Opinion issued October 1, 2009

In The
Court of Appeals
For The
First District of Texas

NO. 01-08-00710-CR
NO. 01-08-00711-CR

TAMINA DENISE HAMID, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Cause Nos. 44,560 & 44,650

MEMORANDUM OPINION

A jury convicted appellant, Tamina Denise Hamid, of the felony offenses of

aggravated robbery[1] and attempted capital murder of a peace officer.[2] TEX. PENAL CODE ANN. § 15.01 (Vernon 2003), § 19.03 (Vernon Supp. 2008), §§ 29.02, 29.03 (Vernon 2003). The causes were tried together and a jury found appellant guilty of both offenses. For each of the offenses, the jury assessed Hamid's punishment at life in prison, with a $10,000 fine.

Appellant contends that the evidence adduced at trial was legally and factually insufficient to support her convictions for (1) aggravated robbery and (2) attempted capital murder of a peace officer.

We affirm.

I. Factual Background

While on patrol at approximately 9:45 a.m. on June 2, 2006, Officer Kelly Davis of the Meadows Place Police Department observed a Toyota 4Runner, in which appellant was a passenger, pass in front of her making a loud noise. In order to investigate the noise, Officer Davis followed the vehicle in her police car. As Officer Davis neared the vehicle, she observed the vehicle accelerate and run through a stoplight. Officer Davis activated her lights and siren to initiate a stop, but the 4Runner continued driving erratically as it turned into a residential neighborhood. Officer Davis observed appellant in the passenger side of the vehicle, waving a gun

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1 Trial Court Cause No. 44,560; Appellate Cause No. 01-08-00711-CR.

2 Trial Court Cause No. 44,650; Appellate Cause No. 01-08-00710-CR.

in the Officer's direction.

Sergeant Eissler, also with the Meadows Police Department, joined the pursuit after hearing Officer Davis say over the radio that a passenger in a vehicle pointed a gun at her. Sergeant Eissler accelerated in his vehicle to catch up to the 4Runner. Sergeant Eissler saw the driver, Joseph Flores, pull out a gun and fire it in the direction of the Sergeant. Sergeant Eissler was shot in the shoulder, but despite being wounded, returned fire on the 4Runner. Officer Davis stopped to aid Sergeant Eissler, but he told Officer Davis to continue the pursuit of the suspects.

Appellant and Flores pulled into a gas station. Jeff Drescher was at the station when he heard gunshots and saw the 4Runner and a police car come speeding into the station. Drescher ducked behind his truck. The 4Runner stopped in front of Drescher's truck, and Flores got out of the 4Runner pointing a gun at Drescher and screaming something at him. Drescher started to back away from his truck. Flores got into the driver's seat, followed by appellant, who jumped in the driver side and crawled over Flores to the passenger seat. Drescher testified that appellant "very willingly" went with Flores into the vehicle. Flores started the truck and sped off.

Officer Davis followed in pursuit of the truck. Several other patrol cars joined the chase, including Sergeant Mike Waller of the Fort Bend County Sheriff's Office. Eventually, Sergeant Waller got close enough to the pickup truck to see inside the vehicle. Sergeant Waller saw appellant point a gun at him and fire "a couple of

rounds." As the chase continued, appellant shot several more rounds at Sergeant Waller, at one point leaning out of the passenger window of the truck to take aim at him. In an effort to disable to vehicle, Sergeant Waller fired shots into the cab of the truck, shattering the back window. Appellant continued to fire at Sergeant Waller several more times through the shattered back window. As the pickup truck entered the feeder road of Highway 59, Sergeant Waller shot out the back tire, causing the vehicle to lose control and slam into a retaining wall on a bridge. Flores immediately exited the vehicle and jumped off of the bridge, but appellant remained stuck in the truck because she could not open the door. As Sergeant Waller approached the vehicle, he noticed a gun near appellant's leg and instructed her to put her hands up and away from the gun. Appellant put her hands up but then starting swinging her hands and kicking her feet. Sergeant Waller pulled the door open, but appellant refused to get out of the truck and had to be forcibly removed from the vehicle. Appellant was uncooperative, aggressive, and unresponsive to simple questions such as her name. Officer Davis accompanied appellant to the hospital and described appellant's demeanor as hostile and angry. At the hospital, appellant mumbled, "F***ing bi*** almost shot me; and shot her, and found the other gun."

