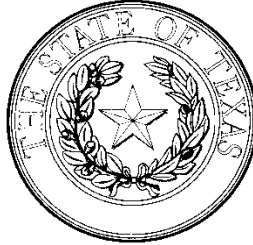


Opinion issued February 10, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-09-00629-CR

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**KENDRICK TORMAI HINES, Appellant**  
**V.**  
**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 178th District Court**  
**Harris County, Texas**  
**Trial Court Case No. 1151414**

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**MEMORANDUM OPINION**

A jury convicted appellant Kendrick Tormai Hines of the offense of murder

and assessed punishment at 85 years' imprisonment and a \$10,000.00 fine.<sup>1</sup> The jury also found true two enhancements for possession of a controlled substance and possession of a firearm by a felon. Appellant brings three issues on appeal, arguing that the evidence is legally and is factually insufficient to support his conviction and that the trial court erred in not allowing him to present evidence concerning the symbolism of a tattoo on the victim's face. We affirm.

### **Background**

Appellant was indicted for the murder of Brandon Rem. At trial, appellant's former girlfriend, Lorena Malone, testified that she lived with appellant and their infant son in the Royal Palms apartment complex. In October 2007, appellant moved into Symintha Robinson's apartment, which was also in the Royal Palms complex. Appellant and Malone ceased dating, and Malone took primary care of their child; however, appellant was able to see his son on a few occasions.

Malone was friends with Brandon Rem. Rem called and asked to stay with Malone because, following an argument with his wife, he had been "put out" of his home. Rem met Malone at her apartment on the morning of December 29, 2007.

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<sup>1</sup> See TEX. PENAL CODE ANN. § 19.02(b)(2) (West 2003).

Malone was cleaning her apartment, and Rem accompanied her to take out the trash. As they returned to the apartment, they saw Robinson.

Later that evening, appellant and Robinson came to Malone's apartment to retrieve some of appellant's property. Malone opened the door; appellant and Robinson remained outside. When appellant saw Rem, he asked who he was. Rem approached the door, and Malone pushed him back. Appellant saw "a chrome reflected item" in Rem's hand and thought it was a gun. Appellant and Robinson left. Malone testified that as appellant walked away he said that "he had something for [Rem]." She further testified that it looked like both appellant and Rem wanted to fight each other.

Malone did not have a telephone, but she wanted to tell her mother that appellant "had gotten into it with [Rem]." She and Rem walked to their neighbor Shanta Jackson's apartment to use the telephone. Rem remained outside during Malone's phone conversation.

Appellant testified at trial that after leaving Malone's apartment he returned to Robinson's apartment to retrieve his gun. He planned to return to Malone's apartment to retrieve his property. On his way back to Malone's apartment, he saw Rem in the courtyard. Appellant testified that Rem said, "What you want to do?"

What's up now?" Appellant testified that he saw a gun in Rem's hand and that Rem aimed the gun at him. Appellant was afraid, shot Rem, and fled the scene.

One witness, Jenise Duncan, testified to the shooting. She testified that Rem did not have a weapon when appellant shot him. She testified that as appellant approached Rem from across the courtyard, Rem took off his jacket and backed up with his hands in the air for protection. Appellant shot Rem, walked over to him, and said, "You ain't got nothing to say now, n——r."

A second witness, Melinda LeBlanc, testified to seeing appellant and Rem immediately after the shooting. Appellant's trial counsel questioned LeBlanc as to what appellant and Rem were wearing immediately after the shooting. LeBlanc testified that Rem "had a do-rag on," and she also stated that "he had a jacket on," although it was not entirely clear from the transcript that LeBlanc was still referring to Rem.

A third witness, Shanta Jackson, also testified to seeing appellant and Rem immediately after the shooting. She testified that she saw appellant walk up to Rem after Rem had been shot. She testified that when she saw Rem on the ground he was not wearing a jacket.

