

Affirmed and Memorandum Opinion filed January 11, 2011.



In The

Fourteenth Court of Appeals

NO. 14-09-00275-CR

DAMIEN LAMAR FREDDIE, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 45741**

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

A jury found appellant Damien Lamar Freddie guilty of murder and sentenced him to ninety years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Freddie appeals his conviction contending that: (1) the evidence at trial is factually insufficient to support a "guilty" verdict; (2) the trial court improperly denied a requested instruction on the lesser charge of aggravated assault; and (3) the trial court improperly denied a requested instruction on the lesser charge of deadly conduct. We affirm.

I

Early in the morning on November 24, 2005, Damien Freddie, Antonio Leonard, and Laviron “Lee-Lee” Billow were playing dice in a southwest Houston apartment. Shawn “Rock” Mayries was also in the apartment but was only watching the game. Both Billow and Mayries testified that after playing dice for several hours Freddie began dropping in and out of the game and pacing back and forth between the game and a window. Freddie eventually locked the front door, brandished a handgun, and announced his intention to rob everyone in the apartment. After failing to comply with Freddie’s commands to give up his money, Leonard made a break for the front door in an attempt to escape. Both Billow and Mayries testified that Freddie shot Leonard in the back multiple times as Leonard ran toward the door. Both men testified that despite having been shot, Leonard managed to open the door and run down a staircase while Freddie pursued and, according to Mayries, continued firing. Having sustained three gunshot wounds, Leonard collapsed and died on the staircase.

Leonard’s ex-fiancé, Dewana Fruge, and his current girlfriend, Jennifer Robinson, were in the parking lot directly outside the third-floor apartment when the shooting occurred. Both gave statements to police at the scene. Fruge testified at trial that after the shots rang out she saw Leonard run out of the apartment and down a staircase that opened up to the parking lot. Fruge then saw another man she could not positively identify run out the apartment and head down a staircase directly opposite from the one Leonard ran down and which opened up to the other side of the building. Fruge approached the base of the staircase Leonard was descending, but when Leonard did not appear, Fruge went up the stairs and found his body. She and Robinson then left the scene to fetch Leonard’s mother. Fruge testified that upon returning, she came across Billow, whom she knew, “hiding in the bushes.” Fruge testified the clothing Billow was wearing matched the clothing of the second man she saw leaving the apartment.

Shortly after arriving on the scene, police arrested Billow on open warrants for unpaid traffic tickets. Once in custody, Billow told investigators that several unknown men had burst into the apartment and attempted to rob everyone there. Detective Roy Swainson of the Houston Police Department testified he doubted Billow's story. Billow had earlier submitted to a gunshot-residue test, and although results of the test were not yet available, Swainson told Billow his results had come back positive. Billow's results would in fact later come back negative, but upon hearing this false report Billow changed his story and said Freddie shot Leonard after attempting to rob those at the dice game. He did not mention Mayries was also present at the game.

Billow also told Swainson that immediately after the shooting he and Freddie ran to Freddie's girlfriend's apartment, which was located in the same complex, and that Freddie hid the gun in a barrette box in her closet. Billow led investigators to the apartment later that day. Stevie Smith, Freddie's girlfriend, along with other residents of the apartment, all denied knowing Freddie. But after obtaining Smith's permission to search her room, police found a duffel bag containing Freddie's driver's license and some of his college transcripts. They did not find the gun Billow said Freddie hid in the closet. Although Smith still denied knowing Freddie, Swainson left his card with her and asked her to tell Freddie to call him.

Swainson had a voice message from Freddie by the time he returned to his office later that day. Swainson returned the phone call and recorded a conversation in which Freddie said he had been in the apartment playing dice but that he left before the shooting took place and did not hear of the incident until sometime between 7 and 9 that morning. He also told Swainson that a fourth person he knew only as "Rock" was also present at the game. Freddie set an appointment for the following Monday to come in to Swainson's office and give a voluntary statement but never showed up.

Swainson then asked Billow whether "Rock" was also present at the game and Billow immediately admitted he was. Billow led Swainson to the apartment where

“Rock” had been staying with his sister. “Rock” was nowhere to be found, but through a series of phone calls Swainson learned his given name was Shawn Mayries and was able to contact him on his cell phone. Mayries gave Swainson a detailed statement in which he claimed Freddie shot and killed Leonard. According to his statement, Mayries fled to his native Florida the day after the shooting. He claimed he went to Florida to escape four unknown men who had assaulted him and warned him not to talk to authorities about the shooting.

