Opinion issued November 30, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-08-00946-CR

BRONWEN NATHANIEL TURNER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Case No. 1141460

MEMORANDUM OPINION

Appellant, Bronwen Nathaniel Turner, was charged by indictment with capital murder for the deaths of Darren Kennerson and Raven Smith.[1] Appellant

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[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 2003), § 19.03(a)(7)(A) (Vernon Supp. 2010).

pleaded not guilty. A jury found appellant guilty as charged. As the State did not seek the death penalty, the trial court sentenced appellant to life imprisonment. On appeal, appellant challenges the sufficiency of the evidence to prove (1) that one of the complainants was Darren Kennerson; (2) that appellant was the shooter; (3) that he killed Smith; and (4) that he acted intentionally and knowingly.[2]

We affirm.

Background

On the evening of October 13, 2007, Darren Kennerson, Raven Smith, Koshella Reyna, Melvin Blake, Brandon Maddox, and Jonathan Roy were at Raven Smith's apartment, located in an apartment complex off of Normandy Street in Harris County, Texas. At least some of the individuals in the apartment were associated with the gang known as the Crips, and the apartment complex was

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[2] Under the Issues Presented portion of his brief, appellant identifies seven points of error. The first six points of error track the elements of capital murder and murder, generally asserting legal and factual sufficiency points of error for each of the offenses. The seventh point of error asserts that the trial court erred in overruling appellant's request for an instructed verdict of acquittal. These points of error are not specifically tied into the arguments made in the body of his brief. Instead, in the Argument portion of his brief, appellant argues (1) that the evidence is legally insufficient to prove (a) that one of the complainants was Darren Kennerson, (b) that he was the shooter, (c) that he killed Smith, and (d) that he acted intentionally and knowingly; (2) that, for the same reasons, the trial court should have granted appellant's motion for instructed verdict; and (3) that, for the same reasons, the evidence was factually insufficient. Appellant does not present new arguments under his sections on instructed verdict and factual sufficiency. Instead he refers back to his argument under his section on legal sufficiency. Accordingly we consider the four points raised under appellant's section on legal sufficiency as his points of error.

known for having a number of Crips living there. At one point, Roy left the apartment and encountered Gleason Rousell, a member of the gang known as the Bloods. Rousell asked Roy, "What's popping?" The testimony at trial established that this is a phrase used by the Bloods to identify their gang membership and to challenge members of other gangs.

Roy returned to the apartment and notified those in the apartment what Rousell had said. Everyone left the apartment and gathered on the sidewalk along the parking lot where Roy had encountered Rousell. In the parking lot, a sand-colored Toyota Corolla passed by them, turned around, and came back so that the passenger side of the car was facing the group from the apartment. A hand holding a gun emerged from the front passenger-side window and shot into the group. The car then left the scene.

Kennerson and Smith were each hit by at least one bullet. Kennerson was shot in the side, penetrating through his arm and into his chest. He yelled that he had been hit, walked over to the stairway that led to Smith's apartment, and sat down. Shortly afterwards, Kennerson died, collapsing on the stairway. Smith was shot in his head, the bullet penetrating his brain. He was immediately rendered unconscious and collapsed on the ground. After EMS arrived, he was transported to the hospital. He died from the gunshot wound on October 18, 2007.

None of the people with Kennerson or Smith were able to identify the shooter. Similarly, none of the physical evidence at the crime scene led to the identification of the shooter, although the investigators were able to determine that the weapon used was most likely a revolver, such as a .38 Special or a .357 Magnum.

Appellant's identification as the shooter came from the testimony of Kiana Briones and Doneshia Patrick. Briones overheard part of a conversation between her brother and appellant in which appellant told her brother that appellant had killed two people on Normandy Street and that he had to do it as a part of his being a member of the Bloods. Appellant stated that the people who were killed were Crips. Briones testified that she remembered appellant saying the apartment complex was "Glen Wood Forest Lane." Smith and Kennerson were shot at the Wood Forest Glen apartment complex. Counsel for the State asked if the name of the complex was "[s]omething like Wood Forest Glen," Briones said, "Uh-huh."

