Affirmed and Memorandum Opinion filed March 22, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00389-CR

MICHAEL WAYNE WALKER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 1183988

MEMORANDUM OPINION

Appellant Michael Wayne Walker appeals his conviction for murder and sentence of sixty years' incarceration. In four issues, appellant claims the evidence is legally and factually insufficient to support his conviction, the trial court erred in instructing the jury on the doctrine of transferred intent, and the trial court erred by overruling his objections to the prosecutor's jury argument. We affirm.

BACKGROUND

Appellant's indictment arose from a September 2008 shooting at the Pines of Westbury apartment complex. Complainant Lester Washington lived in apartment no.

398 and was killed by a bullet shot through the window of that apartment. Living with him in apartment no. 398 at the time were Washington's fiancé Gerlinde Hamilton and her two boys, ages six and eight. Hamilton's older son Gerald Moses lived nearby and visited frequently. Pricilla Powell and her young sons occupied apartment no. 396. At the same time, the Lewis family was staying in apartment no. 396 with the Powells because their electricity was out due to Hurricane Ike.

On the afternoon of September 16, 2008, a group of children, including the Hamilton, Powell, and Lewis children, and some teens were playing football in the courtyard of the Pines of Westbury apartment complex. At some point mid-afternoon, witnesses described the approach of some other teens who attempted to take the football from the kids in the group, including Powell's son.

Powell came out and asked the teenagers, "What's your problem with my son? Why are you messing with him?" One of the kids punched her in the face, and her glasses were knocked-off. Powell's son began fighting with one of the teenagers over the football. Powell's husband told them that they should not be fighting over a football, and one of the boys pushed him. At this point, a brawl broke out in the courtyard. Hamilton called 911. After five minutes, the teenagers "broke out and retreated."

Witnesses at trial describe the events that transpired after the brawl establishing a plot for revenge over the fight. Damien Jordan, appellant's friend, learned that Travione "Woody" Pratt had been in the fight. Woody later also told him that he had been "in a fight with these New Orleans boys." Woody wanted revenge against the "New Orleans boys." Jeremy Williams, who lived at the apartment complex with his grandmother, heard that his female cousin had been hit in the nose by a boy during the brawl, and he wanted revenge for his cousin.

Dana Wilson, who lived at the apartment complex, observed a group of males walking toward the apartment complex as she was coming home. Appellant was with the group and was carrying a liquor bottle. Wilson heard someone in the group say, "He

jumped on my friend . . . we're going to get those niggers." Appellant said, "We fixing to go fight."

A group of several males that included appellant, Jordan, Woody, and Williams congregated on a stairway near apartment no. 398 where they discussed that they "were going to do something to the New Orleans boys that Woodie got in a fight with." Woody pointed to a window where he believed the New Orleans boys were staying. Jordan corrected Woody and said, "No . . . the New Orleans boys don't stay there."

The men initially planned to knock on the door and fight the boys. Appellant, who was holding a .22 caliber Ruger pistol, said, "I've got a gun, let's bust through it." No one else in the group had a gun. Jordan said, "Give me the gun, I do it," but another member of the group, Dalleon Washington, told Jordan not "to do it." Appellant told everyone "to take their positions." Jordan turned his back, walked away, and then heard gunshots. Williams testified that he turned around and saw appellant's "hand pointed at the window." Williams also told the police that he saw appellant shooting at the window. Woody testified that he saw appellant's body falling back as if he were shooting. Woody also told the police that he saw appellant shooting into the window. The group ran when appellant started shooting.

A few members of the group, including appellant, ran to an apartment where Larrielle Morris lived. Appellant told Morris, "You've got to let me in because the police are looking for us." The group was in Morris's bedroom with Morris and Charraine Griffin, who was staying there. Appellant put his gun under one of the beds and then pulled it out and reloaded it. The group stayed about ten to twenty minutes. As the group was leaving, one of the members of the group said, "We're fixing to leave to shoot it up again."

Hamilton was visiting a friend in another apartment. Consequently, she was not inside her apartment during the shooting. When she heard the gunshots, she went toward her apartment. One of the neighbors was in the hallway and told Hamilton that she

"needed to hurry up and get to [her] apartment because it was [her] apartment that they shot." Hamilton found Washington lying on the floor of their apartment. Washington said, "I've been shot. Get my kids out of here." Hamilton saw that Washington had been shot in the chest and called 911.