Max Hunter, a crime scene investigator, testified to the location of the firearms that were recovered. A Glock Model 27 handgun was found in plain view in the front passenger seat of the pickup truck. A Ruger 9-millimeter pistol was found on the

floorboard of the front passenger side of the pickup truck. Both the Glock and the Ruger were loaded and not secured by the safety. Lastly, a Titan FIE .25 automatic pistol was found empty in the front right passenger floorboard of the 4Runner. It is uncontradicted that appellant was seated in the front passenger seat of the 4Runner and the pickup truck.

At trial, the jury was shown video footage taken from the dash cameras of two police officers and video taken by news station KHOU. The videos clearly show the chase and appellant taking aim and firing at Sergeant Waller. Results of a gunshot residue test presented at trial showed that appellant's right hand palm and left hand back were positive for gunshot residue.

Appellant testified that Flores was her boyfriend and they both liked the same drugs. Describing herself as a drug addict, appellant told the jury, "[Y]ou do what you do to get your drugs. It doesn't matter if it hurts your family, your friends, or any of y'all." Appellant testified that she and Flores had a "pattern" of stealing from people; appellant would solicit clients for prostitution, lead the victim to a planned location, and appellant, together with Flores, would steal the victim's money, car, or whatever they needed. Appellant admitted that she and Flores targeted Hispanic males because "they're illegals, they don't like calling the police." Appellant testified that on May 28, just four days prior to the day in question, appellant and Flores used this plan to steal the 4Runner they were driving on the day of the incident.

Appellant testified that, in the hours leading up to the incident, she had smoked marijuana, snorted cocaine, and smoked crack cocaine with Flores. Appellant testified the rent on their hotel room was due so they planned to rob someone in Houston. At approximately 9:00 a.m. on June 2, 2006, appellant testified she approached a man in a car offering him prostitution services. Appellant got into the man's car and directed him to a location to park. After the man parked, Flores walked up to the passenger side of his vehicle and told appellant to get out of the car. Flores then got into the man's car and argued with the man. As the man exited his car, Flores grabbed the man's wallet. Because of the man's abruptness exiting his car, appellant testified she thought the man was going to push her. Appellant testified she reacted by hitting the man in the head with the butt of a .25 caliber gun, causing his head to bleed. Appellant got in the 4Runner and drove off with Flores but testified she does not remember much after this point. Appellant stated that she remembered hearing a noise coming from the 4Runner but did not recall getting in a wreck. Appellant remembered driving past Officer Davis because Flores was "freaking out" when the officer began to follow them. Appellant stated that Flores sped up and was not paying attention to stop signs or lights.

Appellant testified she did not recall waving a gun at Officer Davis. Appellant also does not recall seeing Flores shoot Sergeant Eissler. Appellant testified she did not see Flores point the gun at Drescher when they stole the pickup truck from the gas

station, and said she just followed Flores into the truck.

Appellant admitted to shooting at Sergeant Waller but said that she did so because Flores was yelling at her to shoot him. On cross-examination, appellant admitted that, following her arrest, she did not tell police she felt threatened by Flores. Also, on cross-examination, appellant admitted that she and Flores were involved in a previous police chase in 2005.

II. Sufficiency of the Evidence

Appellant argues that the evidence was legally and factually insufficient to support her convictions for (1) aggravated robbery and (2) attempted capital murder of a peace officer.

A. Standard of Review

In our legal-sufficiency review, we view the evidence in the light most favorable to the verdict and ask whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). In our factual-sufficiency review, we view all of the evidence in a neutral light. *Cain v. State*, 958 S.W.2d 404, 408 (Tex. Crim. App. 1997). We will set aside the verdict for factual insufficiency only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the proof of guilt is against the great weight and preponderance of the evidence. *Johnson*, 23 S.W.3d at 11. Under the first prong of *Johnson*, we cannot conclude

that a conviction 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 v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). Under the second prong of *Johnson*, we also 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.* In our factual-sufficiency review, we must also discuss the evidence that, according to appellant, most undermines the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

The fact-finder alone determines the weight to be given contradictory testimonial evidence because that determination depends on the fact-finder's evaluation of credibility and demeanor. *Cain*, 958 S.W.2d at 408–09. 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; *see also Lancon v. State*, 253 S.W.3d 699, 705-07 (Tex. Crim. App. 2008).

