Opinion issued January 13, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00602-CR

JEVORISH JEVONTA FORD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Case No. 1171503

MEMORANDUM OPINION

Appellant, Jevorish Jevonta Ford, was charged by indictment with capital murder.[1] Appellant 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

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

life imprisonment. In three points of error, appellant (1) challenges the sufficiency of the evidence to establish his identity as one of the shooters and (2) argues that the trial court abused its discretion in overruling appellant's request for a self-defense instruction to be included in the jury charge.

We affirm.

Background

Michael Johnson was at his computer in his apartment on the morning of June 7, 2008 when he heard gunshots outside. He looked out his window and saw a black male in the parking lot of the apartment complex fire approximately three shots from his gun, aiming towards the fence line of the apartment complex. The shooter walked over to some cars and bent down to pick something up. Johnson then noticed that there was a body lying where the shooter was standing. The shooter walked over to a blue Ford Expedition, got in the vehicle, and drove away.

Johnson then observed another black male walking in the parking lot, heading towards a gray Dodge Intrepid. That man got into the car and followed the Ford Explorer away from the scene. Johnson's son's binoculars were in the room. Johnson grabbed them, looked at the Dodge Intrepid, and saw the license plate number. He wrote the number down and later gave it to one of the investigating officers, Sergeant S. Miller.

After the two cars left, Johnson saw the person he had seen lying between the cars, decedent Eduardo Arriaga, stand up. Arriaga pulled out his cell phone and made a call.

Kristina Andrus was cleaning her apartment on the same morning. While cleaning, she heard shots outside. After waiting a moment, she went outside to investigate. As she reached the parking lot, she saw Arriaga making a call on his cell phone. She saw blood coming from Arriaga's ear. At this point, a gray Dodge Intrepid drove up near Arriaga. Andrus saw the driver come to a stop, lean out of the car, and say to Arriaga, "Why are y'all doing this? What are y'all doing?" Andrus turned around to leave and heard shots fired. She ran back to her apartment and called 9-1-1. Some minutes later, Andrus left her apartment again. She found Arriaga sitting on the ground, bleeding from the chest.

Deputy D. Willis, an officer for the Harris County Sherriff's Department, was the first officer on the scene. He approached Arriaga and asked him who had shot him. Arriaga responded, "Roderick did it."

By this time another person had been located by the fence where the first shooter had aimed. This person, decedent Van Lee Guzman, was dead when Deputy Willis arrived. Arriaga was life flighted away from the scene. He died later at the hospital.

Some time later, Andrus was shown a photo array to see if she could identify the driver of the Dodge Intrepid. Andrus identified Roderick Carpenter.

In the course of the investigation, Sergeant Miller spoke to Demontrion Blackmon, appellant's roommate at the time. Blackmon told Sergeant Miller that, on the morning of the shooting, he saw appellant leave the apartment and get into a gray Dodge Intrepid with Carpenter. Blackmon also said that he had spoken to appellant the day after the shooting and that appellant said he had shot someone. Appellant did not give details to Blackmon but said that "either it was me or him," that he would rather people visit him in jail than see him at his funeral, and that "I didn't know what to do so I shot him."

Sergeant Miller also spoke with appellant's brother, Andre Ford. Appellant told Andre that he and Roderick went to do a drug deal and that he shot some Mexicans, one in the head and one in the back. The description of the shots is consistent with the injuries sustained by Arriaga and Guzman. Additionally, two shoe boxes containing cocaine were located in Guzman's car, which was located at the scene of the crime.

Appellant also told Andre that he shot them because "something was not right," "the Mexicans were hesitating," and he and Roderick "felt like the Mexicans [were] about to do them in by shooting them and tak[ing] their money."

Appellant said that "he took one of the Mexicans [sic] truck and drove it over to the east side of town and left it there."

A blue Ford Expedition owned by Arriaga was found away from the apartment complex. The interior was ripped up and papers were scattered throughout the car. Fire and smoke damage established that someone had set fire to the car, but the fire did not consume the car. Appellant's fingerprints were found on three of the papers found inside the car.