Patrick was the girlfriend of Briones's brother at the time. On the night of the shooting, Patrick had been at her boyfriend's apartment. She was in a back room of the apartment when she came out and saw appellant and Rousell talking to her boyfriend. On the table in the room with them was a .357 revolver, which was one of the weapons that investigators testified was most likely used in the shooting. Patrick's boyfriend had a similar revolver, but this was not the same one. Some

days later, Patrick was present when appellant told her boyfriend that he had killed some people because Rousell did not want to do it and that it was done to gain credibility in their gang. Appellant said that he shot one of the persons in the head and one in the side. The record shows that Smith was shot in the head and Kennerson was shot in the side. Patrick also testified that appellant said he went to the location with Rousell in Rousell's grandmother's car.

Shirley Rodriguez, Rousell's grandmother testified that Rousell was living with her at the time of the shooting and that Rousell had used her car—a sand-colored Toyota Corolla—on the night of the shooting. Multiple witnesses to the shooting who testified at trial identified Rodriguez's car as similar or identical to the one used in the shooting.

The jury found appellant guilty of capital murder.

Sufficiency of the Evidence

Appellant argues that the evidence is legally and factually insufficient to prove (1) that one of the complainants was Darren Kennerson; (2) that appellant was the shooter; (3) that he killed Smith; and (4) that he acted intentionally and knowingly.

A. Standards of Review and Applicable Legal Principles

1. Sufficiency of the Evidence Standard of Review

Evidence is insufficient to support a conviction when, considering all the evidence admitted at trial in the light most favorable to the verdict, a fact finder could not have rationally found that each element of the charged offense was proven beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 317, 319 (1979); *In re Winship*, 397 U.S. 358, 361 (1970); *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *see also Brooks v. State*, PD-0210-09, 2010 WL 3894613, at *14, 21–22 (Tex. Crim. App. Oct. 6, 2010) (majority holding legal and factual sufficiency challenges reviewed under *Jackson* standard); *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] November 10, 2010, no pet. h.) (construing majority holding in Brooks). The evidence is insufficient under this standard in two circumstances: (1) the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense; or (2) the evidence, viewed in the light most favorable to the verdict, conclusively establishes a reasonable doubt. *See Jackson*, 443 U.S. at 314, 318 n.11, 320; *Laster*, 275 S.W.3d at 518.

If an appellate court finds the evidence insufficient under the *Jackson* standard, it must reverse the judgment and enter an order of acquittal. *Tibbs v.*

Florida, 457 U.S. 31, 41 (1982). In applying the *Jackson* standard of review, an appellate court must defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *See Jackson*, 443 U.S. at 319; *Williams*, 235 S.W.3d at 750. An appellate court presumes that the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson*, 443 U.S. at 326. An appellate court may not re-evaluate the weight and credibility of the record evidence and thereby substitute its own judgment for that of the fact finder. *Williams*, 235 S.W.3d at 750.

2. Capital Murder

A person commits capital murder if he intentionally or knowingly causes the death of more than one individual during the same criminal transaction. TEX. PENAL CODE ANN. § 19.02(b)(1) (Vernon 2003), § 19.03(a)(7)(A) (Vernon Supp. 2010). "A person acts intentionally . . . when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a) (Vernon 2003). "A person acts knowingly . . . when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b).

B. Identity of complainant, Darren Kennerson

In his first point of error, appellant correctly asserts that one of the decedents in the case was identified in the autopsy report as "Darren Wayne Kennerson II,"

while the indictment identified the complainant as "Darren Kennerson." Appellant argues that the difference between the complainant identified in the indictment and the full name of the decedent as identified in the autopsy report constitutes a material variance between the indictment and the evidence that is fatal to a conviction.

