

Opinion issued February 3, 2011.



In The
Court of Appeals
For The
First District of Texas

NO. 01-09-01017-CR

BRUNO AVILES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Case No. 1175814

MEMORANDUM OPINION

Appellant, Bruno Aviles, appeals from a judgment sentencing him to 99 years' confinement for felony murder. *See* TEX. PENAL CODE ANN. § 19.02(b)(3) (Vernon 2003). Appellant pleaded not guilty. A jury found appellant guilty and determined his sentence. In three issues, appellant contends that (1) the State's

felony murder indictment was improper because deadly conduct cannot be an underlying felony offense for felony murder, (2) the trial court erroneously charged the jury with the wrong culpable mental state for deadly conduct, and (3) the evidence is legally insufficient to support his conviction. We affirm.

BACKGROUND

The day she was shot, Velia Ortega was living with her daughter, Roxanna Garza, and two of her grandchildren, Albert Garza and Brianna Salinas, in an apartment in southeast Houston. The series of events that lead to Ortega's death began in July 2008 when Andrew Garcia decided to illegally repossess a blue Cadillac that he had sold Ortega's grandson, Albert, a year earlier.

During Albert's year of ownership, Roxanna typically drove the Cadillac and parked it at her apartment where the family lived. Once Garcia decided to repossess the Cadillac, he asked an acquaintance of his, David Gomez, to tow the Cadillac from Roxanna's apartment. Gomez found the car at Roxanna's apartment and towed it to Garcia's location. Garcia was with appellant and another friend, Raziel Munoz, when Gomez delivered the car. Although Garcia did not have keys to the Cadillac, he broke the steering column housing and rigged the car's wiring to start the car. Garcia and appellant later acquired aftermarket chrome rims and installed them on the Cadillac.

Roxanna eventually noticed the Cadillac was missing from its typical parking space so she reported it stolen to the police. Later, she discovered from neighbors that Gomez had towed the car so she contacted him. Roxanna informed Gomez that the Cadillac belonged to her son and that she wanted it returned. After Roxanna spoke with him, Gomez searched for the Cadillac and found it at a nearby hotel. Gomez then towed the Cadillac back to Roxanna's apartment without informing Garcia.

Garcia, Munoz, and appellant were at a hotel when Gomez returned the car back to Roxanna's apartment. When Garcia discovered that the Cadillac was missing from the hotel parking spot, he called Gomez and asked whether he had towed the Cadillac. Garcia and appellant became angry when Gomez replied that he had towed the car back to its original location.

After Garcia spoke with Gomez, appellant traveled to Roxanna's apartment and used Munoz's vehicle to survey her apartment complex. Appellant found the Cadillac parked at the complex. Appellant returned to the hotel and picked up Garcia and Munoz. The three of them then went to a "dope house" in the Manchester neighborhood of Houston where Garcia and appellant acquired an AK-47 assault rifle. Garcia also carried a revolver during this episode.

Munoz then drove Garcia and appellant to Roxanna's apartment. The men tried to find the Cadillac but, unbeknownst to them, Roxanna had moved the

Cadillac and was driving it to her boyfriend's sister's house. She removed the Cadillac from her apartment because once she noticed the new rims on the Cadillac, she suspected the rims might incite violence and she did not want to endanger her family by parking the Cadillac at the apartment.

Upon discovery that the Cadillac was not at the apartment, appellant called Roxanna asking that she return the rims. Roxanna responded to appellant that he needed to call the Houston Police Auto Theft Division and obtain the rims from the police. Appellant became upset and mentioned to Roxanna her apartment number. Realizing that the caller knew where she lived, Roxanna became frightened and hung up to call 911. Appellant called Roxanna again, and she again informed him that he needed to call the Auto Theft Division.

At this point, appellant used the AK-47 to shoot a full clip of ammunition into Roxanna's apartment. Appellant shot approximately 30 rounds. Garcia also fired shots with his revolver from inside the vehicle. Albert's grandmother, Ortega, and his sister, Salinas, were inside Roxanna's apartment when appellant fired the AK-47. Appellant did not hit Salinas with his gunfire, but he did hit Ortega.

After the shooting ceased, Salinas went into the living room where she found Ortega slumped over in her wheelchair bleeding from a gunshot wound to her abdomen. Shortly thereafter, Roxanna received a call from a 911-dispatcher who

told her that there had been a shooting at her apartment. Roxanna and her boyfriend drove back to the apartment. When Roxanna arrived at the scene, Ortega was on a stretcher and paramedics were caring for her. At this point, appellant called Roxanna again. He said, "I'm serious. I want my rims. If I don't get my rims by 12:00 midnight, I'm going to kill you." Ortega died from her injuries 21 days later.

Witnesses to the shooting described Munoz's vehicle to the police as a gold or tan Chevrolet Tahoe. The police located the Tahoe on the evening of the shooting and conducted surveillance. When Munoz returned to the truck the police arrested him. The police questioned Munoz and he identified himself as the driver of the truck, and identified Garcia and appellant as the gunmen in the shooting. Munoz identified appellant specifically as the person who shot Roxanna's apartment with an AK-47. The police later apprehended Garcia and appellant.