Swainson sought a warrant for Freddie’s arrest in January 2006, but for reasons that are not clear from the record, the warrant request would not be approved until October. Freddie was arrested and provided a recorded statement in which he again admitted he had been in the apartment with the three other men playing dice but insisted he left without incident sometime around 1 to 2 a.m. He claimed he was not responsible for the shooting and did not know why Billow and Mayries were blaming him. After securing Freddie’s statement, Swainson made a second visit to Smith’s apartment. While she was still reluctant to offer information incriminating Freddie, this time Smith said that Freddie and Billow had entered her room on the morning of the shooting while she was sleeping and that Freddie had hidden a gun in her closet and then slept in her room before leaving around 7 or 8 a.m. She also said that shortly before Freddie was arrested he confessed to her that he shot Leonard, although he claimed the group was being robbed and that the shooting was in self-defense.

At trial, defense counsel sought to paint Billow and Mayries as unreliable witnesses whose stories were inconsistent. It was repeatedly pointed out that Billow changed his story three times between the morning of the shooting and trial and that Mayries had fled the state after the shooting and had weeks to concoct a detailed story before talking to police. While both men testified at trial to the same basic facts of the shooting, there were arguably some discrepancies between their stories. Most significantly, Billow seemingly testified that he, Freddie, and Mayries fled the apartment by going down the same staircase

where Leonard ultimately died, necessarily passing the body as they exited. Mayries, however, testified that he and Billow fled down another staircase which provided an exit from the building opposite from the direction in which Leonard had fled and Freddie pursued. Fruge’s testimony conflicted with both accounts, as she said she saw only Leonard flee down the staircase that opened up to the parking lot and only one other man—whose description best matched Billow—leave the apartment and flee down the opposite staircase.

II

A

Freddie’s primary complaint on appeal is that the evidence presented at trial is factually insufficient to support his murder conviction. However, while this appeal was pending, a majority of the judges on the Court of Criminal Appeals have determined that the *Jackson v. Virginia* legal-sufficiency 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. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (Hervey, J., joined by Keller, P.J., Keasler, and Cochran, J.J.); *id.* at 926 (Cochran, J., concurring, joined by Womack, J.) (same conclusion as plurality). Accordingly, we will analyze Freddie’s factual-sufficiency issue under the *Jackson v. Virginia* standard. *See id.* at 912 (plurality op.); *Pomier v. State*, No. 14-09-00247-CR, ___ S.W.3d ___, 2010 WL 4132209, at *2 (Tex. App.—Houston [14th Dist.] October 21, 2010, no pet.).

In evaluating the legal sufficiency of the evidence to support a criminal conviction, we view all evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007); *Childs v. State*, 21 S.W.3d 631, 634 (Tex. App.—Houston [14th Dist.] 2000, pet. ref’d). We give deference to “the responsibility of the trier of fact to fairly

resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.’’ *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 318–19). The jury is the exclusive judge of the credibility of the witnesses and of the weight to be given their testimony, and it is the exclusive province of the jury to reconcile conflicts in the evidence. *Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998). Hence, we do not reevaluate the weight and credibility of all the evidence or substitute our judgment for the fact finder’s. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Appellate courts merely ensure that the jury’s decision was rational. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d). Additionally, we consider all of the evidence, whether admissible or inadmissible. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

B

Freddie’s arguments against the sufficiency of the evidence revolve largely around questioning the credibility of the witnesses against him. He maintains Billow is an unreliable witness because he was initially a suspect in the shooting, changed his story at least three times, and has since accumulated an unrelated felony conviction. Mayries’s culpability and credibility is questionable, according to Freddie, because he immediately fled to Florida and had weeks to craft his story before speaking to investigators. Smith, Freddie contends, is a “jealous ex-girlfriend” seeking revenge on Freddie. He also focuses on perceived conflicts between Billow’s and Mayries’s accounts of how they exited the complex immediately following the shooting as well as Fruge’s testimony that she saw only one man other than Leonard exiting the apartment after the shooting—a man whose description best matches Billow.