Andrew Friesenhahn, a Houston Fire Department paramedic, responded to the incident, accompanied by other firefighters. They found Rem face down and

determined he was dead. Friesenhahn testified that Rem was not wearing a jacket. Because the crowd was hostile toward the team, and Friesenhahn feared for the officers' safety, the HFD team put Rem's body on a stretcher and placed it in the ambulance to wait for the police to arrive. Friesenhahn testified that he did not see or feel a gun near Rem.

Houston Police Officers M. Valle and E. Tewes were sent to the scene. They attempted to control a crowd of approximately 100 people, while the fire department worked on Rem's body. Officer Valle testified that the only evidence he found at the scene was one spent bullet casing. Officer D. Nunez, a crime scene investigator, arrived and photographed the scene. In addition to the spent casing, he found a camouflage jacket underneath a blanket. Officer Nunez did not find any bullet holes, other spent casings, or other firearms at the scene.

Houston Police Sergeants M. Sosa and P. Munoz of the HPD arrived last. Sergeant Sosa testified that a jacket found near Rem's body was recovered and searched before being tagged into evidence and that no weapon was found in the jacket. Neither the firefighters nor the police officers found a weapon on or near Rem's body.

James Jackson, a forensic chemist from the Harris County Medical Examiner's Office, performed the gunshot residue analysis on Rem. He testified

that he found two particles of the elements that comprise gunshot residue on Rem's right hand and no particles on his left hand. These results were inconclusive as to whether Rem had fired or was handling a gun. Jackson explained to the jury that gunshot residue is very transferable and that individuals who did not come in contact with a gun could have one or two gunshot residue particles on their hands as a result of their day-to-day activities. Jackson further explained to the jury that the presence of gunshot residue particles could indicate that Rem had handled or had fired a gun.

### **Analysis**

#### *Sufficiency of the evidence*

In issues one and two, appellant challenges the legal sufficiency of his conviction because he contends the evidence established that he had a right to use deadly force to defend himself. *See* TEX. PENAL CODE ANN. § 9.31 (West Supp. 2010). When a challenge pertains to the rejection of a defensive claim, we apply the same standards used in reviewing the sufficiency of the evidence to support a guilty verdict. *See Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991).

We review the legal sufficiency of the evidence by viewing the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). The fact finder is the sole judge of the weight and credibility of the evidence. *Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008). Although our analysis considers all of the evidence presented at trial, we may not re-weigh the evidence and substitute our judgment for that of the fact finder. *King*, 29 S.W.3d at 562. We presume that the fact finder resolved all conflicts in the evidence in favor of the verdict, and we defer to that resolution. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

In *Brooks v. State*, the Court of Criminal Appeals overruled *Clewis v. State* and held that claims of factual insufficiency should now be analyzed under the *Jackson v. Virginia* standard used for legal sufficiency review. *Brooks*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (“[W]e decide that the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.”). Because appellant makes the exact same arguments for why the evidence is both legally and factually insufficient, we solely address appellant’s legal sufficiency

contention. *See Leonard v. State*, No. 01-09-00379-CR, 2010 WL 4676989, at \*2 n.2 (Tex. App.—Houston [1st Dist.] Nov. 18, 2010, no. pet. h.).

A defendant asserting a claim of self-defense bears the initial burden of producing some evidence in support of his contention; if he meets this burden, the State then takes on the burden of persuasion to disprove the raised defense. *See Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). The State’s burden of persuasion “is not one that requires the production of evidence, rather it requires only that the State prove its case beyond a reasonable doubt.” *Id.* When the jury finds a defendant guilty, there is an implicit finding against the defensive theory. *Id.*

The jury exclusively judges the credibility of witnesses, the weight to be given to their testimony, and the reconciliation of conflicting evidence. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000); *McKinny v. State*, 76 S.W.3d 463, 468–69 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The jury may believe any part or all of a witness’s testimony. *McKinny*, 76 S.W.3d at 469. “Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.” *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). If there is evidence that establishes guilt beyond a reasonable doubt and the jury



believes that evidence, the judgment must be affirmed. *Fitts v. State*, 982 S.W.2d 175, 185 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