The State indicted appellant for felony murder and alleged the underlying felony was deadly conduct. At trial, Munoz testified for the State and gave a detailed description of the events leading up to and including the shooting. The State also presented testimony from other witnesses, including neighbors who saw the shooting, members of Ortega's family, police officers that responded to and investigated the shooting, police officers from the gang unit, and others. Appellant

did not testify and did not present any witnesses. The jury returned a guilty verdict. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his third issue, appellant contends the evidence is legally insufficient to prove his guilt for the offense of felony murder.

A. Standard of Review

Evidence is legally 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 v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *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). Viewed in the light most favorable to the verdict, 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 conclusively establishes a reasonable doubt. *Laster*, 275 S.W.3d at 518; *Williams*, 235 S.W.3d at 750.

If an appellate court finds the evidence insufficient under this standard, it must reverse the judgment and enter an order of acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982). An appellate court determines

whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). An appellate court presumes that the fact finder resolved any conflicting inferences in favor of the verdict and defers to that resolution. *See Jackson*, 443 U.S. at 326, 99 S. Ct. at 2793; *Clayton*, 235 S.W.3d at 778. 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. Felony Murder and Deadly Conduct

The felony murder statute provides that a person commits murder if he “commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(3); *Contreras v. State*, 312 S.W.3d 566, 583–84 (Tex. Crim. App. 2010). A conviction for felony murder under section 19.02(b)(3) will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter. *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999). A person commits manslaughter if he recklessly causes the death of an individual. TEX. PENAL CODE ANN. § 19.04(a) (Vernon 2003).

The underlying felony in appellant's case was deadly conduct. As alleged in the indictment, a person commits felony deadly conduct if he intentionally and knowingly discharges a firearm (1) at or in the direction of one or more individuals or (2) at or in the direction of a habitation, building, or vehicle and is reckless as to whether the habitation, building, or vehicle is occupied. *See id.* § 22.05 (Vernon 2003).

C. Legal Sufficiency

Appellant asserts the evidence is legally insufficient to support his conviction for felony murder. Munoz identified appellant in the courtroom. Munoz then testified that appellant shot approximately 30 rounds from an AK-47 assault rifle at Roxanna's apartment. Munoz further testified that appellant shot Roxanna's house without confirming that the house was empty. Finally, the State presented evidence that it was a bullet from the AK-47 that caused the death of Ortega.

Appellant asserts that the evidence is insufficient because it did not show that it was appellant's conscious objective to kill Ortega and did not show he was aware his conduct was reasonably certain to cause death. Because the State had to prove felony murder predicated on felony deadly conduct, and, therefore, did not have to prove appellant intended to kill Ortega, it was inconsequential whether

appellant had the conscious objective to kill Ortega or whether he was aware that his conduct was reasonably certain to cause death.

Viewing all evidence in the light most favorable to the verdict, the evidence shows that a jury could reasonably find beyond a reasonable doubt that appellant knowingly discharged a firearm in the direction of a habitation and was reckless as to whether the habitation was occupied and, therefore, committed felony deadly conduct. *See id.* The evidence also demonstrates that a jury could reasonably find beyond a reasonable doubt that in the course of appellant's felony deadly conduct he committed an act clearly dangerous to human life and that act caused the death of Ortega. *See id.* § 19.02(b)(3). We conclude, therefore, that the evidence is legally sufficient. *See Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding testimony by one witness legally sufficient to support conviction).

We overrule appellant's third issue.

LESSER-INCLUDED OFFENSE

In his first issue, appellant contends his conviction was improper because the deadly conduct as alleged was a lesser-included offense of manslaughter. The indictment stated that appellant,

Did then and there unlawfully, intentionally and knowingly commit the felony offense of DEADLY CONDUCT by DISCHARGING A FIREARM IN THE DIRECTION OF A HABITATION AND WAS RECKLESS AS TO WHETHER THE HABITATION WAS

OCCUPIED, and while in the course of an furtherance of the commission of said offense did COMMIT an act clearly dangerous to human life, to-wit: SHOOTING VELIA ORTEGA WITH A DEADLY WEAPON, NAMELY A FIREARM, and did thereby cause the death of VELIA ORTEGA.

A conviction for felony murder under section 19.02(b)(3) of the Texas Penal Code will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter. *See Johnson*, 4 S.W.3d at 258; *see also* TEX. PENAL CODE ANN. § 19.02(b)(3). A person commits manslaughter if he recklessly causes the death of an individual. TEX. PENAL CODE ANN. § 19.04(a). Here, the underlying felony in appellant's case was deadly conduct. A person commits felony deadly conduct if he knowingly discharges a firearm at or in the direction of a habitation and is reckless as to whether the habitation is occupied. *See id.* § 22.05.

