Opinion issued November 3, 2011.

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00636-CR

ISIDORO VALDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th Judicial District Court
Harris County, Texas
Trial Court Case No. 1197254

MEMORANDUM OPINION

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

[1] *See* TEX. PEN. CODE ANN. § 19.03 (Vernon 2011).

three points of error, appellant contends that the evidence is legally and factually insufficient to support his conviction and the trial court erred in denying his request to instruct the jury on the lesser-included offense of murder and allowing the State to make an improper argument at the close of the guilt phase of trial.

We affirm.

Background

Adolfo Gutierrez testified that in December of 2008, he lived with the complainant, Ebodio Bautista, in a one-bedroom apartment, where Gutierrez slept on a mattress in the living room. On December 17, 2008, Gutierrez returned from work and fell asleep. He later awoke to the sound of the front door being kicked in and saw appellant enter the apartment carrying a "big gun." Appellant approached the complainant's bedroom and, as the complainant was exiting the bedroom, shot him "about three times." Appellant then exited the apartment and left the apartment complex in a white truck. Gutierrez noted that he had known appellant for about ten years, appellant went by the name "Juan," and he had previously seen appellant drive the same white truck.

Cirilo Rodriguez testified that he lived in the same apartment as Gutierrez and the complainant, where he also slept in the living room. Rodriguez had been drinking beer with a neighbor at the apartment complex when he left to purchase cigarettes at a nearby store. On his way to the store, he determined that it was "too

late," turned around, and returned to the apartment complex, where he heard "at least two" gunshots coming from his apartment on the second floor. After he saw appellant leave the apartment and come down the stairs with "something in his hand," Rodriguez "got scared" and stayed in the apartment of a woman who also lived in the complex. Rodriguez noted that he recognized appellant because he had previously worked on construction projects with him.

Houston Police Department Sergeant J.C. Padilla testified that he was dispatched to the scene of a homicide at the complainant's apartment. Upon his arrival, he noted that there was "forced entry into the apartment." After speaking to several neighbors, Padilla determined that appellant might be a suspect in the homicide. He found appellant in the parking lot of a nearby apartment complex, sitting in a white truck with the complainant's wife, from whom the complainant was separated. Appellant consented to an interview with Padilla and a search of his residence, a two-bedroom house. In appellant's bedroom, Padilla found twelve unfired .38 Special live bullets, ten unfired .357 Magnum hollow-point bullets, and one "small caliber live round." He also found a pair of pants with "a stain on it that appeared to be blood," which he submitted for DNA testing but never received results. Padilla retrieved a pair of work boots from the apartment, which he submitted along with the complainant's front door, to a crime lab for testing. However, Padilla did not receive a "definitive answer as to whether those boots

were the same boots that made the imprint on the door." He noted that a surveillance video of the apartment complex parking lot revealed that a white truck entered and left the parking lot at approximately 11:30 p.m. on December 17. Padilla explained that the truck in the surveillance video was "similar in appearance" to appellant's truck, although the video did not reveal a license plate number.

Padilla interviewed Rodriguez, who was still "visibly shaken" from the incident. Padilla presented to Rodriguez a photospread containing a photograph of appellant and five other men with similar physical characteristics. Rodriguez immediately identified appellant as the man he had seen leave the apartment after the shooting.

Padilla interviewed Gutierrez, who also immediately identified appellant in a photospread as the man who had entered the apartment and shot the complainant. During their interview, Gutierrez indicated that he was very frightened of appellant "because [appellant] had been asking people about him and his belief was because he was a witness to the incident." Later that day, Padilla arrested appellant as he was leaving the apartment of the complainant's wife.

Dr. Merrill Hines, an assistant medical examiner at the Harris County Institute of Forensic Science, testified that the complainant suffered from gunshot wounds to his head, chest, and right calf. The wounds indicated that the shooter

was one to four feet away from the complainant at the time of the shooting. During the autopsy, Hines was able to retrieve bullet fragments from the complainant's head and chest. On cross-examination, Hines admitted that she was unable to conclusively eliminate the possibility of more than one shooter.