In the meantime, Chad Lewis had left the apartment complex with Powell to go to his house to retrieve some things and to go to the store so that Powell could buy cigarettes. They returned shortly after Lewis realized that he had forgotten his house keys. As Lewis and Powell were entering the apartment complex, they saw appellant and another male running in the parking lot. Lewis and Powell heard appellant say, "I got him." Lewis recognized appellant because he had previously seen him after the brawl.

When Lewis and Powell reached the apartment, a family friend told them to get out of the car and to "[g]et in the house. They're shooting at us." When Lewis was inside the apartment, he heard gunshots. The shooting lasted ten minutes. Lewis heard "the lady next door holler for help." Lewis was able to crawl to apartment no. 398 without going outside. He pushed open the door and saw Washington slumped over in a recliner. More shots were being fired into the apartment. According to Lewis, every time someone touched the blinds, another shot was fired.

Bob Conley of the Houston Police Department was dispatched to the apartment complex at 8:50 p.m. Conley saw Washington lying on the floor. Washington had blood coming from his mouth, was nonresponsive, and died later at the hospital from his gunshot wounds. Medical personnel recovered two .22 caliber bullets from Washington's body. There were five bullet holes in the living room window of apartment no. 298. A bullet fragment was recovered from a stud in one wall. There was a bullet hole in the back of the television.

The State charged appellant with murder: (1) intentionally and knowingly causing the death of Washington by shooting him with a deadly weapon, namely, a firearm, and (2) intending to cause serious bodily injury to Washington and causing the death of

Washington by intentionally and knowingly committing an act clearly dangerous to human life by shooting Washington with a dangerous weapon, namely, a firearm. The court's charge included an instruction on transferred intent. The jury found appellant guilty of murder and assessed punishment at sixty years in prison. On appeal, appellant contends the evidence is legally and factually insufficient to support his murder conviction, the trial court erred by instructing the jury on the doctrine of transferred intent, and the trial court erred by overruling his objection to the prosecutor's misstatement of the law during closing argument.

SUFFICIENCY OF THE EVIDENCE

In his first two issues, appellant challenges the legal and factual sufficiency of the evidence supporting his conviction. While this appeal was pending, the Texas Court of Criminal Appeals held that the *Jackson v. Virginia*, 443 U.S. 307 (1979), legal sufficiency standard is the only standard to evaluate the sufficiency of the evidence in a criminal case. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality opinion); *id.* at 926 (Cochran, J., concurring). Accordingly, we review the sufficiency of the evidence in this case under a rigorous and proper application of the *Jackson v. Virginia* sufficiency standard. *Brooks*, 323 S.W.3d at 906 (plurality opinion).

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the verdict to determine whether the jury was rationally justified in finding guilt beyond a reasonable doubt. *Isassi v. State*, No. PD-1347-09, — S.W.3d —, 2010 WL 3894792, at *3 (Tex. Crim. App. Oct. 6, 2010); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). We defer to the fact finder's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from the facts. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). Our duty as a reviewing court is to ensure that the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams*, 235 S.W.3d at 750.

Circumstantial evidence is as probative as direct evidence in establishing the guilt of the actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). The same standard of review is used for both circumstantial and direct evidence. *Id.* Each fact need not point directly and independently to the guilt of the appellant as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Id.*

A person commits the offense of murder if he (1) intentionally or knowingly causes the death of an individual; or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (West 2003). The court's charge instructed the jury on the doctrine of transferred intent. Under that doctrine, a person is "criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that . . . a different person or property was injured, harmed, or otherwise affected." TEX. PENAL CODE ANN. § 6.04(b)(2) (West 2003). Therefore, the jury was entitled to convict appellant if it believed that appellant intended or knew that death or serious bodily injury would result to an unknown person by shooting the firearm, and that appellant missed the unknown person and instead struck Washington, causing his death.

Appellant claims he shot through the closed blinds of apartment no. 398. Therefore, appellant argues the evidence is legally insufficient because there is no evidence that he (1) knew anyone was inside apartment no. 398, (2) would either kill or cause bodily injury to Washington when he shot through the window, (3) intended to kill someone else when he shot through a window of that apartment but missed and killed Washington instead, or (4) killed Washington because he mistakenly believed Washington was someone else whom appellant intended to kill or to whom he intended to cause serious bodily injury by shooting him with a firearm.

