Opinion issued February 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00312-CR

TYRONE COLBERT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th Judicial District Court
Harris County, Texas
Trial Court Case No. 1209535

MEMORANDUM OPINION

A jury found appellant, Tyrone Colbert, guilty of the offense of capital murder,[1] and the trial court assessed his punishment at confinement for life. In two

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[1] *See* TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 2010).

points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction.

We affirm.

Background

Harris County Sheriff's Office ("HCSO") Deputy T. Crosby testified that on January 14, 2009, shortly before midnight, he was dispatched to an apartment complex to respond to a "weapons disturbance, shots fired" call. Upon his arrival, he saw a man performing C.P.R. on a man on the ground while several people watched. Crosby ordered everyone other than the man performing C.P.R. to "move back and put their hands on top of their heads," and he attempted to secure the scene. Crosby then called for emergency medical assistance, and, upon its arrival, he ordered the man performing C.P.R. to stop. Crosby escorted the man, who he identified as Joshua Winchester, to his patrol car, placed paper bags over his hands, and detained him for further investigation. Crosby noted that Winchester was "hysterical and freaking out" and kept repeating "my buddy got shot."

Joshua Winchester testified that on the night of the shooting, he was staying at the apartment of the complainant, who sold marijuana "on the side." That night, shortly before midnight, Winchester and the complainant were upstairs getting "a marijuana cigarette ready to smoke" when someone knocked on the door.

Winchester explained that it was not common for someone to come by at that late hour, and they believed there might be a "situation." After the complainant took his shotgun and proceeded downstairs to answer the door, Winchester "peeked over the balcony to look downstairs to see what was going on." The complainant had the door "slightly cracked enough to where he could see who [was] outside the door." He then shut the door, locked it, returned upstairs, and prepared a bag of marijuana. When Winchester asked who was at the door, the complainant responded, "Oh, it is nobody. Just some people from my neighborhood." The complainant then returned downstairs and gave the marijuana to the three people outside. Winchester explained that he could hear the people downstairs "chitchatting" and "trying to catch up," but there did not appear to be any trouble at this point. However, the tone of the conversation changed when "one of the guys" said something about how the bag of marijuana did not "look right." Winchester then heard the door slam and then open, at which point he ran downstairs to "see what was going on." He grabbed the shotgun from the "crevice where the door and the wall meet up" and "carefully eas[ed] out" the door. A person to Winchester's left started to run, and Winchester aimed the shotgun at the person, but the shotgun did not fire. To Winchester's right, in his "peripheral" vision, he saw a "flash of white" and the complainant "tussling with somebody." A man pulled the complainant's shirt over his head, and two other men began to

run away. Winchester thought the men "were trying to rob" them. A man wearing a gray jacket then turned around and pulled something out of his waistband that looked like a firearm. Winchester then turned around and tried to take cover in the apartment. He then heard gunshots, saw a flash of light, fell into the apartment, and kicked the door shut. After a few seconds, Winchester opened the door, where he saw the complainant on the ground without his shirt and a "hole in his chest" that "was still smoking." After Winchester began performing C.P.R. on the complainant, a few neighbors came outside and began helping. Winchester then went back inside the apartment to hide the marijuana and the shotgun. He explained that he was "paranoid" about the marijuana because he was the only person in the apartment, and he hid the shotgun because someone had been shot outside and it was the only weapon. Winchester noted that he was worried about "getting into trouble" and concerned that he might be accused of shooting the complainant. Once police officers and emergency medical assistance arrived, an officer escorted Winchester to the back of a police car for questioning. Winchester explained that when he initially spoke with the officer we was not completely truthful because he "was nervous and felt like [] they were trying to pin everything on" him. Winchester did not initially tell the police officers or investigators about the marijuana or the shotgun.

Charlie Fenceroy, a neighbor of the complainant, testified that on January 14, 2009, while lying in bed, he "heard two guys arguing outside" of his apartment, and he recognized his neighbor's voice. He explained that he heard someone knocking at his neighbor's door, someone run up and back down the stairs, and men "arguing about something wasn't right." Soon after, Fenceroy heard six gunshots. He then opened his door to determine if he could see anything, when he saw his "neighbor laying on the concrete" wearing jeans and no shirt. Fenceroy noted that his neighbor's "pants pockets were turned inside out" and he had "wounds to his chest and head area."

HCSO Deputy A. J. Kelly testified that he was the lead detective assigned to investigate the death of the complainant. After Kelly obtained a warrant to arrest appellant for the offense of murder, appellant was arrested and brought to the sheriff's office where Kelly informed him of his legal rights. Appellant agreed to give a statement, which Kelly video-recorded. During trial, the State played the video-recorded interview of appellant for the jury. In his statement, appellant provided varying explanations of the nights' events. Appellant first explained that he went with "Willie J.," "J. Bang," "Mike," "Mike's girlfriend," and "Alexis," the appellant's girlfriend, to purchase some marijuana from the complainant. Appellant identified "Willie J." as Willie Bryant, "J. Bang" as Joshua Holmes, and "Mike" as Michael Holmes. The group took two cars to the complainant's

apartment complex, and appellant remained in a car with his girlfriend while the others went to purchase the marijuana. Appellant believed that the group was taking too long, so he exited the car to see what was happening. Appellant initially stated that he did not have a gun that night. When he walked up to the apartment, appellant saw "Willie J." "arguing" and "fighting" with the complainant, and appellant joined the fight. A person then exited the apartment, pointed what appeared to be a "rifle" at the group, and then fired the weapon in their direction. Appellant then "took off running," and he thought he fell while running away. However, appellant claimed that he "did not discharge [his] weapon." Appellant admitted that during the fight with the complainant, the complainant's shirt "came off," and appellant took the shirt with him because he thought it had his "D.N.A. on it." He noted that he later "poured some bleach" on the shirt and threw it away.

