Opinion Issued December 4, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00081-CR

ANTHONY WADE BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1048441

MEMORANDUM OPINION

Anthony Wade Brown appeals his conviction for first degree felony murder. Brown pleaded not guilty. The jury found Brown guilty, and the trial court assessed punishment at forty-five years' confinement. In three issues, Brown contends that the evidence is legally and factually insufficient to support a guilty verdict, and that he was unfairly prejudiced by an improperly admitted hearsay statement. We conclude that the evidence is legally and factually sufficient to support his conviction, and that the contested statement was properly admitted. We therefore affirm.

Background

On the evening of November 25, 2005, Anthony Wade Brown and Michael Jnlouis, also known as "Twin" and "Yane" respectively, went to Tyrone Norris's apartment looking for Christy Wallen. Norris told Brown and Jnlouis that Wallen was not there, and they left. Later that night, Wallen arrived at Norris's home, and he informed her that Brown and Jnlouis were looking for her. Approximately five minutes later, Jnlouis and Brown returned to Norris's apartment to find Wallen. At the same time, Marie Mojica and another man were in the back bedroom of the apartment where they had been drinking, smoking crack cocaine, and watching a movie with Norris.

Norris testified that he let Brown and Jnlouis into the apartment so they could talk to Wallen, and the three of them began to argue about the "stuff" that they believed she had taken from them. According to Norris, either Brown or Jnlouis slapped Wallen, and Norris told them to take their conflict out of his apartment. Jnlouis and Brown began to drag Wallen out of the apartment. Wallen resisted and asked Norris for help, but Norris continued to tell the three of them to "get out of here with it" because he did not want to be involved in the altercation. Norris testified that Wallen continued to wrestle with the men as they attempted to drag her out of the apartment, and then he heard two gunshots. He testified that he never saw a firearm, but that he saw sparks when the shots were fired. He could not tell who fired the shots because it was dark in the apartment. Norris further testified on cross-examination that there was a third man whom he had never seen before at the apartment with Brown and Jnlouis. After the gunshots, Norris started "screaming and hollering" in terror and ran out of the apartment.

Marie Mojica testified that she was in the back bedroom of Norris's apartment when she heard Wallen asking Norris for help. She testified that she did not see anyone come into the apartment because she was in the back bedroom, but she heard Wallen arguing with someone over "dope" and

became scared. She testified that there was a woman in the front room where Norris, Wallen, Brown and Jnlouis were. She heard the woman say, "Twin, don't mess up your life like this, don't do this," and then she heard a gunshot. She ran out of the apartment to someone's house across the street. At trial, Brown objected to the statement as hearsay. The trial court judge overruled the objection.

Later, police questioned Norris and Mojica. Both identified Brown and Jnlouis[1] in police photo spreads as having been at the apartment on the night of the murder.

Officer A. Arevalo of the Houston Police Department arrived at the scene of the incident and found a dead female lying on her side in a large pool of blood, just inside the threshold of Norris's apartment. After preserving the scene, he searched the apartment and found no one else inside. Officer Arevalo then found Norris nearby and identified him as a potential witness. Officer C. Scales and Officer M. Scott questioned Norris and Mojica in the months following the crime.

Clay Davis, a criminalist with the Houston Police Department Crime Lab, compared the DNA samples of the items found at the scene with the

[1] Norris and Mojica could only identify Brown and Jnlouis by their nicknames, Twin and Yane respectively, as they did not know their real names. At trial, Norris could no longer remember which was Twin and which was Yane.

DNA samples of Norris, Brown, Wallen, and Jnlouis. Davis's comparison excluded Brown and Jnlouis from being major contributors to the DNA samples of Wallen's left and right fingernail scrapings, her pants, and the bandana that was found at the scene. The comparison also excluded Brown as being a contributor to the DNA profile found on the ski mask, but Jnlouis could not be excluded, meaning that there was an extremely high chance that Jnlouis was one of two contributors to the DNA on the mask.