Freddie further complains generally that there was no physical or forensic evidence linking him to the murder and points to a supposed alibi provided by Smith’s mother, Denise Greviance, who lived with Smith at the apartment in which Freddie hid his gun and

slept on the morning of the shooting. Finally, Freddie argues that the autopsy report shows that Leonard was not necessarily shot under the circumstances Billow and Mayries described.¹ Freddie claims these deficiencies in the State's case, taken together, rendered the evidence insufficient to enable a rational jury to find him guilty beyond a reasonable doubt.

It is not clear that any of the evidence—testimonial or otherwise—that Freddie suggests conflicts with Billow's and Mayries's accounts actually presents any conflict at all. We begin with the supposed disparity between Billow's and Mayries's accounts of how they exited the apartment complex immediately following the shooting. Mayries testified that he and Billow fled down the staircase opposite from the one Leonard descended and upon which he ultimately died. But when the prosecution first asked Billow whether he went down the same staircase as Leonard, Billow responded, "I went down the same one." On cross examination, Billow testified that "Rock went in a direction and me and Damien went in one." Three questions later Billow testified that he and Freddie fled in a different direction than Mayries, but it is not clear from the cold record whether Billow was referring to their flight down the staircase or some time afterward. Defense counsel attempted to clarify Billow's testimony regarding the escape paths by showing him pictures of the complex and asking him to point out his route. But counsel did not make Billow's indications clear for the record, leaving it impossible for this court, unlike the jury, to ascertain that part of Billow's testimony. Later, on re-direct examination, Billow testified he was "pretty sure" he, Freddie, and Mayries came down the same staircase as Leonard. The jury was free to draw conclusions as to whether Billow understood the questions being asked of him, how confident he was in the details of his escape path, whether it conflicted with Mayries's testimony, and if so, whether that conflict

¹ In his brief, Freddie describes the alternative scenarios this way: "either a side, ie [sic] the left side shooting of Mr. Leonard, or, a shooting where the two individuals are perhaps facing each other at an angle and at one point a right handed shooter perhaps moved to the left of Mr. Leonard, or that Mr. Leonard was shot in a struggle which would explain why gunshot residue appeared in his hands."

was reconcilable or material to the ultimate question in the case. *See Mosley*, 983 S.W.2d at 254; *King*, 29 S.W.3d 562.

Dewana Fruge's testimony as to what she witnessed from the parking lot immediately following the shooting also does not necessarily contradict Billow's and Mayries's testimony. Even if it did, a rational jury need not see it as a fatal contradiction as Fruge admitted it was dark and that she had ducked behind a car when the shooting began. Additionally, she testified that after seeing Leonard coming down the stairs she approached the staircase from the ground floor to meet him, thus losing her vantage point from which she could see who was leaving or entering the third-story apartment. Her testimony could be rationally reconciled with Billow's and Mayries's by concluding she simply did not see everyone who came out of the apartment or that her recollection had not served her well. Furthermore, her testimony that the one man she did see come out of the apartment after Leonard wore clothes matching what she later saw Billow wearing does not lead inexorably to a conclusion that Billow pulled the trigger and Freddie did not, especially since Billow admitted he was in the apartment when the shooting occurred.

Similarly, Greviance's supposed alibi also does not necessarily conflict with Billow's and Mayries's testimony. Greviance testified that she had looked in Smith's room and saw Freddie sleeping on the floor between 12:30 and 1:00 on the morning of the shooting. The shooting, however, took place sometime after 3:00 a.m. Even if the jury credited Greviance's testimony as true, it was entirely possible that Freddie left Greviance's apartment sometime during the span of time between when Greviance saw him sleeping and the shooting. Greviance herself testified she did not always know when people would come and leave her apartment and admitted it was possible Freddie left without her knowledge after she saw him sleeping. As such, this supposed alibi would not prevent a rational jury from convicting Freddie.

