Opinion issued January 13, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00563-CR

EDWARD PAUL LOPEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Case No. 1112312

MEMORANDUM OPINION

Appellant, Edward Paul Lopez, was charged by indictment with murder.[1] Appellant pleaded not guilty. A jury found appellant guilty as charged and assessed punishment at 45 years' confinement. In two points of error, appellant

---

[1] *See* TEX. PENAL CODE ANN. § 19.02(b) (Vernon 2003).

challenges the sufficiency of the evidence to establish that appellant was the shooter.

We affirm.

Background

The shooting in question took place at Emiliano's, a neighborhood sports bar located at Lyons Avenue in Houston, Texas, near North Wayside Drive. The bar had closed around 2:00 on the morning of January 21, 2006, and it was around this time that the shooting occurred. The complainant, Martin Burciaga, was in his car, a 1997 Buick Park Avenue, at the time of the shooting. The front of his car faced Lyons Avenue at a south-westerly angle. The physical evidence showed that at least seven bullets hit Burciaga's car, one of which also hit Burciaga, leading to his death. Bullets penetrated the front driver's-side of the car, the front hood and windshield, and the front passenger's-side of the car, indicating that the shooter was moving while shooting. About nine casings and one bullet were located across a 90-foot area on Lyons Avenue. The dispersed area in which the casings were found also indicated that the shooter was moving while shooting. Some bullets and bullet fragments were also recovered from the car.

An analysis of all of the bullet casings located at the scene established that they were all ejected from the same gun. An analysis of the bullets and bullet fragments was also done. From all of the bullets and fragments that could be

analyzed accurately, it was established that they were fired from the same gun. Based on analysis of the casings, bullets, and bullet fragments, it was established that the weapon used was a 9mm Luger Smith & Wesson pistol. This is a semi-automatic weapon.

The only evidence presented at trial that established appellant as the shooter was the testimony of Eugene Perez. Perez testified that he arrived at Emiliano's that night with his brother and encountered appellant. Appellant and Perez had known each other since they were about 13 or 14 but had not seen each other for at least two years prior to that night. They spent their time together in the bar. During that time, Perez testified that appellant identified some other people at the bar that were trying to start some trouble with him. Two people in particular were identified, known as Five-Oh and Little Five-Oh. These two were brothers and Burciaga's cousins. Perez told Appellant that he had a 9mm Smith & Wesson in his car. Perez testified that he brought the gun because he had been shot at previously while at that bar. When his brother decided to leave, Perez asked appellant if he would give him a ride home that night. Appellant agreed, but asked Perez to transfer his gun from his car to appellant's car before Perez's brother left. Perez complied.

Perez and appellant stayed until the bar closed. When they left the bar, appellant again saw Five-Oh and Little Five-Oh, who were inside a truck in the

parking lot. Perez testified that appellant asked him to retrieve his gun from appellant's car. Perez complied and brought it to appellant and then returned to appellant's car. Perez got into the driver's seat and waited for appellant. Appellant came to the car, and Perez began driving.

Perez testified that there was a long line of cars on Lyons Avenue heading towards North Wayside Drive, and he was forced to wait in this long line. While they were waiting, appellant looked outside the passenger-side window, stated that he saw "one of them fools," and asked Perez if appellant should kill him. Perez said, "[N]o, let's just go home."

Perez testified that, some time after that—as they waited in the line of cars—he heard some shooting, thought they were being shot at, and ducked down in the car. Perez then heard appellant say, "Let's go. Let's go." Perez looked over and saw that it was appellant doing the shooting. All of this occurred while the car was stationary. Perez then sat back up, moved to the left of the line of cars, and drove towards North Wayside Drive. Perez testified that, after they began moving, appellant fired one more shot. Perez never saw at whom or what appellant was shooting.

Appellant testified that Perez was in possession of his gun at all times. He also testified that after they left the bar, there were some people in the parking lot between appellant and his car who were giving threatening looks and gestures to

the two of them. To avoid trouble, appellant and Perez ran around the bar, reaching the car from the other side. They ran to the car and appellant drove off. Appellant testified that there was no line of cars and they were able to leave immediately. As he was driving off, Perez began shooting from the car.

David Borjs, a friend of appellant's, testified that he was also at Emiliano's that night. He also asked appellant for a ride home that night, and appellant agreed. Close to closing time, Borjs saw appellant and Perez walk outside. After the bar closed, Borjs walked outside to find appellant. He saw appellant run to his car, get into the driver's side of the car, and drive off. As appellant was driving off, Borjs heard gunshots and dropped to the ground. Borjs did not see who fired the shots.

Identity of Appellant as the Shooter

In two points of error, appellant challenges the legal and factual sufficiency of the evidence to establish that appellant was the shooter.

A. 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. 307, 319, 99 S. Ct. 2781, 2789 (1979); *In re Winship*, 397 U.S. 358, 361, 90 S. Ct. 1068, 1071

(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*, 323 S.W.3d 893, 912, 924–28 (Tex. Crim. App. 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, 99 S. Ct. at 2789 & n.11; *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

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, 99 S. Ct. at 2789; *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, 99 S. Ct. at 2793. "The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either

side." *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). 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.

B. Analysis

As it relates to this case, 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) (Vernon 2003). In addition, the State was required to prove beyond a reasonable doubt that the accused is the person who committed the crime that was charged. *Johnson v. State*, 673 S.W.2d 190, 196 (Tex. Crim. App. 1984); *Smith v. State*, 56 S.W.3d 739, 744 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd).

Appellant argues that the physical evidence of the crime scene established that the shooter was moving while shooting. Perez—the only witness who established appellant as the shooter—testified, however, that all but one of the shots fired by appellant were fired from a stationary position. Accordingly, appellant argues, the jury could not have rationally believed beyond a reasonable doubt that appellant was the shooter.

Appellant is correct that Perez's testimony regarding the shooting conflicts with the physical evidence. The jury could, however, disbelieve the details of Perez's testimony regarding whether the car was moving during the shooting but still believe Perez's testimony that appellant was the one that did the shooting. "The trier of fact is always free to selectively believe all or part of the testimony proffered and introduced by either side." *Jones*, 984 S.W.2d at 257. Accordingly, the jury could still have relied on Perez's testimony that he saw appellant do the shooting to establish appellant's testimony as the shooter.

Appellant also points to his own testimony and the testimony of his friend, Borjs, to establish that he was not the shooter. Appellant testified that he was not the shooter and that Perez was. Borjs testified that he saw appellant get into the driver's seat of the car, which conflicted with Perez's account of the shooting and supported appellant's account. The jury was free to disbelieve all of this testimony and rely, instead, on Perez. *Id.*

We hold here was sufficient evidence in the record, viewed in the light most favorable to the verdict, to support a finding by the jury that appellant was the shooter. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. We overrule appellant's two points of error.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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