).

[4] *See also Swe*, 2017 WL 3015855, at *4 n.2; *Strauser v. State*, No. 04-16-00478-CR, 2017 WL 4657467, at *1 (Tex. App.—San Antonio Oct. 18, 2017, no pet.) (mem. op., not designated for publication); *Pridgen v. State*, No. 12-13-00136-CR, 2014 WL 6792583, at *1 (Tex. App.—Tyler Dec. 3, 2014, pet. ref'd.) (mem. op., not designated for publication).

reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914; *Gaona v. State*, 498 S.W.3d 706, 709 (Tex. App.—Dallas 2016, pet. ref'd). The defendant has the initial burden to produce evidence supporting self-defense. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913. Once the defendant produces some evidence, the State bears the ultimate burden of persuasion to disprove the raised defense. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913–14. The State is not required to produce evidence refuting the claim of self-defense, but must prove its case beyond a reasonable doubt. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913.

The issue of self-defense is a fact issue to be determined by the jury, and the jury is free to accept or reject any defensive evidence on the issue. *Saxton*, 804 S.W.2d at 913–14; *see also Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) ("The factfinder exclusively determines the weight and credibility of the evidence.").[5] If the jury finds the defendant guilty, then it implicitly finds against the defensive theory. *Saxton*, 804 S.W.2d at 914.[6] When the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of the verdict, and we defer to that determination. *Jackson*, 443 U.S. at 319 (factfinder's duty to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"); *Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016), *cert. denied*, 137 S.Ct. 1207 (2017).[7]

Analysis

A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use

[5] *See also Robic v. State*, No. 05-16-00337-CR, 2017 WL 2665269, at *3 (Tex. App.–Dallas June 21, 2017, pet. ref'd) (mem. op., not designated for publication).

[6] *See also Robic*, 2017 WL 2665269, at *3.

[7] *See also Jackman v. State*, No. 08-14-00176-CR, 2016 WL 4538533, at *6 (Tex. App.—El Paso Aug. 31, 2016, no pet.) (not designated for publication).

or attempted use of unlawful force. TEX. PENAL CODE ANN. § 9.31(a) (West 2011). A person is justified in using deadly force against another (1) if he would be justified in using force against another under section 9.31, and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. *Id.* § 9.32(a). "Deadly force" means force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury. *Id.* § 9.01. "Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. *Id.* § 1.07(a)(42) (West Supp. 2017). In assessing a claim of self-defense, the jury may consider the totality of the circumstances leading up to, during, and after the use of force. *See Whipple v. State*, 281 S.W.3d 482, 497–98 (Tex. App.—El Paso 2008, pet. ref'd) (considering circumstances before and after shooting); *Valdez v. State*, 841 S.W.2d 41, 43 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (considering acts taken after shooting).[8]

Relying on his medical condition on September 7, 2015, and on Willis's statements that he would return in "beast mode" and kill him, Butler contends it was reasonable for him to use deadly force to protect himself when Willis stepped onto the truck because Willis intended to attack him, he did not know if Willis had a gun, and Willis's fists could be a deadly weapon. However, the jury repeatedly saw the video of the shooting, which does not show Willis stepping onto Butler's truck, and heard Bishop's explanation of what was depicted on the video. The jury also heard evidence that, after the verbal confrontation with Willis, Butler left the truck for a short period of time. Regardless of whether Butler retrieved his gun while he was gone or already "had it on his waist," when he came back he told his friends that he "had something" for Willis if he returned to

[8] *See also Santos-Garcia v. State*, No. 08-13-00324-CR, 2017 WL 5899176, at *6 (Tex. App.—El Paso Nov. 30, 2017, no pet. h.) (not designated for publication).

the truck. Butler's friends attempted to convince him not to use the gun or escalate the situation, and Butler placed the gun in the bed of the truck beside the wheel cover. When Willis returned, he stopped to tie his shoes. He then approached the truck, and asked Butler if he wanted to fight. Butler told Willis to leave and, when Willis failed to do so, shot him.

Finally, Butler testified Willis was rude and disrespectful in prior interactions between the two men. Butler believed that Willis was disrespectful to women, and Willis was disrespectful to Cox on September 7, 2015. Butler viewed himself as a "protector" of his friends, and told the police following the shooting that sometimes an "example" had to be made and there could be "casualties."

Even though Butler expressed he was in fear of Willis at the time of the shooting, a rational jury could have found that Willis approaching Butler with nothing but his fists was not the use or attempted use of unlawful deadly force by Willis against Butler, and that Butler's belief that deadly force was immediately necessary was not reasonable under the circumstances. *See Laster v. State*, 275 S.W.3d 512, 523 (Tex. Crim. App. 2009) ("As long as the verdict is supported by a reasonable inference, it is within the province of the factfinder to choose which inference is most reasonable.").[9] Viewing the evidence in the light most favorable to the verdict, we conclude a rational jury could have found against Butler on the self-defense issue beyond a reasonable doubt. We resolve Butler's first issue against him.

