Affirmed and Memorandum Opinion filed April 28, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00081-CR

TRYAN JOSHUA RILEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 1427803

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

A jury convicted appellant, Tyran Riley, of capital murder and sentenced him to imprisonment for life. *See* Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2015). Appellant challenges the sufficiency of the evidence to support his conviction and claims there was error in the jury charge. We affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

Appellant, Aqeel Faircloth ("complainant"), and Xavier Williams were friends from school. On May 9, 2013, Williams and complainant went to appellant's apartment complex to obtain a shotgun from appellant. When they arrived at appellant's apartment, his brother said appellant was not home. Complainant and Williams began shooting dice in the breezeway of appellant's apartment complex while waiting for appellant to return. Two other teenagers, Bradley[1] and Juquae Jackson, with whom complainant was familiar, arrived in the breezeway and joined the dice game. Williams decided to stop shooting dice because he did not know Bradley or Jackson. Complainant was winning the dice games, and Williams decided to go to the adjacent apartment complex. During this time, appellant arrived and met the group in the breezeway. Shortly after, Pershing Gilmore and Robert Hinton arrived at appellant's apartment complex. Appellant and Bradley went to Gilmore's truck and began discussing the dice game.

During their conversation, Gilmore, Hinton, Bradley, and appellant developed a plan to rob complainant of his dice winnings. Gilmore gave appellant a gun and stated, "it is loaded so watch what you're doing." Gilmore told appellant "to pull the gun out on [complainant]" because they were going to rob him. Gilmore also said he would kill appellant, his mother, and his brother if appellant refused to participate. Hinton formed a gun with his hand, placed it against his temple, and made a shooting gesture. Appellant interpreted this gesture as Hinton telling him to kill complainant. Appellant put the gun in his pocket and returned to the breezeway.

Appellant stood behind complainant, who was squatting down to shoot dice. Gilmore asked appellant if he remembered what Gilmore told him, and then

[1] Bradley's last name is not known by either appellant or the State.

Gilmore reached down to grab the money from the dice game. Appellant then fired the gun, shooting complainant in the head. Complainant fell face-first to the floor, and appellant dropped the gun and ran.

Nikita Hobson lived in appellant's apartment complex and had returned home to find her son, Miguel, and Williams running and shouting frantically. Hobson learned complainant was "layed up" in the breezeway and went to check his pulse; she then shouted for someone to call 911. Hobson also called complainant's mother, Carla Faircloth, to tell her the news. The police arrived at appellant's apartment complex. Deputy Thomas Dousay, a homicide detective, investigated the scene, interviewed witnesses, and spoke with responding officers. During this initial investigation, appellant's brother, Donald Riley, was placed in the back of a police car. Donald was released from the patrol car and returned to his home around three o'clock in the morning. Upon his return, appellant told Donald that he had shot complainant. Donald testified that appellant told him that he "didn't mean to aim [the gun], he didn't even put his hand on the trigger." Donald further testified that appellant "was trying to give [the gun] up when he pulled it out. He didn't even aim [the gun], he didn't want it anymore. When he pulled [the gun] out, it went off. And when [the gun] went off he dropped it." Donald testified appellant said "he was scared, he was so scared. He didn't know what to do, so he ran home."

Later that morning, appellant's mother, Tiffany Riley, also learned appellant was responsible for shooting complainant. On May 10, 2013, appellant called Hobson crying and said he was sorry. Hobson, who was visiting with appellant's mother, advised him to come to her home. Upon his arrival, appellant "broke down and told [them] he was sorry." Hobson asked appellant if he wanted to call complainant's mother. Appellant decided to call Carla, and when she answered

appellant said, "ma'am I'm sorry, I'm so sorry. I didn't mean to do it. He was like my brother." Carla testified that appellant made the phone call from complainant's phone. Later that morning, Deputy Dousay received a call from appellant's mother, and she and Hobson then brought appellant to the police station for questioning. In a videotaped interview, appellant told Deputy Dousay about the dice game, the plan to rob complainant, and the shooting. Appellant stated he participated in the plan because he felt threatened by Gilmore and was afraid that Gilmore would harm or kill appellant and his family if he refused to participate. Appellant also stated that he did not want to shoot his friend, but he saw complainant "reach back and grab something, I thought [complainant] was going to grab something, so I accidentally shot him."