Dr. Stephen Wilson performed an autopsy on Wallen's body. He found gunshot wounds on her head, neck, and right hand. Dr. Wilson also found a number of contusions, abrasions, and scraping injuries on her skin. He testified that some of them were old injuries, but others were recent and may have been caused by a physical altercation shortly before her death. Dr. Wilson concluded that Wallen died as a result of a gunshot wound that was inflicted at a close range. He also found that there was cocaine in her system at the time of the incident.

Christie Carrington testified that Brown and Jnlouis were with her during the entire weekend of Wallen's murder. She testified that she picked them up at around three or four o'clock on Friday afternoon and drove them to her house to attend a party there. She returned them to one of their mothers' homes on Sunday after she answered a call from the police on

either Brown of Jnlouis's cell phone. She further testified that neither Jnlouis nor Brown had a car, and that the scene of the murder was thirty-five to forty minutes away from her home. Carrington had multiple prior theft convictions, and she did not tell the investigating officers that Jnlouis and Brown were with her the night of the murder.

Legal and Factual Sufficiency

In his first and second issues, Brown contends that the evidence is legally and factually insufficient to support a guilty verdict because the State presented no evidence proving that he either caused Wallen's death or was a party to her murder. In particular, Brown observes that the scientific evidence does not incriminate him, and the witnesses who testified against him are unreliable.

Standard of Review

When evaluating the legal sufficiency of the evidence, we 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 offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005). The standard is the same for both direct and circumstantial evidence cases. *King v. State*, 895 S.W.2d 701, 703 (Tex.

Crim. App. 1995). We do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses, as this is the function of the trier of fact. *See Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *Adelman v. State*, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992); *Matson v. State*, 819 S.W.2d 839, 843 (Tex. Crim. App. 1991).

When evaluating factual sufficiency, we consider all the evidence in a neutral light to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We set aside a verdict only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot conclude that a verdict is "clearly wrong" or "manifestly unjust" simply because, on the quantum of evidence admitted, we would have voted to acquit had we been on the jury. *Watson*, 204 S.W.3d at 417. Under the second prong of *Johnson*, 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. *Id.* Before finding that evidence is factually insufficient to support a verdict under the second prong of *Johnson*, we must be able to say, with some objective basis in the record,

that the great weight and preponderance of the evidence contradicts the jury's verdict. *Id.* We must also discuss the evidence that, according to the appellant, most undermines the jury's verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

Murder and the Law of Parties

A person commits the felony offense of 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." TEX. PENAL CODE ANN. § 19.02(b) (Vernon 2007). Under the law of parties, "A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both." TEX. PENAL CODE. ANN. § 7.01(a); *Vodochodsky v. State*, 158 S.W.3d 502, 509 (Tex. Crim. App. 2005).

A person is "criminally responsible" for the conduct of another if, "acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a)(2); *Vodochodsky*, 158 S.W.3d at 509. The mere presence of the accused at the scene of the murder is insufficient to support a conviction. *King v. State*, 638 S.W.2d

903, 904 (Tex. Crim. App. 1982). But such evidence may be sufficient to convict a defendant under the law of parties if it shows that he is both physically present at the commission of the offense and encourages the commission of the offense, either by words or by other agreement. *Salinas v. State*, 163 S.W.3d 734, 739 (Tex. Crim. App. 2005). The presence of the defendant at the scene, combined with the totality of the circumstances, may suffice to show that the accused was a participant in the murder. *Beardsley v. State*, 738 S.W.2d 681, 685 (Tex. Crim. App. 1987).

Legal Sufficiency

Brown contends that the evidence is legally insufficient to support a guilty verdict because there is no evidence that he shot Wallen, or that he knew Jnlouis was armed or agreed with Jnlouis to do anything more than assault or harass Wallen for stealing drugs. He points to the fact that the scientific evidence does not incriminate him, and that the witnesses' testimony is unreliable.