To convict appellant of murder, the State had to prove, beyond a reasonable doubt, that appellant (1) intentionally or knowingly caused Rem's death or (2) intended to cause serious bodily injury and committed an act clearly dangerous to human life that caused Rem's death. *See* TEX. PENAL CODE § 19.02(b) (West 2003). Appellant would have been justified in using deadly force if a reasonable person in his situation would not have retreated and to the extent appellant reasonably believed that deadly force was immediately necessary to protect himself against Rem's use or attempted use of unlawful deadly force. TEX. PENAL CODE § 9.32(a) (West Supp. 2010).

Appellant argues that the physical evidence demonstrates that Rem could have had a gun on the night of the shooting. James Jackson's testimony, however, was inconclusive as to whether Rem had a gun at the time appellant shot him. Appellant further argues that the presence of the blanket and the fact that Rem was not wearing a jacket when the fire department team arrived are signs that the crime scene was contaminated and that Rem's gun could have been taken by another individual. Appellant relies on the testimony of Melinda LeBlanc that Rem was wearing a jacket after he was shot and lying on the ground. Jenise Duncan

testified, however, that Rem removed his jacket before appellant shot him. Shanta Jackson testified that she saw appellant approach Rem after Rem had been shot. This suggests that she witnessed the scene before any alleged contamination. She testified that Rem did not have a jacket on when he was lying on the ground with appellant present. LeBlanc arrived on the scene immediately after the shooting, and the testimony as to whether Rem was wearing a jacket was unclear.

When viewed in the light most favorable to the verdict, there was evidence from which a rational jury could have found guilt and from which it could have formed a rational doubt about the credibility of appellant's defensive theory. The evidence in this case shows that appellant shot Rem. One witness testified to seeing appellant shoot Rem, and numerous others testified that they saw appellant near Rem's body immediately after the shooting. Appellant did not deny shooting Rem. Appellant testified to the jury that Rem had a gun, and the jury chose to disbelieve this testimony. *See Saxton*, 804 S.W.2d at 914 (holding that jury verdict of guilty implicitly shows that jury rejected defendant's self-defense theory); *Denman v. State*, 193 S.W.3d 129, 132 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (holding that “the jury, by finding appellant guilty, implicitly rejected his self-defense theory . . . [and] necessarily chose not to believe [his] testimony.”).

Jenise Duncan testified that appellant shot Rem and that Rem was unarmed, and the jury chose to believe this testimony. *See Saxton*, 804 S.W.2d at 914.

We conclude that a rational trier of fact could have determined beyond a reasonable doubt that appellant committed the offense of murder and did not act in legally permissible self-defense. *See Lee v. State*, 259 S.W.3d 785, 791 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (holding that evidence was legally sufficient to support defendant's conviction for murder because jury could believe testimony of other witnesses and disbelieve conflicting testimony given by defendant on issue of self-defense); *Denman*, 193 S.W.3d at 132–33 (holding that “the jury [does] not have to accept [defendant's] self-defense theory—appellant's testimony does not ‘prove,’ by itself, a claim of self-defense”). We therefore hold that the evidence is both legally and factually sufficient, and we overrule issues one and two.

#### *Admissibility of evidence*

In issue three, appellant contends that the trial court erred by not allowing him to introduce evidence of the meaning of Rem's teardrop tattoo. We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). A trial court has wide discretion in its decision to admit or exclude evidence. *Edwards v.*

*State*, 178 S.W.3d 139, 145 (Tex. App.—Houston [1st Dist.] 2005, no pet.). We will not reverse a trial court’s ruling on the admission of evidence unless that ruling falls outside the zone of reasonable disagreement. *Burden v. State*, 55 S.W.3d 608, 615 (Tex. Crim. App. 2001). If a trial court’s decision is correct under any theory of law, the decision should not be disturbed even if the trial court gave the wrong reason for its ruling. *See Romero v. State*, 800 S.W.2d 539, 543–44 (Tex. Crim. App. 1990).