"[W]hen faced with a sufficiency of the evidence claim based upon a variance between the indictment and the proof, only a 'material' variance will render the evidence insufficient." *Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001). A variance is material (1) when it fails to inform the defendant of the charge against him so that it deprives him of the ability to present an adequate defense, or (2) when it may subject the defendant to double jeopardy. *Id.* at 248 (quoting *United States v. Sprick*, 233 F.3d 845, 853 (5th Cir. 2000)). "[T]he 'law' as 'authorized by the indictment' must be the statutory elements of the offense . . . as modified by the charging instrument." *Curry v. State*, 30 S.W.3d 394, 404 (Tex. Crim. App. 2000). The victim's name is not a required element of murder or capital murder. *See* TEX. PENAL CODE ANN. §§ 19.02, .03. However, the indictment must identify the offense with sufficient specificity so as to bar future prosecution for the same offense. TEX. CODE CRIM. PROC. ANN. art. 21.04 (Vernon 2009).

A variance between the indictment and the proof alleged at trial would be material if the accused did not know whom he was accused of injuring or if he was surprised by the proof presented at trial. *See Fuller v. State*, 73 S.W.3d 250, 255 (Tex. Crim. App. 2002). When a non-statutory fact alleged in the indictment differs from a fact proven at trial, a material variance between the two facts will compel acquittal. *See id.* at 256–57.

Appellant argues that because the decedent's father's name was Darren Kennerson, the indictment was misleading as to whom he was charged with murdering. In alleging the name of a person necessary to be stated in the indictment, if that person "is known by two or more names, it shall be sufficient to state either name." TEX. CODE CRIM. PROC. ANN. art. 21.07 (Vernon 2009). It was well established at trial that the decedent, Darren Wayne Kennerson II, was more commonly known as Darren Kennerson. Accordingly, the indictment appropriately identified the decedent as Darren Kennerson.

A variance may also be deemed material if it could subject the defendant to the possibility of being tried twice for the same crime. *Gollihar*, 46 S.W.3d at 257. When protecting against double jeopardy in the event of subsequent prosecution, a court may refer to the entire record and is not restricted to the language used in the indictment. *Id.* at 258 (citing *United States v. Apodaca*, 843 F.2d 421, 430 n.3 (10th Cir. 1988).

The decedent's mother, Veronica Gallegos, testified that her son's full name was "Darren Wayne Kennerson II" and that his father was "Darren Kennerson." She also identified her son as "Darren Kennerson," however. Furthermore, all of the decedent's friends referred to him as "Darren Kennerson." We hold that there is sufficient information in the record to foreclose any risk of double jeopardy.

We hold that the evidence was sufficient to identify Kennerson as one of the complainants. We overrule appellant's first point of error.

C. Identity of appellant as the shooter

Appellant next argues that he was prosecuted and convicted with less than a scintilla of evidence. The majority of the evidence and testimony presented by the State focused on establishing that two people were killed by someone shooting from a car in an apartment complex on Normandy Street. Appellant does not challenge this evidence on appeal. Instead, in this point of error, appellant challenges the sufficiency of the evidence that identified him as the shooter.

The State must prove beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime. *Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd). The identity of the accused as the perpetrator may be proved by direct or circumstantial evidence, or by inferences drawn from such evidence. *Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). The State is not required to foreclose all possible hypothetical

scenarios before a defendant can be charged or found guilty of a crime. *See Geesa v. State*, 820 S.W.2d 154, 161 (Tex. Crim. App. 1991), *overruled on other grounds*, *Paulson v. State*, 28 S.W.3d 570, 573 (Tex. Crim. App. 2000) (rejecting requirement that State exclude every other reasonable hypothesis than the guilt of the defendant). Contradictions or conflicts between the witnesses' testimony do not destroy the sufficiency of the evidence; rather, they relate to the weight of the evidence and the credibility the jury assigns the witnesses. *Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App. Houston [14th Dist.] 1989, pet. ref'd).