Although the scientific evidence does not incriminate Brown, other evidence proves that Brown was at the scene of the crime. Both Norris and Mojica testified that Brown and Jnlouis were at Norris's apartment that night and that they were fighting with Wallen. Brown further argues that the evidence is insufficient because neither Norris nor Mojica saw Brown shoot

Wallen. However, intent to kill can be inferred from the circumstances surrounding the use of a deadly weapon. *See Godsey v. State*, 719 S.W.2d 578, 580–81 (Tex. Crim. App. 1986) (holding that the defendant's pulling a loaded revolver and aiming it at two officers was sufficient to establish intent to kill); *see also Thompson v. State*, 36 S.W. 265, 266 (Tex. Crim. App. 1896) (holding that defendant's pointing a gun at a sheriff was enough to infer that he intended on using it); *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995) ("Intent [to kill] can be inferred from the acts, words, and conduct of the accused[,] [as well as] the extent of the injuries."). Furthermore, the identification of the defendant by an eyewitness is not essential to prove that he was the perpetrator of a crime; direct or circumstantial evidence may be enough. *See Green v. State*, 124 S.W.3d 789, 792 (Tex. App.——Houston [1st Dist.] 2003, pet. ref'd) (holding that defendant's threats recorded on victim's answering machine, history between victim and defendant, testimony that defendant fled scene, and identification of defendant's car supported finding defendant was perpetrator).

Mojica testified that she heard a woman say, "Twin, don't mess up your life like this. Don't do this," and then she heard a gunshot. Even though neither witness could see the shooter, "Twin" is Brown's nickname,

and thus the jury could reasonably have inferred from the evidence that Brown shot Wallen or assisted the shooter in the murder.

We hold that, under the law of parties, a jury reasonably could infer from the totality of the circumstances that Brown was a party to the crime. *See Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985) (citing *Medellin v. State*, 617 S.W.2d 229 (Tex. Crim. App. 1981) (holding that a court may look to the events occurring before, during, and after the commission of an offense to determine if the accused was a party to the crime); *see also Goodman v. State*, 66 S.W.3d 283, 296 (Tex. Crim. App. 2001) (finding that circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor). The evidence shows, and Brown concedes, that Brown and Jnlouis assaulted Wallen the night of the incident. Witnesses heard gunshots immediately after the altercation. Mojica testified that Brown and Jnlouis "always" had guns with them. Brown and Jnlouis were at Norris's apartment when Wallen was shot, which occurred at the same time that they were fighting with Wallen over drugs that they had accused her of stealing. Brown and Jnlouis forcibly dragged Wallen out of the apartment and, soon after that, one of them shot her. Even if Jnlouis shot Wallen, the jury could reasonably infer that Brown was a party to Wallen's

murder.[2]

Factual Sufficiency

Brown asserts that the evidence is factually insufficient for the same reasons that he argues the evidence is legally insufficient, and observes that a witness offered an alibi for his whereabouts at the time of the murder. He further notes that, because Norris and Mojica had been using drugs and neither of them saw Brown holding a gun or shooting Wallen, their testimony is unreliable and fails to prove that Brown killed Wallen.

The fact-finder alone determines the weight to place on contradictory testimonial evidence because that determination depends on the fact-finder's evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408–09 (Tex. Crim. App. 1997). As the determiner of the credibility of the witnesses, the fact-finder may choose to believe all, some, or none of the testimony presented. *Id.* at 407 n.5. The fact-finder is the exclusive judge of the witnesses' credibility and the weight to be given to their testimony. *Jones v. State*, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996). On appellate review, we may not re-weigh the evidence and substitute our judgment for

[2] Brown further contends that Norris and Mojica are unreliable witnesses because both were using drugs on the night of the murder, and Norris also had a criminal record. In a legal sufficiency analysis, we view the evidence in a light most favorable to the State, and therefore do not evaluate the credibility of witnesses. *See Dewberry*, 4 S.W.3d at 740.

that of the fact-finder. *Johnson v. State*, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998); *see also Wilson v. State*, 863 S.W.2d 59, 66 (Tex. Crim. App. 1993); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