Appellant then stated that although "J. Bang and his brother had been talking about robbing the [complainant]," appellant did not go there "with the intention to rob" anyone. Appellant explained that although "J. Bang" keeps a handgun at his house, appellant was not sure if he had it with him on the night of the shooting. Appellant remembered hearing seven to nine shots as he was "running off," but he did not know who fired the shots. Appellant again stated that he was not "carrying a gun that night."

After a break, appellant then changed his statement, emphasizing that the group did go to the complainant's apartment to rob him of narcotics and money. He then stated that "Willie J." shot the complainant with "J. Bang's revolver." Appellant claimed that he "did not shoot that man." After further questioning, appellant changed his statement again, asserting that the marijuana deal "went sour," but he did not "go [to the complainant's apartment] to hurt anyone." He explained that although he and others in his group "went with the intention of robbing [the complainant] of drugs and money," after the person in the house "pulled out" a firearm, appellant "flipped" approximately four shots. He stated that he "just started shooting," he was "not looking, just trying to get out of the way." And he was not aware of whether he had hit anyone with any of the shots. Appellant admitted that the firearm that he used belonged to "J. Bang," but he did not know the location of the firearm after the shooting. Appellant then again stated that it was "everyone's plan to rob" the complainant.

Harris County Assistant Medical Examiner D. Phatak testified that he performed an autopsy on the complainant's body. He explained that the complainant had "lacerations of his nose and his [left] eyebrow" and a gunshot wound on the left side of his chest. Phatak also observed "stippling" around the gunshot wound and the complainant's left arm, which he explained as "small punctuate burdens [] caused by burning powder fragments that also exit the end of

the gun as it is fired." Phatak explained that stippling does not occur with every gunshot, rather it "only happens when the end of the gun is from six inches to one foot away from the skin." Phatak concluded that the complainant's "cause of death was a gunshot wound to the chest" that "perforated [] the heart, the right lung, diaphragm, and the liver," all of which are "vital organs to human survival."

Standard of Review

We review the legal sufficiency of the evidence by considering all of "the evidence in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979). Evidence is legally insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982). Our role is that of a due process safeguard, ensuring only the rationality of the trier of fact's finding of the essential elements of the offense beyond a reasonable doubt. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). We give deference to the responsibility of the fact finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). However, our duty requires us to "ensure that the evidence presented actually supports a

conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

We now review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, no pet. h.) (citing *Brooks v. State*, 323 S.W.3d 893 912, 926 (Tex. Crim. App. 2010)).

Sufficiency of the Evidence

In his first point of error, appellant argues that the evidence is legally insufficient to support his conviction because "the State failed to sufficiently prove that the complainant was killed during the course of a robbery" and he had "the requisite intent to kill the complainant when he pulled the trigger." In his second point of error, appellant argues that the evidence is factually insufficient to support his conviction because the evidence that "the complainant was shot in the course of a robbery" and "appellant actually intended to kill the complainant" is so weak that the verdict is clearly wrong and manifestly unjust.

A person commits the offense of capital murder if he intentionally or knowingly causes the death of an individual and does so in the course of committing or attempting to commit robbery. TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03(a)(2) (Vernon 2003 & Supp. 2010); *Sholars v. State*, 312

S.W.3d 694, 703 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). A person commits a robbery if, in the course of committing theft and with intent to obtain or maintain control of property, he intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. TEX. PENAL CODE ANN. § 29.02(a)(2) (Vernon 2003). Aggravated robbery is robbery with the use or exhibition of a firearm. *Id.* §§ 29.02, 29.03 (Vernon 2003).

Murder Committed in the Course of Robbery

Appellant first argues that no rational juror could have found beyond a reasonable doubt that he shot the complainant during the course of a robbery or attempted robbery because it is "not enough that at some point earlier in the evening the suspects intended to rob the complainant," but that "they must have been actually robbing him or attempting to rob him at the time of the shooting."

Appellant asserts that there is "no evidence that the robbery ever actually materialized," "the only evidence presented at trial was [] appellant's statement that the suspects planned to rob the complainant earlier in the evening," and "plans change." Appellant notes that Winchester only heard the parties arguing about the weight of the marijuana and "he never saw any weapons until after he charged out of the apartment with the shotgun drawn."