Both Blackmon and Andre provided appellant's cell phone number to Sergeant Miller. Carpenter's cell phone records were also obtained in the investigation. The records for Carpenter's cell phone established that his cell phone was communicating with a certain cell phone tower during the time of the incident. The apartment complex where the shooting took place was in the range of this cell phone tower. Carpenter's cell phone records show that Carpenter was communicating with appellant and Arriaga before and around the time of the shooting. Around the time of the shooting, appellant sent Carpenter a text message saying, "Want me to do it." Thirty-four seconds later, Roderick responded, "Make da move down them." Arriaga's phone records reflect that, less than a minute later, Arriaga made a call to 9-1-1.

Appellant was arrested and charged on June 25, 2009. At trial, appellant asked for a jury instruction of self defense to be included in the charge submitted to

the jury. The State objected to the inclusion, arguing that there was insufficient evidence presented to warrant an instruction on self defense. The trial court agreed and denied the request.

Sufficiency of the Evidence

In his first two points of error, appellant argues that the evidence is legally and factually insufficient to prove that he was one of the shooters.

A. Standards of Review and Applicable Legal Principles

1. Sufficiency of the Evidence Standard of Review

This Court reviews sufficiency-of-the-evidence challenges applying the same standard of review, regardless of whether an appellant presents the challenge as a legal or a factual sufficiency challenge. *See Ervin v. State*, No. 01–10–00054–CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. filed) (construing majority holding of *Brooks v. State*, 323 S.W.3d 893, 912, 924–28 (Tex. Crim. App. 2010)). This standard of review is the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). *See id.* Pursuant to 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; *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). We can hold evidence to be 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 314, 318 n.11, 320, 99 S. Ct. at 2786, 2789 n.11, 2789; *see also Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

The sufficiency-of-the-evidence standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). 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. In viewing the record, direct and circumstantial evidence are treated equally; circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Clayton*, 235 S.W.3d at 778. Finally, the "cumulative force" of all the circumstantial evidence can be sufficient for a jury to find the accused guilty

beyond a reasonable doubt. *See Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

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. Analysis

Appellant argues that this Court should take into account three considerations in determining whether the evidence was sufficient to establish appellant was one of the shooters: (1) none of the witnesses to the crime identified appellant as one of the shooters; (2) there is evidence that another person was at the scene of the crime; and (3) there is no evidence to connect appellant with any attempt to possess cocaine. First, we will review the record for evidence supporting the identity of appellant as one of the shooters.

The morning of the shooting, appellant was seen getting into a gray Dodge Intrepid with Carpenter. Carpenter was identified, by an eyewitness at the scene of

the crime, getting into in a gray Dodge Intrepid. Arriaga, one of the complainants in the case, identified Carpenter as one of the shooters.

After the shooting, appellant told his then-roommate that he had shot someone. Appellant also told his brother that he and Roderick went to do a drug deal and that he shot some Mexicans, one in the head and one in the back. The description of the shots is consistent with the injuries sustained by Arriaga and Guzman. Additionally, two shoe boxes containing cocaine were located in Guzman's car, which was located at the scene of the crime.

The records for Carpenter's cell phone established that his cell phone was communicating with a certain cell phone tower during the time of the incident. The apartment complex where the shooting took place was in the range of this cell phone tower. Carpenter's cell phone records show that Carpenter was communicating with appellant and Arriaga before and around the time of the shooting. Around the time of the shooting, appellant sent Carpenter a text message saying, "Want me to do it." 34 seconds later, Roderick responded, "Make da move down them." Arriaga's phone records reflect that, less than a minute later, Arriaga made a call to 9-1-1.

Appellant also told his brother, Andre, that "he took one of the Mexicans [sic] truck and drove it over to the east side of town and left it there." A blue Ford Expedition owned by Arriaga was found away from the apartment complex. The

interior was ripped up and papers were scattered throughout the car. Fire and smoke damage established that someone had attempted to set fire to the car, but the fire did not consume the car. Appellant's fingerprints were found on three of the papers found inside the car.