Sudden Passion

In his third issue, Butler asserts the evidence is factually insufficient to support the jury's finding he did not shoot Willis while under sudden passion from an adequate cause.

[9] *See also Franklin v. State*, No. 05-16-00546-CR, 2017 WL 4684070, at *4 (Tex. App.—Dallas Oct. 19, 2017, no pet.) (mem. op., not designated for publication) ("Considering all the evidence in a light most favorable to the verdict, and given the jury's role in resolving conflicts in the evidence, we conclude the jury could have rationally rejected appellant's claim of self-defense.").

Standard of Review

Although the issue of sudden passion is a punishment issue, it is analogous to an affirmative defense because the defendant has the burden of proof by a preponderance of the evidence. *Gaona*, 498 S.W.3d at 710. For this reason, a finding on sudden passion may be evaluated for legal and factual sufficiency. *Id.*

In making a factual sufficiency claim, an appellant is asserting that, considering the entire body of record evidence, the factfinder's adverse finding on his affirmative defense of sudden passion was so "against the great weight and preponderance" of that evidence as to be manifestly unjust. *Matlock*, 392 S.W.3d at 671. In a factual sufficiency review of a rejected affirmative defense, we view the entirety of the evidence in a neutral light, but may not usurp the function of the factfinder by substituting our judgment in place of the factfinder's assessment of the weight and credibility of witness testimony. *Id.* We may sustain a factual sufficiency claim only if, after setting out the relevant evidence supporting the verdict, we clearly state why the verdict is so much against the great weight of the evidence as to be "manifestly unjust, conscience-shocking, or clearly biased." *Butcher*, 454 S.W.3d at 20 (quoting *Matlock*, 392 S.W.3d at 671).

Analysis

At the punishment stage of a murder trial, the defendant may raise an issue as to "whether he caused the death under the immediate influence of sudden passion arising from an adequate cause." TEX. PENAL CODE ANN. § 19.02(d). "If the defendant proves the issue in the affirmative by a preponderance of the evidence, the offense is a felony of the second degree." *Id.* A person acts with "sudden passion" if the passion is directly caused by and arose out of provocation by the individual killed and the passion arises at the time of the offense and is not solely the result of former provocation. *Id.* § 19.02(a)(2). An "adequate cause" is one that would "commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render

the mind incapable of cool reflection." *Id.* § 19.02(a)(1); *see also De Leon v. State*, 373 S.W.3d 644, 650 (Tex. App.—San Antonio 2012, pet. ref'd) ("defendant's fear is only sufficient if the cause of the fear could produce fear that rises to a level of terror which makes a person of ordinary temper incapable of cool reflection").

The issue of whether Butler acted under the immediate influence of sudden passion arising from an adequate cause hinged on the jury's evaluation of Butler's credibility, and we must defer to the jury's resolution of the issue. *See Matlock*, 392 S.W.3d at 671. Generally, a claim of fear is insufficient to establish a person acted under sudden passion arising from an adequate cause. *See Smith v. State*, 721 S.W.2d 844, 854 (Tex. Crim. App. 1986) (internal quotations omitted) (concluding "bare claim of fear" does not demonstrate sudden passion arising from an adequate cause); *De Leon*, 373 S.W.3d at 650 (neither ordinary fear nor anger alone is sufficient to establish sudden passion).[10] Further, the jury could have chosen instead to believe Butler had been involved in a number of confrontations with Willis, and felt Willis had been disrespectful toward him as well as toward Cox. After Willis stated he would return in "beast mode," Butler placed his gun beside the wheel cover of his truck and told his friends that, if Willis returned, "he had something for him." Willis returned and wanted to fight Butler, and Butler told Willis to leave. When Willis did not do so, Butler picked up his gun and shot Willis. Butler then told the police that sometimes examples have to be made and there will be casualties.

After reviewing all the evidence relevant to sudden passion in a neutral light, we cannot conclude the jury's rejection of Butler's claim of sudden passion arising from an adequate cause "is so much against the great weight of the evidence as to be manifestly unjust, conscience-

[10] *See also Debusk v. State*, No. 05-16-00947-CR, 2017 WL 3275904, at *8 (Tex. App.—Dallas July 27, 2017, pet. ref'd) (mem. op., not designated for publication).

shocking, or clearly biased." *See Matlock*, 392 S.W.3d at 671. We resolve Butler's third issue against him.

We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

RICHARD LOUIS BUTLER, JR., Appellant

No. 05-17-00279-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 2, Dallas County, Texas, Trial Court Cause No. F15-75937-I. Opinion delivered by Justice Fillmore, Justices Lang and Myers participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 11th day of January, 2018.