B. Aggravated Robbery

First, appellant challenges the legal and factual sufficiency of the evidence supporting her conviction for aggravated robbery of Jeffrey Drescher. Specifically,

appellant points to testimony of Drescher that he saw a male (Flores) point a gun at him but that he never actually saw appellant with a gun. Further, appellant argues that she did not assist Flores in the commission of the offense, pointing to her own testimony at trial that she did not see Flores point the gun at Drescher and simply followed Flores into the truck. Appellant does not argue that an aggravated robbery did not occur, but instead, argues that she was merely present during the incident, and thus, was not a party to the offense.

1. Elements of Aggravated Robbery

In order to convict appellant of aggravated robbery, the State was required to prove beyond a reasonable doubt that appellant, acting as either a principal or a party, while in the course of committing theft, intentionally or knowingly threatened or placed Drescher in fear of imminent bodily injury or death while using or exhibiting a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 29.02, 29.03 (Vernon 2003). A firearm is considered a deadly weapon. *See* TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (Vernon Supp. 2008).

2. Law of Parties

A person is criminally responsible as a party to an offense if the offense is committed by their own conduct, by the conduct of another for which she is criminally responsible, or by both. TEX. PENAL CODE ANN. § 7.02(a) (Vernon 2003). A conviction under the law of parties is appropriate if there is evidence that the

defendant was physically present and encouraged the commission of the crime by words or other agreement. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (op. on reh'g). Since an agreement between parties to act together in common design can seldom be proven by words, the State often must rely on the actions of the parties, shown by direct or circumstantial evidence, to establish an understanding or a common design to commit the offense. *Miller v. State,* 83 S.W.3d 308, 314 (Tex. App.–Austin 2002, pet. ref'd). The agreement, if any, must be made before or contemporaneous with the criminal event, but in determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *Beier v. State,* 687 S.W.2d 2, 3-4 (Tex. Crim. App. 1985); *Miller*, 83 S.W.3d at 314. Circumstantial evidence may suffice to show that one is a party to an offense. *Wygal v. State,* 555 S.W.2d 465, 469 (Tex. Crim. App. 1977); *Miller*, 83 S.W.3d at 314.

While mere presence at the scene is not enough to sustain a conviction, that fact may be considered in determining whether an appellant was a party to the offense. *Valdez v. State*, 623 S.W.2d 317, 321 (Tex. Crim. App. 1979) (op. on reh'g); *Miller*, 83 S.W.3d at 314. If the evidence, however, shows the mere presence of an accused at the scene of an offense, without more, then it is insufficient to sustain a conviction as a party to the offense. *Valdez,* 623 S.W.2d at 321; *Scott v. State,* 946

S.W.2d 166, 168 (Tex. App.–Austin 1997, pet. ref'd).

3. Legal Sufficiency

Viewing the evidence in a light most favorable to the jury's verdict, the record shows that appellant was present during the aggravated robbery and encouraged the commission of the crime. The evidence shows that appellant and Flores stole Drescher's truck at gunpoint. Drescher testified that he saw Flores get out of the 4Runner and point a firearm at him while screaming something at him. Drescher testified appellant willingly followed Flores into the pickup truck, climbing over Flores to get into the truck before driving away.

There is evidence in the record indicating that appellant was acting with Flores under a common scheme. Officer Davis testified that appellant was waving a gun en route to the gas station. The Trace Evidence Manager, William Davis, testified that appellant tested positive for gunshot residue. Appellant testified she was aware that Flores had a gun, even though she claims she did not see him point it at Drescher. Drescher testified that appellant did not seem to be accompanying Flores into the truck against her will. Drescher testified that appellant was "maybe two steps behind," but that the entire encounter happened in a "split second." Further, on the stand at trial, appellant used the phrase, "[w]here <u>we</u> took the truck." (Emphasis added).

The record shows that, in the days leading up to the taking of Drescher's

vehicle, appellant and Flores planned to rob people to get money to pay for hotel rent and to feed their drug habit. Appellant admitted that she was guilty of armed robbery of the man she and Flores robbed when she hit the man in the head with the butt of her gun. Appellant testified that the evening before the day in question, she and Flores planned to lure a victim by appellant's soliciting clients for prostitution and then robbing the victim with the assistance of Flores. Appellant admits that she had acted together with Flores in the past to steal from people and then "get away" with it.