“A defendant in a homicide prosecution who raises an issue of self-defense may introduce evidence of the deceased’s violent character.” *Torres*, 71 S.W.3d at 760; *see* TEX. R. EVID. 404(a)(2). This evidence can include the victim’s reputation for violence or particular violent actions committed by the victim which would be relevant to the defendant’s reasonable belief that he needed to act in self-defense. *See Ex parte Miller*, No. AP-76,167, slip op. at 10–11, 2009 WL 3446468, at \*4 (Tex. Crim. App. Oct. 28, 2009), *reh’g granted* (Jan. 27, 2010); *see also Stone v. State*, 751 S.W.2d 579, 585 (Tex. App.—Houston [1st Dist.] 1988, pet. ref’d) (citing *Thompson v. State*, 659 S.W.2d 649, 653–55 (Tex. Crim. App. 1983)). The evidence of the victim’s reputation or previous violent actions must be relevant for a purpose other than character conformity. TEX. R. EVID. 404(b). Evidence demonstrating the deceased’s violent character or the defendant’s fear of

danger, to prove the reasonableness of apprehension in a defendant's self-defense claim, can be a relevant use of evidence apart from character conformity. *See Torres*, 71 S.W.3d at 761. This evidence must be admitted as testimony in the form of opinion or testimony to reputation. TEX. R. EVID. 405(a).

In *Mozon v. State*, the Court of Criminal Appeals set out two theories for the admissibility of evidence of the deceased's character for violence. The evidence may be admitted (1) to show that the defendant's perception of danger was reasonable based on the deceased's violent character, which requires a showing that the defendant was aware of the deceased's violent character, and (2) to show that the deceased was the first aggressor in conformity with his or her character, which does not require a showing that the defendant have personal knowledge of the deceased's violent character. *Mozon v. State*, 991 S.W.2d 841, 845 (Tex. Crim. App. 1999). *Mozon* also addressed the effect of the Texas Rules of Criminal Evidence on the common-law understanding of these theories of evidence. *Id.*

In *Ex parte Miller*, the Court of Criminal Appeals clarified that:

[A] defendant may offer reputation or opinion testimony or evidence of specific prior acts of violence by the victim to show the "reasonableness of defendant's claim of apprehension of danger" from the victim. This is called "communicated character" because the defendant is aware of the victim's violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not. This theory does not invoke Rule 404(a)(2) because Rule 404 bars character evidence only when offered to prove conduct in

conformity, *i.e.*, that the victim acted in conformity with his violent character. Here, the defendant is not trying to prove that the victim actually is violent; rather, he is proving his own self-defensive state of mind and the reasonableness of that state of mind.

*Ex parte Miller*, No. AP-76,167, slip op. at 10–11, 2009 WL 3446468, at \*4 (internal citations omitted).<sup>2</sup> Evidence of the victim’s previous violent acts, when offered for a noncharacter purpose, may be admissible under Rule 404(b). *Id.*, No. AP-76,167, slip op. at 13, 2009 WL 3446468, at \*5.

The victim’s previous violent acts do not need to involve the defendant directly before this evidence can be admissible under Rule 404(b). *See Hayes v. State*, 161 S.W.3d 507, 509 (Tex. Crim. App. 2005) (holding that evidence of victim’s previous bad acts can be admitted under Rule 404(b) even if those acts did not “implicate” defendant). However, the defendant must be aware of the reputation or specific acts for the evidence to be admissible to demonstrate his state

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<sup>2</sup> The Texas Court of Criminal Appeals case on this issue, *Ex parte Miller*, No. AP-76,167, 2009 WL 3446468 (Tex. Crim. App. Oct. 28, 2009), *reh’g granted* (Jan. 27, 2010), has not been released for publication yet. *Miller* clarifies that 404(a)(2) applies only to evidence offered to show that the victim was the first aggressor. *Id.*, No. AP-76,167, slip op. at 10–11, 2009 WL 3446468, at \*4. It also clarifies that evidence offered to show that the defendant’s apprehension of danger is reasonable “does not invoke 404(a)(2)” and “may be admissible under 404(b).” *Id.*, No. AP-76,167, slip op. at 10–13, 2009 WL 3446468, at \*4–5.

of mind at the time of the commission of the crime. *Hayes v. State*, 124 S.W.3d 781, 785–86 (Tex. App.—Houston [1st Dist.] 2003) (citing *Torres*, 71 S.W.3d at 761 n.4), *aff'd*, 161 S.W.3d 507 (Tex. Crim. App. 2005).

