Affirmed and Memorandum Opinion filed August 31, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00060-CR

FRANK CHRISTOPHER SUSTAITA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 54th District Court
McLennan County, Texas
Trial Court Cause No. 2007-1314-C2

M E M O R A N D U M O P I N I O N

A jury found appellant Frank Christopher Sustaita guilty of murder and sentenced him to fifty-five years in the Institutional Division of the Texas Department of Criminal Justice. Appellant raises the following issues on appeal: (1) the trial court erred in overruling appellant's objection to the State's alleged misstatement of law during its closing argument and (2) the evidence of appellant's intent to commit the offense is factually insufficient. We affirm.

I. BACKGROUND

Appellant and his girlfriend, Jennifer, lived with her aunts, Renee Alderete and Jennie Macias, and her cousins. Appellant and Jennifer shared the back bedroom of the house. On June 2, 2007, appellant and Jennifer returned to the house after visiting his family. Jennifer reportedly walked into the house, slammed the door behind her, and said, "I swear, I hate him." Afterwards, appellant entered the house.

That same day, Alderete and Macias watched Jennifer pace back and forth from the back to the front of the house with appellant following behind her. According to them, she "seemed to be pretty upset." Later, Appellant and Jennifer retired to their bedroom where Jennifer took a nap. While they were in there, Alderete and Macias heard two loud noises. Thereafter, appellant ran out of the bedroom and yelled, "I didn't do it."

Alderete and Macias ran to Jennifer, who was bleeding profusely from her head. Alderete left the room to call 9-1-1. Macias took Jennifer's hand and said, "I need to know if he did this to you . . . . if he did, . . . I need you to squeeze my hand twice." According to Macias, Jennifer squeezed her hand twice. At that point, appellant ran to the dresser, grabbed something, and ran out of the house. Alderete reentered the room while still on the phone with 9-1-1, and Macias told Alderete that appellant shot Jennifer twice.

An ambulance took Jennifer to Hillcrest Hospital. There, an emergency room physician retrieved a bullet from her skull. Due to the severity of Jennifer's injuries, she was life-flighted to Scott and White Hospital in Temple, Texas. She died eleven days later.

At trial, Dr. Randall Smith, a trauma surgeon at Scott and White Hospital, testified that a bullet entered Jennifer's forehead and exited above her right ear. He also testified that Jennifer had what looked like another entrance wound in her right eyebrow, but he could not conclusively determine how many times she was shot. Dr. Jill Urban, a

forensic pathologist at the Dallas County Medical Examiner's Office, testified "that [Jennifer] died as a result of gunshot wound or wounds of the head." Dr. Urban could not discern with certainty how many times Jennifer was shot because many of the injured areas had been removed during surgery.

Frank Sustaita, appellant's father, testified that appellant ran to his house and asked him to hide him. He testified that appellant told him two different versions of how Jennifer was shot. At one point, appellant told him, "the gun went off. It was an accident. I did not do it." At another point, appellant told him that Jennifer "had been trying to commit suicide all day."

Frank also testified that appellant was very familiar with guns and carried them for protection. He personally taught appellant how to load and handle a gun and about gun safety generally. He told his son always to have the safety on, never to leave a loaded gun, and never to point a gun at people and pull the trigger—even if unloaded—because doing so was dangerous.

Waco Police Officer Fernando Flores testified he went to Frank's home to arrest appellant. At that time, appellant told him that Jennifer was shot when he pulled his gun out of his waistband and the gun went off.

Waco Police Officer Michael Alston testified that he interviewed appellant at the police station, and that appellant told him multiple versions of how Jennifer was shot. At first, appellant told him "it was an accident." Jennifer was lying on the bed, appellant pulled his gun out of his waistband, and it went off. Officer Alston told appellant that, if that account were true, he would have expected that Jennifer's wounds would have had different entry and exit paths.