In determining whether a defendant participated as a party in the commission of an offense, the fact finder may look to events that occurred before, during, or after the offense, and may place reliance on acts showing an understanding and common design. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (op. on reh'g). An agreement of the parties to act together in a common design seldom can be proven by direct evidence; reliance, therefore, may be placed upon the actions of the parties, showing either by direct or circumstantial evidence an understanding and common design to do a certain act. *Rivera v. State*, 990 S.W.2d 882, 887 (Tex. App.–Austin 1999, pet. ref'd), *cert. denied*, 528 U.S. 1168 (2000). Evidence is legally sufficient to convict under the law of parties when the defendant is physically present at the commission of the offense and encourages its commission by acts, words, or other agreement. *Ransom*, 920 S.W.2d at 302.

A rational jury could conclude from this evidence that appellant, acting as a party, while in the course of committing theft, placed Drescher in fear of imminent bodily injury or death while using or exhibiting a deadly weapon, namely, a firearm. TEX. PENAL CODE ANN. §§ 29.02 & 29.03 (Vernon 2003). Therefore, the evidence is legally sufficient to support the jury's verdict of guilt. *See Miller v. State*, 83 S.W.3d 308, 313–14 (Tex. App.–Austin 2002, pet. ref'd).

4. Factual Sufficiency

Appellant also asserts that the evidence is factually insufficient to support the jury's verdict of guilt. In large part, the evidence appellant points to in support of her argument is her own testimony that she did not know or remember events and that she felt threatened and pressured by Flores.

Appellate courts should afford almost complete deference to a jury's decision when that decision is based on the evaluation of credibility. *Lancon v. State,* 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). The jury is in the best position to judge the credibility of a witness because it is present to hear the testimony, as opposed to an appellate court who relies on the cold record. *Id*. The jury may choose to believe some testimony and disbelieve other testimony. *Id.* at 707.

While it is true that appellant testified at trial that she was scared and intimidated by Flores, she also testified that Flores was her boyfriend and they both "do the same drugs." Appellant testified that she had been in a police high speed

chase in 2005 with Flores after Flores had stolen a woman's purse and appellant helped him to get away. While they were both incarcerated for the 2005 chase, Flores and appellant wrote letters to each other. Further, the incident in question happened less than 30 days after their release.

On cross-examination, appellant admitted that she did not tell police in her initial statement that she had been pressured by Flores to participate in the offenses. Appellant did not indicate that she was acting against her will until trial. The jury could have reasonably found her testimony not credible.

Weighed in a neutral light, the evidence is not so weak that the verdict is clearly wrong and unjust. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). Also, there is no objective basis in the record to conclude that the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Crim. App. 2006). We hold the evidence is factually sufficient to support the conviction for aggravated robbery.

C. Attempted Capital Murder of a Peace Officer

Second, appellant challenges the legal and factual sufficiency of the evidence supporting her conviction for attempted capital murder of Sergeant Mike Waller, a peace officer.

1. Elements of Attempted Capital Murder

In order to convict appellant of attempted capital murder, the State was

required to prove beyond reasonable doubt that appellant, with the intent that the offense of murder be committed, intentionally shot at Sergeant Waller, a peace officer acting in the lawful discharge of his official duty, knowing him to be a peace officer. TEX. PENAL CODE ANN. § 15.01 (Vernon 2003), § 19.03 (Vernon Supp. 2008).

2. Legal Sufficiency

In her first point, despite her own testimony that she shot at Sergeant Waller, appellant challenges the legal sufficiency of the evidence supporting her conviction for attempted capital murder of Sergeant Waller. Viewed in the light most favorable to the jury's verdict, the evidence shows that appellant shot at Sergeant Waller on at least five occasions. Sergeant Waller testified that he saw appellant fire shots from the passenger side of the vehicle, taking direct aim at Sergeant Waller's car. Sergeant Waller identified appellant in the courtroom as the passenger who fired a gun at him. Additionally, videos admitted at trial clearly depict appellant leaning out of the passenger window, taking aim, and firing at Sergeant Waller. Sergeant Waller testified that he knew appellant was actually trying to shoot him because he saw the muzzle of the gun pointed in his direction. The Trace Evidence Manager, William Davis, testified that appellant tested positive for gunshot residue. Appellant admitted at trial and in her brief that she fired the gun. Sergeant Waller testified that at the time of the shooting he was in full uniform, driving a marked Fort Bend County Sheriff's Office vehicle, and had his lights and siren activated.