Appellant was indicted for capital murder. Appellant's video interview with the police was admitted at trial and played for the jury. Dr. Ana Lopez, an assistant medical examiner, performed complainant's autopsy and determined his cause of death was from a penetrating gunshot wound to the head. The jury was instructed on capital murder and the lesser-included offenses of murder, felony murder, and manslaughter. The jury found appellant guilty of capital murder and assessed punishment at life in prison in the Institutional Division of the Texas Department of Criminal Justice.

II. SUFFICIENCY OF THE EVIDENCE

In this case, in order for the jury to find appellant guilty of capital murder the State was required to prove appellant intentionally or knowingly caused the death of complainant, while in the course of committing or attempting to commit robbery. *See* Tex. Penal Code Ann. § 19.03(a)(2) (West Supp. 2015). In his first issue, appellant claims the evidence is insufficient because the only evidence of robbery or attempted robbery was his confession and under the *corpus delicti* rule

there had to be corroborating evidence. In his second issue, appellant asserts there was no evidence, apart from his confession, that he acted intentionally or knowingly when he fired the shot that killed complainant.

A. STANDARD OF REVIEW

In determining sufficiency of the evidence, we consider all the evidence, both direct and circumstantial, and any reasonable inferences which can be drawn from the evidence. *See Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). The jury is the sole judge of the credibility of the witnesses and the evidence presented. *See Villani v. State*, 116 S.W.3d 297, 301 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd.). We view all evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact finder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). We do not sit as the thirteenth juror and may not substitute our judgment for that of the fact finder by re-evaluating the weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We defer to the jury's responsibility to fairly resolve conflicts in testimony, weigh the evidence, and draw all reasonable inferences from basic facts to ultimate facts. *Id.* Our duty as reviewing court is to ensure the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

B. THE RULE OF CORPUS DELICTI

An extrajudicial confession alone, without some independent evidence of the *corpus delicti*, is not legally sufficient evidence to support a conviction. *Miller v. State*, 457 S.W.3d 919, 924 (Tex. Crim. App. 2015) (citing *Hacker v. State*, 389 S.W.3d 860, 865 (Tex. Crim. App. 2013)). *Corpus delicti* means "harm brought

about by the criminal conduct of some person." *Gribble v. State*, 808 S.W.2d 65, 70 (Tex. Crim. App. 1990). The purpose of the rule is to ensure no person is convicted of a crime that never occurred, based solely on his own false confession. *Miller*, 457 S.W.3d at 924. The requisite independent evidence need not connect the defendant to the crime; it need only show that a crime was committed. *Hammond v. State*, 942 S.W.2d 703, 706–07 (Tex. App.—Houston [14th Dist.] 1997, no pet.). In addition, such evidence need not be sufficient by itself to prove the offense; it need only be "some evidence which renders the commission of the offense more probable than it would be without the evidence." *Rocha v. State*, 16 S.W.3d 1, 4 (Tex. Crim. App. 2000). Under the *corpus delicti* rule, we consider all the record evidence—other than appellant's extrajudicial confession—in the light most favorable to the jury's verdict to determine whether that evidence tended to establish that an offense occurred. *Fountain v. State*, 401 S.W.3d 344, 353 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd) (citing *Fisher v. State*, 851 S.W.2d 298, 303 (Tex. Crim. App. 1993)). The State may prove the *corpus delicti* by circumstantial evidence. *See McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997); *Fountain*, 401 S.W.3d at 353.

C. EVIDENCE OF ROBBERY

Appellant contends there was no evidence other than his confession that he committed robbery, the felony underlying the charge of capital murder. In the case at bar, both the murder and the robbery, must be shown by independent evidence. *See Gribble*, 808 S.W.2d 71. The evidence need not show that appellant committed the robbery, only that a murder and a robbery took place to which appellant could confess. *See Lane v. State*, 933 S.W.2d 504, 507 (Tex. Crim. App. 1996). It is possible for a conviction to rest on a confession alone provided the *corpus delicti* of the offense is proven. *Id*.

The testimony of Carla Faircloth and records from complainant's cell phone established appellant was in possession of complainant's cell phone after the murder. Such circumstantial evidence renders the *corpus delicti* of robbery more probable than it would be without that evidence. *See Hammond*, 942 S.W.2d at 706–07. Appellant's confession, together with the independent evidence of appellant's possession of complainant's cell phone, supports the jury's finding a robbery occurred during the course of the murder. *See id.* We overrule appellant's first issue.

