Memorandum Opinion filed January 13 2011 Withdrawn; Affirmed and Corrected Memorandum Opinion filed February 3, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00749-CR

CORNELIUS CONWAY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 1144821

CORRECTED MEMORANDUM OPINION

The court withdraws its opinion of January 13, 2011 and issues this corrected memorandum opinion in its place.

A jury found appellant Cornelius Conway guilty of capital murder and the trial court sentenced him to life imprisonment. Conway appeals his conviction contending that: (1) the evidence at trial is legally insufficient to support a guilty verdict; (2) the evidence at

trial is factually insufficient to support a guilty verdict, and (3) the trial court erroneously admitted an overly prejudicial photograph over trial counsel's objection. We affirm.

I

Cornelius Conway was convicted of capital murder for his role in an armed robbery in which Carltrell Odom, an off-duty Harris County deputy constable, was shot and killed. At about nine o'clock on the evening of November 29, 2007, Odom was standing in the parking lot of the apartment complex where he lived talking with two other residents, Raul Duran and Jorge Lemus. The three men had been visiting for about thirty minutes when four African-American, teenaged males walked toward them in a single-file line. Lemus testified that the first teenager wore a white hoodie with camouflage patterns, and the other three wore black hoodies. Duran and Lemus both testified that the teenagers encircled the three men and each drew a gun. The teenager wearing the white hoodie directed the three men to get down, proclaiming, "This is a fucking robbery." Both Lemus and Duran got down on the ground and testified they could feel guns pressed against their heads. They gave the four males everything in their pockets, including Duran's cell phone.

Lemus stated that he witnessed Odom start to get down on the ground, but after being struck several times with a gun, Odom stood up and stated, "You cannot treat me like this." Lemus testified that Odom began to argue with the teenager in the white hoodie, who then pointed his gun at Odom. Odom hit his assailant's hand, turned around, and began to run. Lemus stated that he heard a gunshot fired in Odom's direction. The assailant then chased Odom and fired another shot causing Odom to fall to the ground. Lemus testified that the assailant who shot Odom walked over to his body, stood over it, and shot Odom once more in the back of the head. Albert Chu, assistant medical examiner, performed the autopsy on Odom's body and testified that either shot could have caused his death. After the third shot was fired, the four robbers jumped into a black Infiniti sedan and drove out of the apartment complex.

After the shooting, several Houston Police Department ("HPD") officers arrived on the scene, including Sergeant Tony Huynh. Sergeant Huynh testified that when he discovered Duran's cell phone was stolen, he contacted a special agent with the U.S. Marshal's office, who helped him track or "ping" the cell phone to find its location. Sergeant Huynh stated that he followed the agent in an unmarked vehicle to 4839 Redbud. After arriving at the address, Sergeant Huynh, HPD Sergeant Mark Newcomb, and two uniformed officers knocked on the front door and asked if a young male lived at the home. Loveless Nickerson, mother of Alan Michal Nickerson, answered, "Yes," and gave the officers permission to enter the home and speak with her son.

Once in the home, Sergeant Newcomb found Nickerson, who appeared to be sleeping, along with Duran's cell phone and a multicolored camouflage hoodie. The officers asked Nickerson if he was willing to accompany them to the police station. Nickerson agreed and gave a voluntary statement in which he confessed he was involved in the robbery as the getaway driver. After being taken into custody and giving police four different statements about the robbery-murder, Nickerson admitted he was the robber who wore the white and camouflaged hoodie and that he shot Odom. He also identified Conway, Damian Edwards, Christopher Crenshaw, and Wallace Hightower as fellow participants in the robbery-murder. Nickerson directed officers to Crenshaw's residence, where Crenshaw's mother consented to a search. In the home, police discovered a five-shot revolver that contained two unfired bullets and three spent cartridge casings. A HPD firearms examiner testified at trial that a ballistics analysis revealed the revolver was the murder weapon.

Conway was taken into custody on December 7, 2007, after police obtained a warrant for his arrest. While in custody, Conway gave two separate interviews—one on video and another on audio only. Sergeant Newcomb testified that in these statements Conway admitted "[h]is job was to stand over the individuals after they were being placed down on the ground so that they wouldn't get back up" and "[t]o maintain control over the

individuals, the complainant's [sic] on the ground." Conway denied ever displaying a gun during the robbery-murder. Although it was not contested at trial that Nickerson fired the shots that killed Odom, Conway was charged and convicted of capital murder as a party to the offense.