At that point, according to Officer Alston, appellant changed his story and told him that "he pulled the pistol out of his pants[,] . . . pointed it at [Jennifer,] and pulled the trigger." He stated his actions were part of a game he and Jennifer would play. He and Jennifer "would point the pistol at each other . . . and they would pull the trigger with it

loaded and the safety on." Officer Alston asked who could verify that they played this game, and appellant did not have an answer.

Appellant's cousin testified he had seen Jennifer and appellant play the game three times, but the version of the game varied significantly. Appellant's cousin testified that of those three times, he never saw the game played with bullets in the gun, neither person ever pointed the gun at the other's head, and neither person ever pulled the trigger. Rather, appellant's cousin testified that they would point the pistol at each other and say, "I'll pistol whip you." The cousin testified appellant carried the gun for protection when riding with his friends.

Macias testified that in the several weeks prior to the shooting, "[t]hings hadn't looked right between [Jennifer] and [appellant]." Macias testified that she had started to notice changes in Jennifer and appellant's relationship, and she was concerned about appellant's possessiveness.

The court charged the jury on murder and manslaughter. The jury subsequently convicted appellant of murder, and he was sentenced to fifty-five years' imprisonment. This appeal ensued.

II. DISCUSSION

A. Improper Jury Argument Claim

In his first issue, appellant contends that during the State's closing argument, the State made several improper statements to the jury about the correct procedure for considering a lesser-included offense. Specifically, appellant takes issue with the State's statements during argument that the jury could not consider the lesser-included offense of manslaughter unless the jurors unanimously found appellant not guilty of murder. Before closing arguments, the court read the following charge in relevant part:

> Unless you so find beyond a reasonable doubt, that the Defendant is guilty of murder under the instructions given you herein, or if you have a reasonable doubt thereof, you will *acquit* the *Defendant* of murder and *next*

consider the lesser included offense of manslaughter.[1]

During its closing argument, the State made the following allegedly improper arguments:

> [Counsel for the State]: [*Y*]*ou can't even consider manslaughter until every last one of you agrees he's not guilty of murder*. And it is only until that time—
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> [Counsel for Appellant]: Your Honor, that's a misstatement of the law. I'm going to object that that's a misstatement of the law.
>
> The Court: Overruled.
>
> [Counsel for the State]: It is only at that point that you can even move to manslaughter. Okay. It says right here. Unless you so find beyond a reasonable doubt that the Defendant is guilty of murder under the instructions given herein, or if you have a reasonable doubt thereof, you will acquit the Defendant of murder and next consider the lesser included offense of manslaughter. *So you don't get to manslaughter until all of you say not guilty of murder*.[2]

Then, during rebuttal, the State added:

> [Counsel for the State]: You must find that he is not guilty of murder to consider the lesser included [offense] of recklessly causing her death of manslaughter. And that is a lesser included, a second-degree felony, as we talked about in voir dire. *So you have to unanimously believe that he did not murder her before you consider that offense.*[3]

Counsel for appellant objected to the first alleged misstatement, but did not object to the second or third.

To complain on appeal about an improper jury argument,[4] a defendant must object

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[1] Emphasis added.

[2] Emphasis added.

[3] Emphasis added.

[4] The Texas Court of Criminal Appeals has clearly held the jury may consider guilt as to the lesser offense before deciding on a verdict of the greater offense. *Barrios v. State*, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009).

to the argument at trial and pursue his objection to an adverse ruling. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996); *Johnson v. State*, 233 S.W.3d 109, 114 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Additionally, under current Texas law, a defendant must object each time an improper argument is made, or he waives his complaint, regardless of how egregious the argument. *Valdez v. State*, 2 S.W.3d 518, 521–22 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd); *Wilson v. State*, 179 S.W.3d 240, 249 (Tex. App.—Texarkana 2005, no pet.) (citing *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991)). Here, appellant did not object each time the argument was made. Therefore, under existing Texas law, we are compelled to conclude he has waived his right to complain about the arguments on appeal.[5] *See Valdez*, 2 S.W.3d at 521–22.