D. EVIDENCE OF INTENT

Appellant next argues the evidence, apart from his extrajudicial confession, is insufficient to support his conviction for murder because the State failed to prove that he intentionally or knowingly caused the death of complainant. As relevant to the facts of this case,[2] a person commits the offense of murder if (1) he intentionally or knowingly causes the death of an individual; or (2) he 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 2011). A person acts intentionally with respect to a result of his conduct when it is his conscious objective or desire to cause the result. *Id.* § 6.03(a) (West 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b) (West 2011). Proof of a culpable mental state almost always depends upon circumstantial evidence. *Gilder v. State*, 469 S.W.3d 636, 639 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Intent to cause death may be inferred from circumstantial evidence such as the acts, words, and conduct of the accused. *See*

[2] Intentional murder is a "result of conduct" offense. *Cook v. State*, 884 S.W.2d 485, 490 (Tex. Crim. App. 1994).

Guevara v. State, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). A jury may infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996); *Mouton v. State*, 923 S.W.2d 219, 223 (Tex. App.—Houston [14th Dist.] 1996, no pet.). A firearm is a deadly weapon per se. Tex. Penal Code Ann. § 1.07(a)(17)(A) (West Supp. 2015).

Jackson testified that appellant pulled a gun from his waistband, pointed the gun at complainant's head, and shot him. Lopez testified the shot traveled at a downward angle and hit the back of complainant's head, which was consistent with the shooter standing over a squatting complainant. Complainant died as a result of the gunshot wound.

Viewing the evidence in the light most favorable to the verdict, we conclude any rational fact finder could have found appellant guilty of murder beyond a reasonable doubt under either section 19.02(b)(1) or 19.02(b)(2) of the Penal Code. *See id.* § 19.02(b)(1) & (2); *see also Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012) (recognizing that specific intent to kill may be inferred from defendant shooting victim with a deadly weapon); *Forest v. State*, 989 S. W.2d 365, 368 (Tex. Crim. App. 1999) ("[F]iring a gun in the direction of an individual is an act clearly dangerous to human life."). Accordingly, we overrule appellant's second issue.

III. LESSER-INCLUDED OFFENSE

In his final issue, appellant argues the trial court abused its discretion by refusing to instruct the jury on the lesser-included offense of criminally negligent homicide. Specifically, appellant contends that Donald's testimony provided evidence from which a rational jury could have found that if appellant was guilty, he was guilty of only the lesser offense and thus he was entitled to the requested instruction.

A. STANDARD OF REVIEW

We review the trial court's decision on the submission of a lesser-included offense for abuse of discretion. *Jackson v. State*, 160 S.W.3d 568, 575 (Tex. Crim. App. 2005). The trial court abuses its discretion when its decision is arbitrary, unreasonable, or without reference to guiding rules or principles. *Makeig v. State*, 802 S.W.2d 59, 62 (Tex. Crim. App. 1990). We apply a two-part test when determining whether a defendant is entitled to an instruction on a lesser-included offense. *See Sweed v. State*, 351 S.W.3d 63, 67 (Tex. Crim. App. 2011). We first consider whether the lesser-included offense is included within the proof necessary to establish the charged offense. *See McKithan v. State*, 324 S.W.3d 582, 587 (Tex. Crim. App. 2010). This inquiry requires that we compare the elements of the greater offense as pleaded in the indictment with the statutory elements of the lesser offense. *See Ex parte Amador*, 326 S.W.3d 202, 206 n.5 (Tex. Crim. App. 2010). If the elements of the lesser offense cannot be established by proof of the same or less than all of the facts required to establish the commission of the greater offense, then the lesser offense is not a lesser-included offense, and our analysis ends there. *See Hall v. State*, 225 S.W.3d 524, 536–37 (Tex. Crim. App. 2007).

If the lesser offense is actually a lesser-included offense, then we examine whether there is some evidence from which a rational jury could acquit the