Finally, Freddie suggests the autopsy report conflicts with Billow's and Mayries's accounts of how Leonard was shot. But he does not point to any specific conclusions in

the autopsy report or testimony proffered at trial to support an interpretation that Leonard died under circumstances different than those described by Billow and Mayries. The jury could have concluded the autopsy report corroborated the witness accounts of the shooting.²

Upon examining the record as a whole, we find there was sufficient evidence for a rational jury to find all the elements of murder were met beyond a reasonable doubt. Criminal prosecutions are often made or broken on the believability of a handful of witnesses who are neither model citizens nor perfectly consistent in their testimony. The jury was made aware that Billow changed his story and that he was a convicted felon, just as it was made aware that Mayries fled Houston to Florida after the shooting. The jury's role as trier of fact renders it the sole judge of the credibility of the witnesses and strength of their testimony. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). Similarly, to the extent that conflicts actually existed in the testimony presented, it is fully and exclusively within the jury's province to resolve those conflicts. *See Moseley*, 983 S.W.2d at 254. Billow and Mayries did not differ on any details essential to the basic facts of the incident, and any supposed conflicts between the two were marginal enough that the jury was free to reconcile the differences or resolve them in favor of one party or the other depending on its evaluation of that witness's credibility, clarity, and confidence of memory. We do not reevaluate the weight and credibility of all the evidence or substitute our judgment for the fact finder's. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991); *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986).

² A Fort Bend County medical examiner testified at trial about Leonard's gunshot wounds, including their entrance and exit points. The medical examiner testified that Leonard suffered three gunshot wounds. The first entered through the back of his left arm and did not exit. The second "was the front of the chest just in front which went into the chest cavity, caused some damage to the lung and came out in the middle of the chest." The third hit Leonard in the "left lower back" and "went into the abdomen and punctured the kidney, the liver, the heart and the right lung and came up on the back of the right shoulder." Defense counsel did not clarify the medical examiner's testimony on cross-examination or develop any testimony supportive of the interpretation Freddie suggests for the first time on appeal.

Two witnesses claimed to watch Freddie murder Leonard, and a third said Freddie hid a gun in her bedroom after the incident and later confessed to her that he shot Leonard. While Freddie is correct that police did not locate a murder weapon or recover fingerprints from the scene, he is incorrect to suggest that no physical evidence linked him to the crime. To the contrary, physical evidence corroborated both Billow's and Mayries's testimony, including Leonard's body, a pair of dice nearby, an envelope filled with money in Leonard's pocket, multiple gunshot wounds, a trail of blood leading out the apartment door, and reports from crime-scene investigators that examinations of bullet trajectory revealed the shots were fired from within the vicinity of the apartment's dining room. The foregoing evidence was sufficient to enable a rational jury to find all the elements of murder established beyond a reasonable doubt. Freddie's first point of error is overruled.

III

In Freddie's second and third issues, he contends the trial court erred by failing to charge the jury on the lesser-included offenses of aggravated assault³ and deadly conduct.⁴ Defense counsel timely requested both instructions before the jury was charged, and both were refused by the court.

In deciding whether the jury should have been charged on a lesser-included offense, we apply a two-prong test. *Segundo v. State*, 270 S.W.3d 79, 90 (Tex. Crim. App. 2008); *see also Hall v. State*, 225 S.W.3d 524, 528 (Tex. Crim. App. 2007). First, we determine if the offense is a lesser-included offense of the charged offense. *Salazar v. State*, 284 S.W.3d 874, 875–76 (Tex. Crim. App. 2009); *Hall*, 225 S.W.3d at 535–36. Second, we determine if there is some evidence in the record “from which a rational jury could acquit the defendant of the greater offense while convicting him of the lesser-included offense.” *Segundo*, 270 S.W.3d at 90–91.

³ Tex. Penal Code §§ 22.01, 22.02.

⁴ Tex. Penal Code § 22.05.

In evaluating the second prong, we review the entire record. *Moore v. State*, 969 S.W.2d 4, 8 (Tex. Crim. App. 1998). Before a defendant is entitled to a charge on a lesser-included offense, the evidence must not merely raise the possibility of the lesser offense, but must establish the lesser-included offense as a valid rational alternative to the charged offense. *Wesbrook v. State*, 29 S.W.3d 103, 113–14 (Tex. Crim. App. 2000). In this analysis, anything more than a scintilla of evidence can be enough to afford the defendant a lesser-included charge. *Hall*, 225 S.W.3d at 536. However, if a defendant either presents evidence that he committed no offense or presents no evidence, and there is no evidence otherwise showing he is guilty only of a lesser-included offense, then a charge on a lesser-included offense is not required. *Nash v. State*, 115 S.W.3d 136, 139 (Tex. App.—Texarkana 2003, pet. ref’d) (citing *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985)).