The jury heard evidence that appellant was planning to seek revenge on some people who were involved in a fight earlier that day—people who were either living in apartment no. 398 or next door in apartment no. 396. While appellant's group was sitting on the stairs discussing what they were going to do, appellant was the only one with a gun. Appellant told everyone to take their positions. Williams saw appellant shooting into the window. Woody twice told the police that appellant was shooting into the window. Appellant was seen reloading the gun and the group was "fixing to leave and shoot it up again." Appellant was heard to say "I got him" as he ran from the scene of the shooting. Appellant owned a .22 Ruger, and a .22 caliber bullet was recovered from Washington.

Appellant asserts that everyone involved in the incident testified that the blinds to both apartment no. 396 and apartment no. 398 were closed and it was not possible to see inside. Jordan testified that they did not know if it was the right window or if anyone was at home. Williams testified that the blinds were closed and he could not see inside the window or tell if there were lights on inside. Woody testified that the blinds were closed and the windows were dark. Woody could not determine whether the lights were on inside, and he could not see anybody through the blinds.

However, the jury also heard evidence that it was possible to see inside the apartment from the outside. Hamilton testified that she had blinds and hunter green curtains on her windows. Hamilton testified it was possible to see inside the apartment because "you can see through those curtains" when the light is turned on in the living room. E.P. Aguilera of the Homicide Division, Crime Scene Unit testified that the blinds were opened slightly, portions of the blinds were "fairly" open, and someone standing outside could see directly into the apartment. Finally, Lewis and Powell heard appellant say "I got him," indicating appellant could see into the apartment.

Reconciliation of conflicts in the evidence is within the exclusive province of the jury. *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000), *overruled on*

other grounds by Laster v. State, 275 S.W.3d 512 (Tex. Crim. App. 2009). Therefore, the jury may choose to believe some testimony and disbelieve other testimony. *Id.* Accordingly, we conclude the evidence, when viewed in the light most favorable to verdict, is legally sufficient to support the jury's verdict. *See Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1987) (op. on reh'g) (holding that, when appellant fired through the door, he intended to kill his former wife and that felonious intent transferred over to the killing of his child). We overrule appellant's first and second issues.

JURY CHARGE

In his third issue, appellant contends the trial court erred in instructing the jury on the doctrine of transferred intent. Appellant objected to the instruction on transferred intent as follows:

> [APPELLANT'S COUNSEL]: . . . Secondly, the defense would object to the charge of transferred intent. There is no evidence to support a jury charge or instruction of transferred intent. . . .
>
> * * *
>
> [THE STATE]: . . . In terms of transferred intent, Your Honor, I think it's clear that his target and his intent was to harm the individuals in Apartment 396 as opposed to 398. So, transferred intent would be a valid charge.
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> * * *
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> [APPELLANT'S COUNSEL]: Nothing further, Judge. I think the evidence is clear there was no intention to injure or shoot Mr. Lester Washington, that there was no evidence to indicate that they even knew whether there was anybody inside the apartment. The windows were closed, the drapes were drawn, the blinds were shut. And the evidence is clear that — even from the people that were out there outside that were going to knock on the door, they were not aware or had no idea whether or not there was anybody inside the apartment. And you cannot intend to shoot somebody in the apartment if it's pretty clear from the parties that they had no information that there was anybody in the apartment.

[THE STATE]: Well, Judge, I think Mr. Dodier is mistaken as to what exactly the evidence showed and what the witnesses said. What the witnesses said — and specifically the witnesses who were out there with the defendant that day, they knew they were inside, they wanted to knock on the door to lure them out so they could fight them, but opposed to luring them out to fight them, the defendant decided that he would just shoot the house up.

So, there's certainly enough for intent and there's certainly enough for transferred intent.

[APPELLANT'S COUNSEL]: We disagree, Judge. The evidence is the reason that he knocked on the door is because they didn't know if there was anybody in there. Anyway, that's our position.

THE COURT: Motion is denied.

[APPELLANT'S COUNSEL]: Thank you, Judge.

THE COURT: The charge stands.

In analyzing charge error, we first must determine whether there is error in the charge. *Sakil v. State*, 287 S.W.3d 23, 25 (Tex. Crim. App. 2009). If there is error in the charge, and the defendant timely objected to the error, reversal is required if the error is calculated to injure the rights of defendant, meaning there must be some harm to the defendant. *Id.*; *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). The degree of harm is determined in light of the entire jury charge, the state of the evidence, including the contested issues and the weight of the probative evidence, the argument of counsel, and any other relevant information revealed by the record of the trial as a whole. *Almanza*, 686 S.W.2d at 171.