At trial, the significance of Rem’s tattoos was first addressed in the cross-examination of Sergeant Sosa by appellant’s trial counsel. Once Sergeant Sosa testified that he was familiar with gang tattoos and that gang tattoos have symbolism attached to them, appellant’s trial counsel approached Sergeant Sosa with photos of Rem and asked about the symbolism of Rem’s tattoos. Sosa testified that he was familiar with the teardrop tattoo in particular and that it was symbolic. The State objected to questions about the tattoo as improper character evidence. Counsel approached the bench, and appellant’s trial counsel stated that the characterization of the tattoo could show that there was a “fight between [appellant and Rem]” and that the tattoo could explain why the crowd was hostile to Malone and Rem.

On voir dire examination, Sergeant Sosa, outside the presence of the jury, testified that a teardrop tattoo could represent either “the loss of a homeboy” or that the person with the tattoo had killed someone. The trial court then determined that testimony as to the meaning of Rem’s teardrop tattoo was inadmissible. The trial court ruled (1) that the evidence was not relevant and (2) even if the evidence

were relevant, then it was excluded because the probative value of the evidence was outweighed by the danger of undue prejudice, confusion of the issue, or danger of misleading of the jury. *See* TEX. R. EVID. 403 (providing that relevant testimony may be excluded if probative value of evidence is outweighed by potential of unduly prejudicing, confusing, or misleading jury).

Latoya Rem, Brandon Rem's wife, later testified that she was familiar with Rem's tattoos. Appellant's trial counsel asked Latoya Rem if she knew what the tattoos meant. The State objected that the question was both irrelevant and improper character evidence. The trial court sustained this objection. The trial court retired the jury, and appellant's trial counsel questioned Latoya Rem about Rem's tattoos in a voir dire examination. Latoya Rem testified that Rem was not in a gang, that she did not know if the tattoos on Rem's body signified gang membership, and that Rem's teardrop tattoo meant that "[Rem] lost a loved one."

In subsequent testimony, appellant testified that he did not see Rem's teardrop tattoo during their initial meeting at Malone's apartment or at any time on the night that he shot Rem. Further, he testified that he had never seen Rem before the night he shot him.

We hold that the trial court did not err in refusing to admit the testimony on the symbolism of Rem's tattoo. Appellant's determination that he needed to shoot



Rem in self-defense could not have been based on apprehension of Rem's previous violent acts or reputation as demonstrated by the tattoo because appellant was unaware of Rem's teardrop tattoo. *Compare Hayes*, 124 S.W.3d at 786 (upholding exclusion of evidence of potential victim's previous assault on third party with gun as evidence to show defendant's state of mind because defendant did not have personal knowledge of this assault), *with Espinoza v. State*, 951 S.W.2d 100, 102 (Tex. App.—Corpus Christi 1997, pet. ref'd) (holding that it is reversible error to exclude defendant's evidence of victim's reputation for violence when defendant testified that he was aware of victim's violent nature). Appellant was not aware of Rem's reputation as demonstrated by his teardrop tattoo; therefore, evidence about the tattoo to demonstrate appellant's state of mind was not admissible. *See Hayes*, 124 S.W.3d at 785–86. The trial court did not abuse its discretion in excluding inadmissible evidence.

We overrule appellant's third issue.

## **Conclusion**

We affirm the trial court's judgment.

Evelyn V. Keyes  
Justice

Panel consists of Justices Keyes, Higley, and Bland.

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