Appellant's identification as the shooter came from the testimony of Kiana Briones and Doneshia Patrick. Briones overheard part of a conversation between her brother and appellant in which appellant told her brother that appellant had killed two people on Normandy Street and that he had to do it as a part of his being a member of the Bloods. Appellant stated that the people who were killed were Crips. Briones testified that she remembered appellant saying the apartment complex was "Glen Wood Forest Lane." Smith and Kennerson were shot at the Wood Forest Glen apartment complex. Counsel for the State asked if the name of the complex was "[s]omething like Wood Forest Glen," Briones said, "Uh-huh."

"Uh-huh" is used when the witness answers affirmatively. *Uniform Format Manual for Texas Court Reporters*, 62 TEX. B.J. 583, 592 (1999).[3]

Patrick was the girlfriend of Briones's brother at the time. On the night of the shooting, Patrick had been at her boyfriend's apartment. She was in a back room of the apartment when she came out and saw appellant and Rousell there talking to her boyfriend. On the table in the room with them was a .357 revolver, which was one of the weapons that investigators testified was most likely used in the shooting. Patrick's boyfriend had a similar revolver, but Patrick testified that the revolver on the table was not his. Some days later, Patrick was present when appellant told her boyfriend that he had killed some people because Rousell did not want to do it and that it was done to gain credibility in their gang. Appellant said that he shot one of the persons in the head and one in the side. The record shows that Smith was shot in the head and Kennerson was shot in the side. Patrick also testified that appellant said he went to the location with Rousell in Rousell's grandmother's car.

Both Briones and Patrick testified that appellant told Briones's brother that he had shot a "black man" and a "Mexican man." The autopsy report, which was presented to the jury, revealed that Raven Smith was African American.

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[3] The Texas Court of Criminal Appeals adopted the Uniform Format Manual for Texas Court Reporters in 1999. *Merritt v. State*, No. 14-09-00396-CR, 14-09-00397-CR, 2010 WL 2649941, at *5 n.2 (Tex. App.—Houston [14th Dist.] July 6, 2010, no pet.).

Testimony at trial established that Kennerson, although also African American, was known by the nickname "Mexican D."

In addition, Shirley Rodriguez, Rousell's grandmother testified that Rousell was living with her at the time of the shooting and that Rousell had used her car—a sand-colored Toyota Corolla—on the night of the shooting. Multiple witnesses to the shooting who testified at trial identified Rodriguez's car as similar or identical to the one used in the shooting.

Appellant asserts that Patrick's testimony was inconsistent based on her testimony that appellant had said that he got out of the vehicle, stood up, and started shooting.[4] In her initial statement to the authorities, Patrick stated that appellant had said that he got out of his vehicle, stood up, and started shooting. We agree with appellant that this is inconsistent with the testimony of the witnesses to the shooting that said the shooter never got out of the car. We disagree, however, that this conflict renders the evidence insufficient to support the verdict. *See Weisinger*, 775 S.W.2d at 429.

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[4] Appellant appears to argue that Briones's and Patrick's testimony are not trustworthy because they vary from each other. This is not a relevant matter because Briones and Patrick testified about separate conversations and none of the details conflict in any material terms. *See Weisinger v. State*, 775 S.W.2d 424, 429 (Tex. App. Houston [14th Dist.] 1989, pet. ref'd) (holding contradictions or conflicts between witnesses' testimony relate to the weight of evidence and credibility jury assigns witnesses, not sufficiency of evidence).

Finally, appellant asserts that (1) there was no physical evidence linking him to either of the complainants or the scene of the shootings; (2) no evidence resulted from the investigation of the crime that linked appellant to the crime; (3) there was no evidence that appellant was associated with the complainants; (4) no eye witness identified appellant as being at the scene of the shooting; (5) no one identified the license plate number of the get-away car; (6) the investigating officers failed to adequately speak to eyewitnesses or search the area for possible fugitives; and (7) the investigating officers failed to search a certain cell phone for possible relevant information.