Mohamad Al-Mohamad, a forensic scientist at the HPD firearms lab, testified that he analyzed the bullets recovered from the autopsy and the complainant's apartment. His analysis demonstrated that the bullet fragments recovered from the complainant's head and chest were fired from one gun, which was either a .38 Special revolver or a .357 Magnum revolver. There was no conclusive evidence that the bullet recovered from the complainant's apartment came from the same gun, but Al-Mohamad explained that there was "some similarity" and it could have come from the same gun as the bullets recovered during the autopsy. Al-Mohamad noted that the .38 Special bullets found in appellant's residence could be fired from a .38 Special revolver and the .357 Magnum bullets found in appellant's residence could be fired from either a .38 Special revolver or a .357 Magnum revolver.

Sufficiency of the Evidence

In his first point of error, appellant argues that the evidence is legally and factually insufficient to support his conviction because Rodriguez's testimony was "highly unreliable," there is "absolutely no physical evidence linking" appellant to

the crime, and, no rational jury could have found that appellant was the person who shot the complainant.

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 she 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*, 331 S.W.3d 49, 52–56 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd.).

A person commits the offense of capital murder if he intentionally commits a murder "in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat." TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 2011). A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. *Id.* § 19.02(b)(1). A person commits the offense of burglary if he "without the effective consent of the owner . . . enters a building or habitation and commits or attempts to commit a felony, theft, or an assault." *Id.* § 30.02(a)(3).

In support of his sufficiency challenge, appellant asserts that he was not the shooter of the complainant, and he argues that Rodriguez's testimony was "inherently unreliable" because, on direct examination, he failed to identify appellant in the courtroom and failed to definitively identify his own initials on the photospread.

Viewing the evidence in the light most favorable to the verdict, we note that Rodriguez later explained on re-direct examination that his initial failure to identify appellant was because appellant was not in the courtroom at that time. Padilla also confirmed that Rodriguez had previously identified appellant in the photospread. It is the function of the jury to resolve any conflicts in the testimony and evaluate the credibility of the witnesses. *Williams*, 235 S.W.3d at 750.

Additionally, Gutierrez testified that he witnessed appellant kick down the door to the apartment without his consent and intentionally shoot the complainant, which itself satisfies the elements of the offenses of murder and burglary. The testimony of a single eyewitness may be legally sufficient to support a conviction of a criminal offense. *See Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971) (upholding conviction for attempted murder where only one witness saw appellant with gun); *Davis v. State*, 177 S.W.3d 355, 358–59 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (affirming conviction for aggravated robbery where central issue involved a single witness's credibility); *see also Proctor v. State*, 319 S.W.3d 175, 185 (Tex. App.—Houston [1st Dist.] 2010, pet. struck); *Lee v. State*, 176 S.W.3d 452, 457–58 (Tex. App.—Houston [1st Dist.] 2004), *aff'd*, 206 S.W.3d 620 (Tex. Crim. App. 2006). Finally, although appellant argues that there is "absolutely no physical evidence" linking him to the murder, Padilla retrieved ammunition from appellant's apartment consistent with the bullets recovered from the crime scene.

Given this evidence, a reasonable trier of fact could have concluded that appellant kicked down the complainant's door and shot him. Accordingly, we hold that the evidence is sufficient to support appellant's conviction.

We overrule appellant's first point of error.

Lesser-Included Offense

In his second point of error, appellant argues that the trial court erred in denying his request to instruct the jury on the lesser-included offense of murder because "there was some evidence that appellant was only guilty of murder and not capital murder."

We use a two-step analysis to determine whether an appellant is entitled to a lesser-included offense instruction. *Hall v. State*, 225 S.W.3d 524, 528 (Tex. Crim. App. 2007); *Rousseau v. State*, 855 S.W.2d 666, 672–73 (Tex. Crim. App. 1993). First, an offense is a lesser-included offense 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 2011). We compare the elements of the offense as they are alleged in the indictment or information with the elements of the potential lesser-included offense. *Hall*, 225 S.W.3d at 535–36.