Appellant argues that the evidence is insufficient to support a finding that he was one of the shooters because none of the eyewitnesses to the crime identified him as one of the shooters. The identity of the accused as the perpetrator, however, 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). An eyewitness identification is not required so long as other direct or circumstantial evidence exists. *See id.*

Appellant also argues that there is evidence that another person was at the scene of the crime. Appellant argues that, because there was evidence that other people may have been present during the shooting, the other person may have committed the murder and appellant may have been simply a passenger in the Ford Expedition. Even assuming there was sufficient evidence in the record to suggest that another person may have been present, there is also evidence in the record that appellant admitted to being one of the shooters. It was within the jury's discretion to believe the testimony that appellant admitted to being one of the shooters. *See Jackson*, 443 U.S. at 319 (holding it is responsibility of jury to fairly resolve

conflicts in testimony, to weigh evidence, and to draw reasonable inferences from facts); *Williams*, 235 S.W.3d at 750 (same).

Finally, appellant argues that there is no evidence to connect appellant with any attempt to possess cocaine. Appellant was charged with capital murder by intentionally or knowingly causing the death of more than one individual during the same criminal transaction. *See* TEX. PENAL CODE ANN. § 19.02(b)(1), § 19.03(a)(7)(A). Possessing or attempting to possess cocaine is not an element of capital murder as alleged in appellant's indictment. Accordingly, whether appellant attempted to possess cocaine is not relevant to the jury's finding of guilt.

We overrule appellant's first two points of error.

Jury Instruction on Self Defense

In his third point of error, appellant argues that the trial court erred by denying his request for an instruction in the charge on self defense.

A. Standard of Review

If evidence raises the issue of self defense, the defendant is entitled to have it submitted to the jury, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996); *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source,

on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007). However, "[i]f a jury were instructed as to a defense even though the evidence did not rationally support it, then the instruction would constitute an invitation to the jury to return a verdict based on speculation." *Id.* at 658.

The defendant's testimony alone may be sufficient to raise the defensive theory requiring a charge. *Hayes v. State*, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987); *Dyson*, 672 S.W.2d at 463; *Warren v. State*, 565 S.W.2d 931, 934 (Tex. Crim. App. 1978). In determining whether the testimony of a defendant raises an issue of self-defense, the truth or credibility of the defendant's testimony is not at issue. *Rodriquez v. State*, 544 S.W.2d 382, 383 (Tex. Crim. App. 1976); *Guilbeau v. State*, 193 S.W.3d 156, 159 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). A reviewing court must view the evidence or testimony in a light most favorable to the appellant. *Dyson*, 672 S.W.2d at 463. If such testimony or other evidence viewed in a favorable light does not establish a case of self defense, an instruction is not required. *Id.*

B. Analysis

As it would apply in this case, a person is justified in using deadly force in self defense:

> (1) if the actor would be justified in using force against the other under Section 9.31; and
>
> (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
>
> (A) to protect the actor against the other's use or attempted use of unlawful deadly force . . . .

TEX. PENAL CODE ANN. § 9.32(a) (Vernon Supp. 2010). The State argues that appellant did not present any evidence that his belief that deadly force was necessary was reasonable. We agree.

When he spoke to the police, Blackmon said that he had spoken to appellant the day after the shooting and that appellant said he had shot someone. Appellant did not give details to Blackmon but said that "either it was me or him," that he would rather people visit him in jail than see him at his funeral, and that "I didn't know what to do so I shot him."

Appellant's brother, Andre, also spoke to the police. Andre told the police that Appellant told him that he shot the two men because "something was not right," "the Mexicans were hesitating," and he and Roderick "felt like the Mexicans [were] about to do them in by shooting them and tak[ing] their money."

Appellant relies on these statements for proof that he was acting in self defense. All but one of these statements relate to appellant's subjective state of mind. These statements show that appellant believed deadly force was necessary.

The only statement that does not relate to appellant's subjective state of mind is the statement "the Mexicans were hesitating."

"[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw*, 243 S.W.3d at 657–58. The statement that "the Mexicans were hesitating" does not support a rational inference by the jury that appellant's belief that deadly force was necessary was reasonable. *See* TEX. PENAL CODE ANN. § 9.32(a)(2) (requiring proof that belief deadly force is immediately necessary be reasonable). No other evidence in the record offers any justification for the reasonableness of appellant's belief that deadly force was necessary. Including an instruction on self defense, then, would have "constitute[d] an invitation to the jury to return a verdict based on speculation." *Id.* at 658. We hold that the trial court did not err in overruling appellant's request to have a jury instruction on self defense included in the charge.

We overrule appellant's third point 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).