II

It is unclear from the briefing submitted on Conway's first two points of error which arguments he wishes us to consider under a legal-sufficiency review and which he wishes us to consider under a factual-sufficiency review; he occasionally refers to them separately and distinctly but at other points says his arguments apply to both standards. However, while this appeal was pending, a majority of the judges of the Texas Court of Criminal Appeals 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 Conway's factual-sufficiency issue under the *Jackson v. Virginia* standard. *See id.* at 912 (plurality op.); *Pomier v. State*, 326 S.W.3d 373, 378 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

Conway claims the evidence is insufficient to support his conviction for capital murder. Specifically he argues that (1) there was no evidence that Nickerson—the actual shooter—acted with the specific intent required to murder Odom; (2) there is insufficient evidence to allow a rational jury to reach the conclusion beyond a reasonable doubt that Conway should have reasonably anticipated the murder would occur when he participated in the robbery; and (3) Conway's statement to police and co-defendant accomplice-witness Damian Edwards' testimony at trial as to Conway's involvement in the robbery-murder are, standing alone, legally insufficient to support his conviction.

In evaluating the 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 v. Virginia*, 443 U.S. 307, 319 (1979); *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).

A person commits capital murder if he intentionally commits murder while in the course of a robbery or attempted robbery. Tex. Penal Code § 19.03(a)(2). A perpetrator who participates in the robbery can be charged with capital murder even if he does not himself perform the act if he is "criminally responsible as a party to an offense." *Id.* § 7.01(a)–(b). A defendant can be held criminally responsible if the offense is committed "by his own conduct, by the conduct of another for which he is criminally responsible, or by both." *Id.* § 7.01(a). A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit

the offense. *Id.* § 7.02(a)(2). Criminal responsibility can also be established through the following:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Id. § 7.02(b). A reviewing court may look to events before, during, and after the commission of the offense to determine whether an individual is a party to the commission of the offense. *See Beardsley v. State*, 738 S.W.2d 681, 684 (Tex. Crim. App. 1987); *Diaz v. State*, 902 S.W.2d 149, 151–52 (Tex. App.—Houston [1st Dist.] 1995, no pet.). Mere presence at the scene of a crime by itself will not make a person a party to the crime, but it is a circumstance tending to prove a person is a party to the crime, and when taken with other circumstances may be sufficient to show the same. *See Wygal v. State*, 555 S.W.2d 465, 469 n.3 (Tex. Crim. App. 1977); *Diaz*, 902 S.W.2d at 152.

A

Conway contends there is no evidence that Nickerson intended to kill Odom or that Conway could have reasonably anticipated Nickerson's actions. We disagree. Upon accosting the group of victims, Nickerson proclaimed, "This is a fucking robbery," brandished a handgun, and ordered the group to get on the ground. Co-accomplice Edwards testified that Nickerson shot at Odom three times, hitting him twice. Lemus, one of the robbery victims, testified that the robber wearing the multicolored camouflage hoodie shot twice at Odom, bringing him to the ground after the second shot. Lemus then testified as follows: "So the shooter just — after the second shot on his body, he fell down. The shooter just went and stood next to him and proceeded — and he shot one more shot on his head." A multicolored camouflage hoodie was later seized at Nickerson's residence, and Sergeant Newcomb also testified that Nickerson confessed he

shot Odom. The testifying medical examiner's interpretation of the autopsy report corroborated these witness accounts by revealing bullet entry points in Odom's back and the back of his head. The location of the gunshot wounds, combined with testimony as to the circumstances under which Odom was shot, give rise to a rational inference that Nickerson acted with specific intent to kill. *See Godsey v. State*, 719 S.W.2d 578, 580–81 (Tex. Crim. App. 1986) ("The specific intent to kill may be inferred from the use of a deadly weapon unless in the manner of its use it is reasonably apparent that death or serious bodily injury could not result.") (citations omitted); *Childs v. State*, 21 S.W.3d 631, 635 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) ("[W]here a deadly weapon is fired at close range, and death results, the law presumes an intent to kill."). The evidence is sufficient for a rational jury to conclude beyond a reasonable doubt that Nickerson shot Odom with the specific intent required for murder.