However, in order to prove capital murder it was not necessary for the State to prove that appellant completed the theft in order to establish the underlying

offense of robbery or attempted robbery; rather, the jury may have inferred the intent to rob from the circumstantial evidence, particularly appellant's assaultive conduct. *See Young v. State*, 283 S.W.3d 854, 862 (Tex. Crim. App. 2009); *see also Bustamante v. State*, 106 S.W.3d 738, 740 (Tex. Crim. App. 2003). For capital murder, the State must only show that an intent to commit robbery was formed prior to the murder. *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1994); *Moody v. State*, 827 S.W.2d 875, 892 (Tex. Crim. App. 1992) (noting that to prove murder committed in course of robbery State must prove nexus between murder and theft such that "murder occurred in order to facilitate the taking of the property"). To constitute capital murder committed in the course of a robbery, an intent to rob must be formulated before or at the time of the murder. *Herrin v. State*, 125 S.W.3d 436, 441 (Tex. Crim. App. 2002).

Here, the State presented appellant's video-recorded statement, in which appellant admitted that the men intended to rob the complainant of narcotics and money. Appellant also admitted to taking the complainant's shirt. Although appellant stated that the complainant had a bag of marijuana when he left the apartment, no marijuana was recovered from his possession. Also, appellant acknowledged that the marijuana was taken by one of the men who was with appellant at the time of the shooting. Appellant's statement shows that he and those with him had formed an intent to commit robbery prior to the time of the

murder. Additionally, Fenceroy testified that he saw the complainant with his pockets inside out, and Winchester saw the complainant "tussling" with one of the men as they pulled his shirt off. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could find beyond a reasonable doubt that appellant formed the intent to commit a robbery before or at the time of the murder. Accordingly, we hold that the evidence is sufficient to support the jury's implied finding that appellant shot the complainant in the course of a robbery.

Intent to Kill

Appellant next argues that the evidence is insufficient to prove that he had a specific intent to kill the complainant because the evidence shows his shot was "a reflexive move with no conscious intent to do anything other than simply get away."

In order to prove capital murder, the evidence must show that the defendant had the specific intent to kill. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1992). "[I]ntent to kill may be inferred from the use of a deadly weapon, unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon." *Sholars*, 312 S.W.3d at 703; *Dominguez v. State*, 125 S.W.3d 755, 761 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding evidence permitted inference of intent to kill when defendant

and other members of his gang planned to rob person walking alone at night, and, in course of theft or attempted theft of complainant, defendant retrieved loaded shotgun from car trunk and shot complainant in abdomen, resulting in complainant's death); *see Staley v. State*, 887 S.W.2d 885, 889 (Tex. Crim. App. 1994). A firearm is a deadly weapon per se. TEX. PENAL CODE ANN. § 1.07(a)(17)(A) (Vernon Supp. 2010). Moreover, intent may also be inferred from the means used and the wounds inflicted, and as a factual matter, intent is to be determined by a jury from all the facts and circumstances in evidence. *See Hemphill v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974). "When a deadly weapon is fired at close range, and death results, the law presumes an intent to kill." *Sholars*, 312 S.W.3d at 703; *Ervin v. State*, No. 01-08-00121-CR, 2010 WL 3212095, *7 (Tex. App.—Houston [1st Dist.] Aug. 11, 2010, pet. ref'd).

Appellant asserts that "the State was required to prove that he actually wanted the complainant to die" and the evidence shows, "at most, appellant shot in the complainant's direction[] in a panic while trying to escape [Winchester,] who was bearing down on the suspects with a shotgun," and appellant's reaction was "defensive" and "performed in the panic of the moment." Appellant also asserts that the testimony of Winchester, "the only witness that was actually present when this incident occurred," shows appellant did not have the specific intent to kill. In particular, he points to Winchester's testimony that none of the men present had a

firearm out when Winchester exited the apartment and pointed the shotgun in appellant's direction and, once Winchester pulled out the firearm, the men "scattered and the person who shot the complainant, fired behind him as he was running away."

Viewing all of the evidence in the light most favorable to the prosecution, the evidence shows that appellant admitted to bringing a firearm to the complainant's apartment and firing it in the direction of the complainant. The complainant was found shot in the chest, and, as testified to by Phatak, the complainant's wound was consistent with a gunshot fired at close range. The jury could have reasonably inferred that appellant intended to kill the complainant when he pointed the firearm in the complainant's direction and fired the shots. *See Sholars*, 312 S.W.3d at 704. Winchester did testify that the shots were fired as the shooter was running away. However, Phatak testified that the "stippling" on the complainant's body was consistent with shots being fired from six inches to one foot away from his chest. As the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given their testimony, the jurors were free to believe or disbelieve all or any part of the testimony. *McKinny v. State*, 76 S.W.3d 463, 468–69 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

We conclude that a rational trier of fact could have found beyond a reasonable doubt that appellant had the specific intent to kill the complainant when

he fired a deadly weapon in the complainant's direction at close range. *See Sholars*, 312 S.W.3d at 703. Accordingly, we hold that the evidence is sufficient to support the jury's implied finding that appellant shot the complainant with the intent to kill him.

We overrule appellant's first and second points of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Brown.

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