A rational jury could conclude from this evidence that appellant, with the intent that the offense of murder be committed, intentionally shot at Sergeant Waller, a peace officer acting in the lawful discharge of his official duty, knowing him to be a peace officer. TEX. PENAL CODE ANN. § 15.01 (Vernon 2003), § 19.03 (Vernon Supp. 2008). Therefore, the evidence is legally sufficient to support the jury's verdict of guilt.

3. Factual Sufficiency

Appellant also challenges the factual sufficiency of the evidence supporting her conviction for attempted capital murder of Sergeant Waller. The evidence appellant points to in support of her argument is again her own testimony that she did not know or remember events, and that she felt threatened and pressured by Flores.[3]

As stated above, appellate courts should afford almost complete deference to a jury's decision when that decision in based on the evaluation of credibility. *Lancon v. State,* 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). While it is true appellant testified at trial that during the relevant events she felt scared and intimidated by Flores, she never made these claims earlier in her statements to investigators

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[3] Appellant testified she acted against her will during the episode at issue because she was threatened by Flores. However, appellant did not establish the defense of duress. Duress is an affirmative defense that the defendant must raise and prove by a preponderance of the evidence. TEX. PENAL CODE §§ 2.04, 8.05(a)) (Vernon 2003). Duress was not asserted at trial or included in the jury's instructions. Defense counsel made no objection or request to the jury instructions. Further, duress, as a defense to a felony offense, requires a threat of imminent death or serious bodily injury. TEX. PENAL CODE § 8.05(a)) (Vernon 2003). Appellant has not alleged that such a threat was made, but only that she felt pressured.

following the incident. Her testimony showed that Flores was her boyfriend, that they used drugs together, and they had a pattern of planning and executing crimes together. Thus, the jury could have inferred from other testimony and evidence that she was not being truthful when she said she felt threatened by Flores.

In her brief, appellant points out that she testified that, "she was not aware that lights and sirens were chasing her." It is unclear what issue appellant is trying to present. Presuming appellant is arguing (contrary to her own testimony) that she did not know she was shooting at a police officer, her assertion does not make the evidence factually insufficient. At trial appellant testified that she remembered driving past Officer Davis because Flores was "freaking out" when the officer began to follow them. This testimony makes clear that she knew she and Flores were being followed by police earlier in the chase. Also, she admitted on cross examination that she knew she was in the middle of a high speed chase, even calling it a "police chase" in her testimony. Thus, the jury was free to discredit appellant's testimony that she did not know she was being chased by lights and sirens.

Appellant argues that, while the State may have proved that appellant fired a gun near Sergeant Waller, the evidence is nonetheless insufficient to prove that a projectile was discharged from appellant's firearm and that she intended to shoot at Waller rather than one of the other officers or at his vehicle. Specifically, appellant cites to Sergeant Waller's testimony that the pistol was pointed "in the direction of the

patrol cars."[4] Additionally, Sergeant Waller testified that no bullets actually struck him or his patrol car to his knowledge. However, evidence and testimony was presented that make the jury's finding reasonable. The jury heard appellant admit that she shot at Sergeant Waller and the other officers. Appellant's hands tested positive for gunshot residue. Further, Sergeant Waller testified that he knew appellant was actually trying to shoot him because he saw the muzzle of the gun pointed in his direction. Thus, Sergeant Waller's testimony is clear evidence that appellant was shooting at him specifically. Appellant is correct in noting that Sergeant Waller's testimony may also suggest that appellant shot at other officers. But even if true, that would not absolve appellant of guilt for attempted capital murder of Sergeant Waller. Rather, that fact would make appellant also guilty of attempted capital murder of the other officers.

Weighed in a neutral light, the evidence is not so weak that the verdict is clearly wrong and unjust. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009). Also, there is no objective basis in the record to conclude that the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State*, 204

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[4] The testimony appellant cites, when read in context, does not stand for the point she argues. The testimony is included below:

> Q: (MR. CROWLEY) Did you see the direction the pistol was pointed in?
> A: (SGT. WALLER) *In my direction,* in the direction of the patrol cars.
>
> *(emphasis added).*

S.W.3d 404, 417 (Tex. Crim. App. 2006).

III. Conclusion

Having overruled all of appellant's issues on appeal, we affirm the judgment of the trial court in both causes.

George C. Hanks, Jr.
Justice

Panel consists of Justices Keyes, Alcala, and Hanks.

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