Second, some evidence must exist in the record that would permit a rational jury to find the defendant is guilty only of the lesser offense, if he is guilty at all. *Hall*, 225 S.W.3d at 536; *Salinas v. State*, 163 S.W.3d 734, 741 (Tex. Crim. App. 2005); *Rousseau*, 855 S.W.2d at 672–73. There must be some evidence from which a rational jury could acquit the appellant of the greater offense while convicting him of the lesser included offense. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). We may not consider whether the evidence is credible, controverted, or in conflict with other evidence. *Id.* Anything more than a scintilla of evidence entitles a defendant to a lesser charge. *Hall*, 225 S.W.3d at 536.

Because the State concedes that murder is a lesser-included offense of capital murder, we address only the second prong by examining whether the evidence would allow a rational jury to find, if appellant was guilty, that he was guilty only of murder. *See id.* The indictment asserted that appellant, in the course of committing burglary, intentionally caused the death of the complainant. For appellant to be guilty only of murder, the jury would have to find that he shot the complainant without committing burglary. *See* TEX. PEN. CODE ANN. § 19.03(a)(2) (defining capital murder to include murder "in the course of committing . . . burglary"). Although appellant asserts that the testimony of Gutierrez and Rodriguez "raised the issue" for a murder charge, he cites to no specific testimony indicating that appellant did not commit a burglary in the course of shooting the

complainant. Furthermore, Gutierrez testified that he witnessed appellant kick down the front door and shoot the complainant, and Rodriguez testified that he witnessed appellant leave the apartment immediately after the shooting. Neither testimony indicates that appellant did not enter the apartment or entered the apartment consensually. At trial, appellant took the position that he did not commit the offense at all, and there is no evidence that the perpetrator of the offense shot the complainant without committing burglary. Thus, there is no evidence in the record from which a rational jury could have convicted appellant only of murder and not of capital murder. Accordingly, we hold that the trial court did not err in denying appellant's request to instruct the jury on the lesser-included offense of murder.

We overrule appellant's second point of error.

Improper Jury Argument

In his third point of error, appellant argues that the trial court erred in overruling his objection to the State's argument during the guilt phase of trial because the prosecutor "sought to inject her personal opinion regarding the culpability of [a]ppellant."

Proper jury argument is generally limited to (1) summation of the evidence presented at trial, (2) reasonable deductions drawn from that evidence, (3) answers to opposing counsel's argument, and (4) pleas for law enforcement. *Westbrook v.*

State, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000) (en banc); *Swarb v. State*, 125 S.W.3d 672, 685 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd). The trial court has broad discretion in controlling the scope of closing argument. *Lemos v. State*, 130 S.W.3d 888, 892 (Tex. App.—El Paso 2004, no pet.); *see Herring v. New York*, 422 U.S. 853, 862–63, 95 S. Ct. 2550, 2555–56 (1975). The State is afforded wide latitude in its jury arguments and may draw all reasonable, fair, and legitimate inferences from the evidence. *Allridge v. State*, 762 S.W.2d 146, 156 (Tex. Crim. App. 1988).

Appellant complains that in the following excerpt from closing argument, the prosecutor injected her "personal opinion" concerning the testimony of Rodriguez:

> And you know he's been scared from the very beginning. My gosh, look how long it took them to be able to track him down. Is that the action of somebody who's looking to get somebody in trouble? Don't you think he would have stuck around if he wanted to get the defendant in trouble and say: I know, I know who it was. It was Juan. It was Juan. That's not what he did. He tried to hide. He didn't want to be involved in this, because he knew this man was dangerous . . .

A prosecutor may argue her opinions "concerning issues in the case so long as the opinions are based on the evidence in the record and not as constituting unsworn testimony." *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985) (en banc). Rodriguez testified that after the shooting, he "got scared" because "when a person commits a crime and you are there, they are going to kill you also,

so you don't say anything." Officer Padilla testified that, during their interview, Rodriguez appeared "scared, like he was reluctant to get involved," and his demeanor "did not change throughout" the interview. Thus, even if classified as opinion, the State's argument was based on permissible reasonable deductions from the evidence. *See Westbrook*, 29 S.W.3d at 115. Accordingly, we hold that the trial court did not err in overruling appellant's objection to the State's closing argument.

We overrule appellant's third point of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Sharp, and Brown.

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