B

Conway's claim that there is insufficient evidence to show he should have reasonably anticipated the murder is also without merit. Although Conway denied having a gun during the robbery, both Duran and Lemus along with co-accomplice Edwards testified that all of the robbers brandished firearms. It was within the jury's province to credit Duran's, Lemus's, and Edwards's testimony as true and disregard Conway's testimony to the contrary. *See Mosley*, 983 S.W.2d at 254–55. Texas courts have consistently held that when a murder occurs in the course of a conspiracy to commit robbery, all parties to the robbery are guilty of murder. *See Green v. State*, 682 S.W.2d 271, 285–86 (Tex. Crim. App. 1984); *see also Ruiz v. State*, 579 S.W.2d 206, 209 (Tex. Crim. App. [Panel Op.] 1979); *King v. State*, 502 S.W.2d 795, 797–98 (Tex. Crim. App. 1973); *Naranjo v. State*, 745 S.W.2d 430, 433–34 (Tex. App.—Houston [14th Dist.] 1988, no pet.); *Flores v. State*, 681 S.W.2d 94, 96 (Tex. App.—Houston [14th Dist.] 1984), *aff'd*, 690 S.W.2d 281 (Tex. Crim. App. 1985). Conway's participation in a robbery in which

all the perpetrators displayed firearms is sufficient evidence for a rational jury to determine Conway reasonably should have anticipated a murder would result.

C

Finally, Conway argues that the only evidence against him is his own confession and Edwards's accomplice testimony against him, and that this evidence is insufficient to support his conviction. His argument rests on two separate theories. First, he relies on Article 38.14 of the Code of Criminal Procedure, which provides that a conviction "cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of an offense." Second, he argues that Conway's extrajudicial confession is not enough to support his conviction because the statement must be corroborated by independent evidence tending to establish the corpus delicti of murder and the underlying felony of robbery. We address these arguments in turn.

1

Article 38.14 requires that, before a conviction may rest upon the testimony of an accomplice witness, the accomplice's testimony must be corroborated by independent evidence tending to connect the accused with the crime. Tex. Code Crim. Proc. art. 38.14; *Brown v. State*, 270 S.W.3d 564, 567 (Tex. Crim. App. 2008). The corroboration evidence, however, need not be sufficient in itself to establish guilt, nor must it directly link the accused to the commission of the offense. *Hernandez v. State*, 939 S.W.2d 173, 176 (Tex. Crim. App. 1997). Conway suggests there was only "scant" evidence to corroborate Edwards's accomplice testimony against him. Part of that evidence includes Conway's own confession to the crime. This alone is sufficient to uphold his conviction as it is evidence "tending to connect" Conway with the offense as required by Article 38.14. *See Brown*, 270 S.W.3d at 568 ("We have held that sufficient accomplice-witness corroboration may be furnished by the suspicious conduct of a defendant, and under most circumstances, an admission or confession will be sufficient to corroborate the

accomplice-witness testimony."); *Joubert v. State*, 235 S.W.3d 729, 731 (Tex. Crim. App. 2007) (holding defendant's videotaped statement admitting he participated in the crime but was not the shooter was sufficient to tend to connect him to the offense in order to corroborate the accomplice witness testimony as required by Art. 38.14). Therefore, Conway's confession to participation in the robbery-murder constitutes sufficient evidence "tending to connect" Conway with the crime.

2

Conway also argues his confession is insufficient to support his conviction because in the context of capital murder, an extrajudicial statement must be corroborated by independent evidence tending to establish the corpus delicti of murder and the underlying felony, in this case, robbery. The common-law corpus delicti doctrine provides that a conviction cannot be based on a confession without some corroborating evidence that a crime, in fact, occurred. *See Bridges v. State*, 362 S.W.2d 336, 337 (Tex. Crim. App. 1962); *see also Gribble v. State*, 808 S.W.2d 65, 70 (Tex. Crim. App. 1990) (plurality op.). The evidence need not necessarily tie the confessor to the crime, but must simply establish that a crime was committed by someone. *See Fisher v. State*, 851 S.W.2d 298, 302–03 (Tex. Crim. App. 1993) ("The corpus delicti of a crime—any crime—simply consists of the fact the crime in question has been committed by someone."). This requirement assures that no person is convicted without some evidence showing that the very crime to which he confessed was actually committed. *See Emery v. State*, 881 S.W.2d 702, 705 (Tex. Crim. App. 1994).