Norris and Mojica's testimony do not correspond on all of the events on the night of the murder, but the defense had the opportunity to expose any inconsistencies in their testimony. The weight to be given to contradictory testimony is within the sole province of the jury. *Johnson v. State*, 23 S.W.3d 1, 8 (Tex. Crim. App. 2000). The jury was free to believe Mojica's testimony that a woman in the front room said, "Twin don't mess up your life. Don't do this," even though Norris testified that there was no other woman in the apartment. *See Glockzin v. State*, 220 S.W.3d 140, 147 (Tex. App.—Waco 2007, pet. ref'd) (observing that jury was free to rely on victim's testimony rather than that of defendant or other witnesses, and disregard any inconsistencies); *see also Perez v. State*, 113 S.W.3d 819, 838–39 (Tex. App.—Austin 2003, pet. ref'd). The jury was also free to disbelieve Christie Carrington's alibi testimony. We cannot hold that the jury's decision is manifestly unjust merely because it resolved conflicting views of the evidence in favor of the State. *Cain*, 958 S.W.2d at 410.

Brown also contends that Brown's "mere presence" at the apartment is insufficient to prove that he killed Wallen or was a party to her murder.

Brown was present at Norris's apartment, but other circumstances also exist: he and Jnlouis assaulted Wallen, demanded drugs from her, and cooperated in an effort to drag her outside of the apartment. "The jury maintains power to draw reasonable inferences from the basic facts to the ultimate facts." *Welch v. State*, 993 S.W.2d 690, 693 (Tex. App.—San Antonio 1999, no pet.). The evidence supports an inference that Brown was not merely a bystander, but rather a participant in the assault and murder. We hold that Brown's presence, his involvement in the assault, and the surrounding circumstances, when viewed in a neutral light, is not so obviously weak or contrary to the overwhelming weight of the evidence as to be factually insufficient.

Hearsay Testimony

In his last issue, Brown contends that the trial court abused its discretion by admitting hearsay testimony over his objection. We review a trial court's decision to admit evidence under an abuse of discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). We will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001).

Hearsay is an out-of-court statement offered at trial to prove the truth

of the matter asserted. TEX. R. EVID. 801(d) (Vernon 2003). Hearsay is not admissible absent an exception. TEX. R. EVID. 802 (Vernon 2003). Here, the State elicited Mojica's testimony that she heard a woman in the front room say, "Twin don't mess up your life like this. Don't do this." The State offered the statement to identify Brown as a perpetrator of the crime. The statement conveyed events as the witness perceived them. Thus, it falls within the present sense impression exception to the hearsay rule. *See* TEX. R. EVID. 803(1) (Vernon 1998). A present sense impression is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. *Id.* Mojica testified that the woman made the statement in response to the argument that she was observing between Brown, Jnlouis, and Wallen. *See Jacobs v. State*, No. 01-86-0136-CR, 1987 WL 10540, at *2–3 (Tex. App.—Houston [1st Dist.] 1987, no pet.) (mem. op., not designated for publication) (holding that where the witness was in the next apartment and heard the victim's sister scream "Someone help. Please help. He's going to shoot her," the statement was an excited utterance). Moreover, testimony that tends to show that the defendant is a suspect and explains the circumstances leading up to the murder is admissible. *See Porter v. State*, 623 S.W.2d 374, 385 (Tex. Crim. App. 1981) (holding that statements made about communications

between police officers and dispatchers were admissible at trial to show circumstances leading up to shooting); *Parker v. State*, 192 S.W.3d 801, 807 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that officer's statements about tips received from a confidential informant were admissible to show circumstances leading up to appellant's arrest). We hold that this testimony was admissible under an exception to the hearsay rule, and thus the trial court did not abuse its discretion in admitting it over Brown's hearsay objection.

Conclusion

We conclude that legally and factually sufficient evidence supports the verdict and that the trial court did not abuse its discretion in admitting the complained of evidence. Accordingly, we affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Justices Jennings, Hanks, and Bland.

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