Opinion issued May 19, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00262-CR

PEDRO SHEPHERD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1204350

MEMORANDUM OPINION

A jury convicted appellant Pedro Shepherd of murder and assessed his punishment at twenty-eight years in prison.[1] In two points of error, Shepherd contends that the evidence is neither legally nor factually sufficient to sustain his conviction for murder because the State failed to disprove beyond a reasonable doubt that he acted in self-defense. We affirm.

BACKGROUND

Appellant and the complainant, Lanathan Johnson, each sold narcotics at the same apartment complex where appellant lived. One morning in November 2006, a police informant, MJ, who lived in the same complex, was in her apartment when she heard an argument taking place outside. Curious to see what was going on, MJ went outside and saw the complainant talking with a group of individuals, expressing anger because appellant's narcotics sales were infringing on his sales. MJ testified that, at this time, the complainant said that he was going to get a gun. Eventually, MJ diffused the situation.

Later that day, MJ returned to the apartment complex and saw a crowd gathered outside but noticed that the complainant was missing. Fearing that the complainant had gone to confront appellant, she ran toward appellant's apartment. On her way, MJ witnessed appellant fire a rifle at the complainant and two other

[1] TEX. PENAL CODE ANN. § 19.02(b)(1)–(2), (d) (West 2003).

men as the three of them were running away from appellant; the two other men got away, but the complainant was fatally shot and fell to the ground. MJ acknowledged that she took cover and did not see what transpired in detail, but at no point did she see the complainant holding a gun. The homicide investigator, Louis Flores, confirmed the absence of a gun on the complainant's corpse. However, the crime scene officer, Ernest Aguilera, testified that he found a revolver with live ammunition in its cylinder about eighteen feet from the complainant's body. The bullets were dented, indicating that the trigger had been pulled but the gun did not fire. There were no fingerprints on the gun.

Appellant testified that shortly before the incident, strangers knocked on his door and told him that the complainant was upset with him and "had a gun for [him]." Deciding to leave, appellant walked toward his friend's car, carrying the AK-47 for protection. It was on his way to the car that appellant encountered the complainant in a breezeway. Appellant testified that the complainant pointed a gun at him, prompting him to start shooting.

A total of fourteen shell casings were collected at the scene of the crime, all of which came from the AK-47 type of firearm used by appellant. Five of those shots hit the complainant, four of which pierced his body from the back to the front. After the shooting, appellant drove off with his friend in the friend's white

Nissan Altima. Appellant went to New Orleans and then North Carolina for eight months following the incident. Appellant admitted that when he was finally arrested, he denied being at the apartment complex on the day of the shooting.

Bronson Jones, incarcerated in the same cell-block as appellant, testified that he and appellant spoke about the incident and that appellant admitted that he shot the complainant because he was "short-stopping" his corner by selling drugs outside of his apartment and that he did not think that the complainant had a gun. Jones admitted that he was testifying because he hoped to get a better deal for his own drug possession case, but that no such deal had yet been made.

DISCUSSION

One commits murder if he intentionally or knowingly causes the death of an individual or if he 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 2003). A person is generally justified in using deadly force if he reasonably believes that deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful force, and a reasonable person in the actor's situation would not have retreated. TEX. PENAL CODE ANN. §§ 9.31(a), 9.32(a) (West 2003). The defendant has the burden of producing some evidence to support a claim of self-defense, including the justified

use of deadly force. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003) (analyzing burden of persuasion under factual sufficiency challenge); *see also Saxton v. State*, 804 S.W.2d 910, 913–14 (Tex. Crim. App. 1991) (cited in *Zuliani* as properly analyzing burden of persuasion under legal sufficiency challenge). Once the defendant satisfies his burden, the State then bears the burden of persuasion to disprove the raised defense. *Id.* The State's burden of persuasion does not require it to produce evidence; it requires only that the State prove its case beyond a reasonable doubt. *Id.* A determination of guilt by the fact-finder implies a finding against the defensive theory. *Id.*

Sufficiency of the Evidence

In two points of error, appellant contends that the evidence is legally and factually insufficient to sustain his conviction for murder because the State did not disprove his assertion of self-defense beyond a reasonable doubt.

This court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant raises a legal or a factual sufficiency challenge. *See Brooks v. State*, 323 S.W.3d 893, 912, 924–28 (Tex. Crim. App. 2010); *see also Ervin v. State*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979).

See Brooks, 323 S.W.3d at 912, 924–28. Under this standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). We can hold evidence insufficient under the *Jackson* 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 conclusively establishes a reasonable doubt. *See Jackson*, 443 U .S. at 320, 99 S. Ct. at 2789; *see also Laster*, 275 S.W.3d at 518. 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, 99 S. Ct. at 2793. As the determiner of the credibility of the witnesses and the weight to be given to their testimony, the fact-finder may choose to believe all, some, or none of the testimony presented. *See Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000).

Appellant contends that the evidence is insufficient to support his murder conviction because the evidence shows that the complainant pointed a gun at appellant, thus, justifying appellant's use of deadly force. The only evidence that

raises the issue of justified use of deadly force, however, is appellant's own testimony that the complainant had a gun, MJ's testimony that hours before the shooting she heard the complainant say that he was going to get a gun, and testimony that a revolver was found eighteen feet away from the complainant's corpse—a fact which might reasonably support an inference that the complainant did have a gun. The jury was also presented with contradictory testimony that refuted appellant's self-defense claims, specifically, Jones's testimony that appellant admitted to him that he did not think that the complainant had a gun, MJ's testimony that she never saw complainant with a gun, and the lack of fingerprints or any other evidence to establish a link between the complainant and the found revolver. As the sole fact-finder and judge of witness credibility, the jury was well within its province to believe the portions of testimony refuting appellant's self-defense claim and disbelieve the contradictory testimony, thereby rationally determining that the complainant did not have a gun and that the use of deadly force was not immediately necessary. *See Margraves*, 34 S.W.3d at 919 (stating that as sole judge of credibility of witnesses and, weight to be given their testimony, jury may choose to believe all, some, or none of testimony presented).

After reviewing all of the evidence in the light most favorable to the verdict, we conclude that a jury could have reasonably found against appellant on the issue

of self-defense beyond a reasonable doubt. We overrule appellant's first and second points of error.

CONCLUSION

We affirm the judgment of the trial court.

Jim Sharp
Justice

Panel consists of Justices Jennings, Alcala, and Sharp.

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