Accordingly, we overrule appellant's first issue.

B. *Factual Insufficiency Claim*

Appellant contends the evidence that he had the requisite intent or knowledge to commit murder is factually insufficient. We disagree.

In a factual-sufficiency review, we examine the evidence in a neutral light. *Grotti v. State*, 273 S.W.3d 273, 283 (Tex. Crim. App. 2008). Only one question is to be answered in a factual-sufficiency review: Considering all of the evidence in a neutral light, was the jury rationally justified in finding guilt beyond a reasonable doubt? *See id*. Evidence can be factually insufficient in one of two ways: (1) if the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust; and (2) if the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *See id*.

[5] In *Miller v. State*, 741 S.W.2d 382 (Tex. Crim. App. 1987), the Court of Criminal Appeals identified an exception to the general preservation-of-error rule for improper arguments. *See id.* at 391. There, the court held an appellant need not preserve error as to an improper argument if it so infected the trial with unfairness as to make the resulting conviction a denial of due process. *Id.* Because appellant makes no due process claim here, it is unnecessary for this court to decide whether the *Cockrell* court overruled *Miller*.

We cannot reverse a judgment for factual insufficiency if the greater weight and preponderance of the evidence actually favors conviction. *See id*. Thus, although an appellate court has some ability to second-guess the jury to a limited degree, a factual-sufficiency review should remain deferential to the jury's role as the sole judge of the weight and credibility given to any witness's testimony, with a high level of skepticism about the jury's verdict required before a reversal can occur. *See id*.

Appellant contends there is no *direct* evidence that he intended to kill Jennifer or knew that her death was certain to result. However, as with virtually any other issue in a criminal case, intent may be proven by circumstantial evidence. *See Jordan v. State*, 707 S.W.2d 641, 644–45 (Tex. Crim. App. 1986). We may infer a defendant's intent from his actions, words, and conduct. *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995). Circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone may be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Thus, it is unnecessary for every fact to point directly and independently to the defendant's guilt; rather it is sufficient if the finding of guilt is supported by the cumulative force of all the incriminating evidence. *Powell v. State*, 194 S.W.3d 503, 507 (Tex. Crim. App. 2006).

Here, we cannot say the proof of guilt is so obviously weak that the verdict must be clearly wrong and manifestly unjust. *See Grotti*, 273 S.W.3d at 283. Similarly, we also cannot say the proof of guilt, although legally sufficient, is greatly outweighed by contrary proof. *See id.*

A number of factors support the jury's verdict. Macias testified that the couple's relationship had deteriorated around the time of the shooting, and Macias was concerned about appellant's possessiveness. Alderete also testified that Jennifer "seemed to be pretty upset" on the day of the shooting and had stated, "I swear, I hate him"—apparently referring to appellant.

Appellant's actions after he shot Jennifer are also telling. First, he ran out of the

bedroom and blurted out, "I didn't do it." Appellant ultimately fled the scene, ran to his father's house, hid the gun in his father's garage behind a pallet, and asked his father to hide him. In subsequent questioning, appellant told several different versions of how the shooting occurred: that Jennifer had tried to commit suicide; that the gun had gone off accidentally; and that appellant had aimed at Jennifer and pulled the trigger as part of a game.

Clearly, there is more than adequate circumstantial evidence from which a jury could infer appellant's intent and guilt. Evidence of appellant's deteriorating relationship with Jennifer, appellant's sophistication with guns, his flight, and his changing versions of events are all consistent with the finding of guilt. Accordingly, after reviewing the record in a neutral light, we cannot say the proof of guilt is so obviously weak that the verdict must be clearly wrong and manifestly unjust, or the proof of guilt is greatly outweighed by contrary proof. *See Grotti*, 273 S.W.3d at 283. Accordingly, we overrule appellant's second issue.

III. CONCLUSION

Having overruled appellant's two issues, we affirm the judgment of the trial court.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.
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