None of the evidence that appellant asserts was lacking at trial and none of the inadequacies of the investigation that appellant claims to exist—even if taken as true—undermine the adequacy of the evidence that was presented at trial. Direct evidence is not required to identify a defendant as the perpetrator of the crime. *See Gardner*, 306 S.W.3d at 285 (holding identity may be proven by direct evidence, circumstantial evidence, or inference). Nor is there any requirement that all possible hypothetical scenarios be foreclosed before a defendant can be charged or found guilty of a crime. *See Geesa*, 820 S.W.2d at 161 (disavowing requirement that State exclude every other reasonable hypothesis than the guilt of the defendant).

We hold that, cumulatively, the evidence was sufficient to identify appellant as the shooter. We overrule appellant's second point of error.

D. Death of Smith

In his third point of error, appellant argues that the evidence was insufficient to establish that he murdered Smith. Appellant bases this argument on the fact that the evidence established that the shot that ultimately killed Smith travelled from the rear of his head towards the front in an upwards trajectory.[5] Appellant asserts that the evidence shows that, at the time of the shooting, Smith was facing the parking lot. As a result, appellant argues, the bullet that killed Smith must have come from a different location than the parking lot.

Appellant does not cite to any portion of the record that establishes that Smith was facing the parking lot at the time of the shooting. In fact, there is no such evidence in the record. Because the record does not support appellant's argument, we overrule appellant's third point of error.

E. Intentional or knowing

In his final point of error, appellant argues that the evidence is insufficient to prove that he acted intentionally or knowingly. The State charged appellant with capital murder by alleging that he intentionally or knowingly caused the death of

[5] While most of the bullet never penetrated Smith's skull or brain, some of the bullet fragments did penetrate his skull and brain, ultimately causing his death.

Kennerson and Smith in the same criminal transaction. *See* TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03(a)(7)(A).

"A person acts intentionally . . . when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a) (Vernon 2003). "A person acts knowingly . . . when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). A person is guilty of murder if he intentionally or knowingly fires a weapon into a crowd of people and at least one of the persons in the crowd dies. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999).

Reyna was one of the trial witnesses who was present at the time of the shooting. On direct examination, the following exchange occurred:

> Q: Do you know if the gun was outside the window?
>
> A: It was outside, hanging outside the window. No face was showing. No aiming. Just shoot everybody.
>
> Q: How many people were standing there?
>
> A: It had to be, like, seven, eight people standing in one small group. And everybody just started going every which way.

On cross-examination, the following exchange occurred:

> Q: All right. And, so, indiscriminately they're firing in y'all's direction, correct?
>
> A: Yes.
>
> Q: The person who has the -- there's one person with a gun, correct?

A: Correct.

Q: All right. And that person is firing indiscriminately in y'all's direction, correct?

A: Yes.

Q: All right. Indiscriminately, even recklessly, correct?

A: Yes.

On redirect examination, the following exchange occurred:

Q: Are you saying that somebody wasn't intending to shoot that gun at y'all?

A: Was they intending? Yes, they intended.

. . . .

A: They intended to shoot the gun because they shot it.

Q: Well, if --

A: And they stopped in front of us to shoot at us directly.

Based on Reyna's cross-examination testimony, appellant argues that the evidence shows that he did not cause the death of Kennerson or Smith intentionally or knowingly. Taken as a whole, Reyna's testimony establishes that the shooter fired indiscriminately into the group but intended to shoot at the group. A person is guilty of murder if he intentionally or knowingly fires a weapon into a crowd of people and at least one of the persons in the crowd dies. *Medina*, 7 S.W.3d at 640. The testimony from the witnesses to the shooting, including Reyna, established that the shooter fired directly at the group. This is sufficient to establish that the

shooter intentionally or knowingly caused the death of two of the people in that group. *Id.* We overrule appellant's final point of error.

Conclusion

The evidence at trial was sufficient to establish that appellant intentionally or knowingly caused the death of Kennerson and Smith in the same criminal transaction. We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland.

Do not publish. *See* TEX. R. APP. P. 47.2(b).