The jury charge must allow the jury to determine the defendant's guilt in light of the evidence and the law. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). Transferred intent occurs when a defendant, with the required culpable mental state, intends to injure or harm a specific person but injures or harms a different person or both. TEX. PENAL CODE ANN. § 6.04(b).

Appellant argues that the evidence does not show that he shot at the window of apartment no. 398 with the intent to kill or cause serious bodily injury to another person, but missed that person, and struck Washington. Appellant asserts the evidence showed that he did not know whether anyone was inside the apartment when he shot at the window because the blinds were closed and no one could see if anyone was in the apartment; therefore, he argues that it was impossible for him have intentionally or knowingly shot at any particular individual, miss that individual, and strike Washington.

The jury heard evidence that appellant planned to seek revenge on the "New Orleans boys"; Woody thought the intended victim was staying in apartment no. 398; Jordan told Woody that he was wrong about where the "New Orleans boys" were staying; someone could see into the apartment from the outside; appellant was shooting at a person inside the apartment; and appellant believed that he "got him." Therefore, there is evidence that appellant intended to shoot one victim, but shot Washington. Accordingly, the trial court properly instructed the jury on transferred intent.

Even if the trial court erred in charging the jury on transferred intent, such error does not require reversal. Because appellant objected to the instruction on transferred intent, we consider whether such error was calculated to injure the rights of appellant. *See Almanza*, 686 S.W.2d at 171. Pursuant to the charge, the jury could convict appellant either based on direct intent or transferred intent, and the evidence was sufficient to convict appellant of murder without an instruction on transferred intent. Appellant was planning to seek revenge on the "New Orleans boys," had a gun, and fired the gun through the window. Appellant fled the scene with the group, but returned for another round of shooting, and stated that "I got him," indicating that appellant could see into the apartment. Appellant's counsel did not refer to transferred intent during closing argument; instead, he argued that there was no intent to shoot Washington. The prosecutor spoke about transferred intent for about a page in the reporter's record. The

trial court's error, if any, was not calculated to injure appellant's rights. We overrule appellant's third issue.

JURY ARGUMENT

In his fourth issue, appellant contends that the trial court erred in overruling his objection to the State's argument that the jury must unanimously agree appellant is not guilty of murder before considering the lesser-included offenses. The following occurred during the first part of the State's closing argument:

> [THE STATE]: . . . The important thing that you need to think about here and the important thing that you need to remember is before you even consider a lesser, before you even consider manslaughter, before you even consider deadly conduct, all 12 of you have to agree that he is not guilty of murder. That is the most important thing on the lesser.
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> [DEFENSE COUNSEL]: Your Honor, I object to that. That is not a correct statement of the instructions that you gave the jury and of the law.
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> [THE STATE]: Your Honor, that is a correct statement.
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> THE COURT: Overruled.
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> [THE STATE]: Let me clarify that.
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> All 12 of you have to agree that he is not guilty of murder. Now, the charge may sound a little bit confusing. Okay? What it basically says is if you have a reasonable doubt as to whether or not he is guilty of murder, then you next consider manslaughter and so on. Okay? Or if you can't agree whether or not he is guilty of murder, then you next consider manslaughter and so on to deadly conduct.
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> What that is basically saying is: Hold me to my burden. That's all that's saying. It's not saying that if 11 of you know he's guilty of murder and one of you possibly thinks that he's guilty of manslaughter, you find him guilty of manslaughter. That's not what it's saying. It's talking about your individual verdict. Okay? Each of you as individuals. It's not saying that if six of you on the one hand know he's guilty of murder and six of you on the other hand possibly believe he is guilty of manslaughter, you find him guilty of manslaughter. That's not what it's saying.

> [DEFENSE COUNSEL]: Your Honor, again, I object. That's not a proper statement of the evidence or of the instructions.
>
> THE COURT: Overruled.
>
> [THE STATE]: It's talking about your individual verdict and you holding me to my burden. So, you as a juror, if for some reason you possibly think that he's not guilty of manslaughter — I'm sorry — that he's not guilty of murder, then you as an individual, you consider manslaughter, but when you get together as a whole before you consider manslaughter, all 12 of you as a whole agree that he not guilty of murder.