Appellant asserts the deadly conduct as alleged in this case qualifies as a lesser-included offense of manslaughter. An offense qualifies as a lesser included offense only if:

- (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
- (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
- (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. ANN. art. 37.09 (Vernon 2006).

Contrary to appellant's contention, the deadly conduct as alleged is not a lesser included offense of manslaughter. First, to prove deadly conduct as alleged in this case, the State had to show that appellant intentionally and knowingly discharged a firearm, a fact not required to establish the offense of manslaughter under the first criterion of article 37.09. *See id.* art. 37.09(1). Second, the deadly conduct also required proof of discharging a firearm, therefore, it was not a lesser included offense of manslaughter under the second criterion of article 37.09. *See id.* art. 37.09(2). Third, the deadly conduct as alleged required proof of intentional and knowing conduct that would not be required for the State to prove manslaughter. Because it differed from manslaughter more than just in the respect that a different culpable mental state sufficed to establish its commission, the deadly conduct as alleged was not a lesser included offense of manslaughter under the third criterion of article 37.09. *See id.* art. 37.09(3). Finally, the deadly conduct as alleged was not simply an attempt to commit manslaughter; therefore, it also failed to qualify as a lesser included offense under the fourth criterion of article 37.09. *See id.* art. 37.09(4). Because the deadly conduct as alleged in the indictment was not a lesser included offense of manslaughter under the criteria set out in article 37.09, we conclude that the deadly conduct offense as alleged was not a lesser included offense of manslaughter. *See Yandell v. State*, 46 S.W.3d 357,

361 (Tex. App.—Austin 2001, pet. ref'd) (holding deadly conduct was not lesser included charge of manslaughter under article 37.09).

We overrule appellant's first issue.

JURY CHARGE

In his second issue, appellant contends the trial court erred by failing to properly limit the relevant conduct elements in the jury charge to the appropriate culpable mental states for the deadly conduct offense. The State concedes that “it was error for the trial court to define all three mental states as to the result of one’s conduct only” because the jury charge should have defined “intentionally” and “knowingly” with respect to the nature of appellant’s conduct and have defined “recklessly” with respect to the circumstances surrounding appellant’s conduct. *See* TEX. PENAL CODE ANN. § 6.03(a)–(d) (Vernon 2009); *see also* *Ash v. State*, 930 S.W.2d 192, 194 (Tex. App.—Dallas 1996, no pet.) (noting that offenses may involve one or more of three conduct elements: (1) nature of conduct; (2) result of conduct; and (3) circumstances surrounding conduct).

Appellant failed to object to the jury charge at trial; therefore, we review the error to see if it was so egregious that appellant was denied a fair and impartial trial. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). For both preserved and unpreserved charging error, the actual degree of harm is assessed in light of the entire jury charge, the state of the evidence, including the

contested issues and weight of the probative evidence, the argument of counsel, and any other relevant information in the record. *Almanza*, 686 S.W.2d at 171; *see also Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996).

We begin by looking to the application paragraphs to determine whether the charge as a whole properly focused the jury on the applicable conduct element. *See Patrick v. State*, 906 S.W.2d 481, 492 (Tex. Crim. App. 1995) (noting that when determining harm suffered from inclusion of improper conduct elements in definitions of culpable mental states, we “may consider the degree, if any, to which the culpable mental states were limited by the application portions of the jury charge.”) (quoting *Hughes v. State*, 897 S.W.2d 285, 296 (Tex. Crim. App. 1994)). In this case, the application paragraph did not use the broad language contained in the definitions, but instead sufficiently limited the culpable mental states to their relevant conduct element. The application paragraphs provided that the jury was to find appellant guilty if he individually or as a party “intentionally or knowingly commit[ted] the felony offense of deadly conduct by discharging a firearm in the direction of a habitation and was reckless as to whether the habitation was occupied.” Because the application paragraph sufficiently limited the culpable mental states to the relevant conduct element, we conclude that the charge as a whole properly focused the jury on the applicable conduct elements.

Even if the culpable mental states had not been properly limited to their relevant conduct element in the application paragraph, we conclude appellant could still not show he suffered egregious harm. The record shows overwhelming probative evidence of appellant's guilt. It further shows that the State's closing argument outlined the culpable mental states and limited them to their relevant conduct elements. Appellant did not present a defense regarding mental culpability, and the only defensive tactic employed by appellant was to question the evidence against him in his closing argument. After reviewing the record, we conclude that appellant cannot show the trial court's jury charge deprived him of a fair and impartial trial. *See, e.g., Nations v. State*, 894 S.W.2d 480, 490 (Tex. App.—Austin 1995) (holding error in providing definitions on applicable culpable mental states does not result in egregious harm when culpable mental state was not contested issue at trial), *vacated on other grounds*, 930 S.W.2d 98 (Tex. Crim. App. 1996); *Manning v. State*, 803 S.W.2d 881, 883 (Tex. App.—Fort Worth 1991, no pet.) (holding same). We hold that the trial court's error was harmless.

We overrule appellant's second issue.

CONCLUSION

We affirm the judgment of the trial court.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Massengale and Brown.

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