In this case, proof of the corpus delicti for capital murder in the course of a robbery requires proof that both a murder and the underlying felony offense of robbery were committed by someone. *Id.* As such, evidence need only show that a murder and a robbery took place to which Conway could confess, although it need not go so far as to establish Conway actually had any connection to the crime; it is possible for a conviction to rest on a confession alone provided the corpus delicti of the offense is proven. *See Lane v.*

State, 933 S.W.2d 504, 507 (Tex. Crim. App. 1996). In this case, there is an abundance of evidence showing both a robbery and a murder took place, including Odom's body, testimony from victims Duran and Lemus that they were robbed at gunpoint and that in the process Odom was shot twice; confessions from Nickerson that he shot Odom and from Conway that he participated in the robbery; recovery of a portion of the stolen property—Duran's cell phone—in Nickerson's possession; and testimony from the medical examiner establishing that Odom had been shot fatally once in the back and once in the back of the head. The foregoing evidence is more than sufficient to establish the corpus delicti of the crime—that both a robbery and a murder were perpetrated by someone.

The evidence in this case is sufficient for a rational jury to find all of the elements of capital murder beyond a reasonable doubt. Conway's first and second issues are overruled.

III

In his third issue, Conway argues the trial court erred in overruling his objection to an autopsy photograph which was admitted into evidence and shown to the jury. The photograph complained of on appeal was a full-color depiction of the deceased complainant's entire brain after its removal from the complainant's body during the autopsy. The picture revealed the entry point into the brain of the bullet that struck complainant in the back of the head. Conway argues the picture should have been excluded on the grounds that the probative value of the picture was outweighed by the danger of unfair prejudice. Tex. R. Evid. 403.

Defense counsel lodged an objection to the photograph when the State offered eighteen exhibits into evidence en masse. The exhibits were all photographs from Odom's autopsy. At a bench conference, trial counsel stated the grounds for his objection:

> The only one I have an objection to is that one, Judge. Because I think it's not — I understand he'll describe an injury to it, but it's also reflected in the pathology report. It's also reflected in the external photographs. There is no dispute about the cause of death in this case whatsoever and I just think, under 403, it's just not relevant in that regard. I mean, it's relevant —

The prosecutor then interrupted and said, "Do you know what I'm pointing at? It shows the bullet." The trial court then overruled defense counsel's objection and admitted all 18 photographs into evidence.

Rule 403 provides that evidence that is otherwise relevant may be deemed inadmissible under Rule 403 on the grounds that its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, the potential to mislead the jury, considerations of undue delay, or needless presentation of cumulative evidence. Tex. R. Evid. 403. As a prerequisite for presenting a complaint for appellate review, the record must show that a timely objection was lodged in the trial court that "stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context" and complied with the requirements of the Texas Rules of Evidence. Tex. R. App. P. 33.1(a)(1)(A)-(B).

We note initially that although defense counsel's reference to "that one" when objecting to a photograph may have made it clear to the trial judge which photograph counsel found objectionable, it is of little help to this court in determining which of the 18 submitted photographs Conway claims should have been excluded. However, we do not reach the question of whether defense counsel's failure to identify the objectionable photograph by exhibit number was sufficient to preserve the complaint for appellate review because the failure to state a particular basis for objection under Rule 403 preserves nothing for this court to review. As such, we do not reach an analysis of whether the autopsy photograph should have been excluded under the Rule 403 balancing test.

There are five separate and distinct grounds that serve as a basis for objection under Rule 403. Defense counsel did not specify any of these grounds as a basis for his objection, and therefore did not preserve error. *See Williams v. State*, 930 S.W.2d 898, 901 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) ("Rule 403 provides five distinct grounds for excluding otherwise relevant evidence. Appellant's "general Rule 403" objection was too general and forced the trial judge to determine which of the five specific grounds was applicable. Thus, it did not give the judge any specific ground on which to rule."); *Phelps v. State*, 999 S.W.2d 512, 520 (Tex. App.—Eastland 1999, pet. ref'd) (holding a general 403 objection to admission of extraneous offenses was insufficient to preserve error). A Rule 403 objection must specify one of the five distinct grounds for objection to preserve error for appellate review. Conway's trial objection did not meet this standard. Conway's third issue is overruled.

* * *

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

/s/ Justice Jeffrey V. Brown
Judge

Panel consists of Justices Anderson, Frost, and Brown.
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