Appellant's counsel gave his closing argument, which responded to the prior complained-of argument:

> [APPELLANT'S COUNSEL]: . . . And contrary to what the prosecutor said, if some of you think he's guilty of murder and some of you say: No, he's not, he's probably guilty of manslaughter, you have to resolve the issue with manslaughter.

The State then gave the rest of its closing argument, correcting the earlier complained-of argument:

> [THE STATE]: Now, I want to cover a couple of other key concepts, a couple of other legal concepts. I spoke to you sometime [sic] ago about lessers, lesser-included offenses. I want to clarify something for you because I misspoke. The law has changed. You can consider a lesser at any time. Okay? I misspoke. I wanted to clarify that. You can consider a lesser at any time, but I submit to you that the lesser of manslaughter and the lesser of deadly conduct won't even be an issue because the defendant is guilty of murder. You can consider at any time. Okay? As a whole or individual, you can consider it. That was my mistake. Again, the law has changed. Those aren't going to be issues for you because the defendant is guilty of murder.

Proper jury argument falls within one of the following categories: (1) summation of the evidence, (2) reasonable deduction from the evidence, (3) in response to argument of opposing counsel, and (4) plea for law enforcement. *Davis v. State*, 329 S.W.3d 798, 821 (Tex. Crim. App. 2010). Argument that misstates the law or is contrary to the jury charge is improper. *Whiting v. State*, 797 S.W.2d 45, 48 (Tex. Crim. App. 1990); *Burke*

v. State, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). A trial court puts its stamp of approval on the prosecutor's misstatement of the law when it overrules the defense's objection. *Burke*, 652 S.W.2d at 790; *Lee v. State*, 971 S.W.2d 130, 131 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

The jury is entitled to consider the charge as a whole and is not required to unanimously agree that a defendant is not guilty of the greater offense before considering the lesser-included offense. *Barrios v. State*, 283 S.W.3d 348, 349–50 (Tex. Crim. App. 2009). Therefore, the prosecutor's statement that all members of the jury must agree that appellant is not guilty of murder before they could consider the lesser-included offenses was a misstatement of the law.

Improper-argument error is non-constitutional error. *Brown v. State*, 270 S.W.3d 564, 572 (Tex. Crim. App. 2008). Non-constitutional error that does not affect substantial rights must be disregarded. *Id.* To determine whether appellant's substantial rights were affected by improper argument, we balance the following factors: (1) the severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's comment), (2) any curative measures taken (the effect of any cautionary instruction by the trial court), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Mosely v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998).

We first consider the severity of misconduct. "[I]n evaluating the severity of the misconduct, we must assess 'whether [the] jury argument is extreme or manifestly improper [by] look[ing] at the entire record of final argument to determine if there was a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial.'" *Brown*, 270 S.W.3d at 573 (quoting *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997)). When viewing the State's closing argument in whole, we cannot conclude that there was a willful and calculated effort on the part of the State to deprive appellant of a fair and impartial trial.

Second, we consider any curative measures, including those taken by the prosecutor. *See Hawkins v. State*, 135 S.W.3d 72, 84 (Tex. Crim. App. 2004) ("Although a prosecutor's self-corrective action might not carry the same weight as a trial court's instruction to disregard, it is nevertheless a relevant consideration in determining harm and can, in the appropriate circumstances, render an improper comment harmless."). Although the trial court did not provide a curative measure, the prosecutor corrected her prior misstatement of the law. In the second part of her argument, the prosecutor subsequently admitted that her prior statement regarding lesser included offenses was incorrect, explained that the law had changed, and specifically stated three times that the jury could consider a lesser included offense at any time. Moreover, appellant's counsel informed the jury of the correct status of the law. Finally, the court's charge properly instructed the jury on the status of the law. *See id.* (explaining the court of appeals erred in failing to consider that the jury charge properly instructed the jury on the law).

Third, we consider the certainty of appellant's conviction for murder. As discussed above, appellant intended to seek revenge on the "New Orleans boys." Appellant was the only one in the group in possession of a gun just prior to the shooting. Witnesses testified that appellant was shooting at the window. Appellant had a .22 caliber Ruger, and two bullets of the .22 caliber family were recovered from Washington's body. Appellant was heard to say "I got him" as he was running through the parking lot. The evidence supporting appellant's murder conviction is strong. Therefore, the prosecutor's error in initially misstating law was harmless. We overrule appellant's fourth issue.

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

/s/ Sharon McCally
Justice

Panel consists of Justices Anderson, Seymore, and McCally.

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