As a matter of law, aggravated assault and deadly conduct are lesser-included offenses of murder. *Flores v. State*, 245 S.W.3d 432, 440 (Tex. Crim. App. 2008); *Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000). The first prong is therefore satisfied. Freddie contends, however, that sufficient evidence was presented that would enable a rational jury to acquit Freddie of murder while convicting him of aggravated assault or deadly conduct. We disagree.

It is not clear from Freddie’s briefing what theory he wished the jury, and this court, to consider as a rational alternative that would have resulted in his acquittal of murder but under which he potentially would be held responsible for aggravated assault or deadly conduct. Such a theory would require evidence showing Freddie was present at the shooting and fired a gun but lacked the intent to kill necessary to sustain a murder conviction. No such evidence was presented. Instead, the jury heard two recorded conversations with Freddie—one a pre-arrest phone conversation between Freddie and Detective Swainson, and the second a post-arrest interview—in which Freddie claimed he left the apartment before the shooting occurred. Freddie does not claim, and there was no

evidence to suggest, that Freddie fired multiple shots, three of which hit and ultimately killed Leonard, but lacked the requisite intent for murder while potentially fulfilling the elements of either aggravated assault or deadly conduct. This contradiction between the evidence presented and the facts that must necessarily exist to support the requested lesser-included offense instructions cannot give rise to a rational alternative from which the jury could convict Freddie of aggravated assault or deadly conduct but not murder.

Freddie also points to Billow's original statement to police that a group of unknown robbers burst in the apartment with the intention of robbing all four men, presumably to pose Billow's original story as an alternative set of facts the jury could have accepted. However, it is not explained why Billow's original story, even if believed by the jury, would warrant a lesser-included offense instruction of aggravated assault or deadly conduct. Moreover, Billow himself abandoned the story mere hours after offering it and Freddie also contradicts it by claiming to police he was not at the apartment when the shooting occurred. While defense counsel made use of the contradiction in Billow's stories to paint him as an unreliable witness, no evidence or argument was presented to show Billow's original story was in fact true. An alternative story later confessed by the storyteller to be a lie and contradicted by a defendant's own statement to police can hardly be considered an alternative on which a jury could rationally rely to arrive at the conclusion that Freddie was at the scene, despite his statements to the contrary, and fired multiple shots but did not intend to kill Leonard. Freddie's statements to the police present evidence that he committed no crime, not that he lacked intent to commit a greater crime but could be convicted of a lesser crime; as such, he is not entitled to instructions on the lesser-included offenses. *See Nash*, 115 S.W.3d at 136.

Finally, Freddie argues for the first time on appeal that the trajectory report from the autopsy "does not accurately reflect that the deceased was shot in the back, but rather appeared to have been shot from the side or perhaps from the front and side during a struggle of movement." It is not explained on appeal whether this observation is meant to

insinuate that someone else shot Leonard or that Freddie shot him but did so without murderous intent. Either way, this argument was not raised at trial, nor was any evidence presented showing the autopsy report conflicted with witness accounts of the shooting. Defense counsel did not pursue any line of questioning to support the theory during cross-examination of the medical examiner who interpreted the autopsy report. As such, it cannot be argued that at trial it was evidence that contributed toward presentation of a rational alternative to the offense of murder. *See Wesbrook*, 29 S.W.3d at 113–14.

The evidence does not show, and Freddie’s statements contradict, any scenario under which a rational jury could acquit him of murder but convict him of aggravated assault or deadly conduct because no evidence presented at trial offered an alternative set of events or circumstances under which Freddie fired a gun and killed Leonard but lacked murderous intent. A murder defendant is not entitled to an instruction on the lesser offense of aggravated assault or deadly conduct when the evidence showed him, at the least, to be guilty of a homicide. *See Jackson v. State*, 992 S.W.2d 469, 475 (Tex. Crim. App. 1999). The evidence presented to the jury at trial did not call into question whether Leonard was killed with murderous intent—all the evidence indicated he was. The only question was who pulled the trigger, and whoever did was guilty of at least murder. Freddie’s second and third points are overruled.

* * *

For the foregoing reasons, we affirm the trial court’s judgment.

/s/ Justice Jeffrey V. Brown
Justice

Panel consists of Justices Anderson, Frost, and Brown.

Do Not Publish — TEX. R. APP. P. 47.2(b).