defendant of the charged offense but convict him of the lesser offense. *See Guzman v. State*, 188 S.W.3d 185, 188–89 (Tex. Crim. App. 2006); *Delacruz v. State*, 278 S.W.3d 483, 488 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). The evidence must establish the lesser offense as "a valid rational alternative to the charged offense." *See Segundo v. State*, 270 S.W.3d 79, 90–91 (Tex. Crim. App. 2008). We consider all of the evidence presented at trial, regardless of its credibility or whether it is produced by the State or defendant. *See Hayward v. State*, 158 S.W.3d 476, 478–79 (Tex. Crim. App. 2005); *Thompson v. State*, 521 S.W.2d 621, 624 (Tex. Crim. App. 1974). Evidence cannot be reviewed in isolation or "examined in a vacuum." *See Godsey v. State*, 719 S.W.2d 578, 584 (Tex. Crim. App. 1986). "A defendant is entitled to an instruction on a lesser-included offense if some evidence from any source raises a fact issue on whether he is guilty of only the lesser, regardless of whether the evidence is weak, impeached, or contradicted." *Cavazos*, 382 S.W.3d 383. However, it is not enough that the fact finder may disbelieve crucial evidence pertaining to the greater offense; rather, there must be some evidence directly germane to the lesser-included offense for the fact finder to consider before an instruction on a lesser-included offense is warranted. *See Sweed*, 351 S.W.3d at 68.

B. ANALYSIS

A person commits capital murder if he intentionally commits a murder in the course of committing or attempting to commit a felony. *See* Tex. Penal Code Ann. § 19.03(a)(2). A person commits criminally negligent homicide if he causes the death of an individual by criminal negligence. *See id.* § 19.05(a) (West 2011). A person is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct, when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. *Id.* § 6.03(d)

(West 2011). The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances viewed from the actor's standpoint. *Id*. Courts have recognized that the difference between criminally negligent homicide and murder is the culpable mental state, and thus criminally negligent homicide is a lesser-included offense of murder. *See Saunders v. State*, 913 S.W.2d 564, 572 (Tex. Crim. App. 1995) (holding negligent homicide is a lesser-included offense of murder). Therefore, the first prong of the test is satisfied.

Next, we look for evidence from any source which establishes that if appellant is guilty, he is guilty only of the lesser offense. Because the key difference between criminally negligent homicide and capital murder is the culpable mental state, any evidence which negates the culpable mental state of murder and establishes that of criminally negligent homicide would entitle appellant to an instruction on the lesser-included offense. *Cavazos*, 382 S.W.3d at 383. The culpable mental state of criminal negligence involves inattentive risk creation, meaning the actor ought to be aware of the risk surrounding his conduct or the results thereof. *Thomas v. State*, 699 S.W.2d 845, 849 (Tex. Crim. App. 1985). The key to criminal negligence is the actor's failure to perceive the risk. *Id*. Thus, before a charge on criminally negligent homicide is required, the record must contain some evidence showing appellant's unawareness of the risk. *Jackson v. State*, 248 S.W.3d 369, 371–72 (Tex. App.—Houston [1st Dist.] 2007 pet. ref'd) (citing *Mendieta v. State*, 706 S.W.2d 651, 653 (Tex. Crim. App. 1986)).

Appellant contends Donald's testimony showed appellant was unaware of the risk and established criminally negligent homicide as a valid rational alternative to capital murder. Donald testified appellant told him that "he didn't mean to aim it, he didn't even put his hand on the trigger. . . . When he pulled it

out, it went off."

An allegation of accidental discharge of a gun does not necessarily raise the issue of criminally negligent homicide. *Thomas*, 699 S.W.2d at 850. The surrounding circumstances from which the defendant's mental state can be inferred must be collectively examined in light of the definition of criminally negligent conduct. *Id*. Before such a charge is required, other evidence raising the issue of whether a defendant was aware of the risk must be presented. *Id.* "Evidence that a defendant knows a gun is loaded, that he is familiar with guns and their potential for injury, and that he points a gun at another, indicates a person who is aware of a risk created by that conduct and disregards the risk." *Id.*

The evidence in this case tends to show appellant was, at the very least, aware of the risk associated with his conduct. Appellant told police that when Gilmore gave him the gun, Gilmore said the gun was loaded. Appellant knew the gun's type and had told complainant and Williams that he had a shotgun and a Smith and Wesson. When Hinton formed a gun with his hand, placed it against his temple and made a shooting gesture, appellant interpreted it as an instruction to kill complainant. In his police interview, appellant stated that after Gilmore reached down to grab the money from the dice game, complainant reached back, grabbed something, and looked back at appellant — that is when appellant fired the shot.

We cannot hold the evidence in this case raised a fact issue on whether appellant was unaware of the risk associated with his conduct. *See Salinas v. State*, 644 S.W.2d 744, 746 (Tex. Crim. App. 1982) (holding that a defendant who exhibits a loaded, cocked pistol is presumed to be aware of the risk, regardless of whether he is aware of actually shooting the deceased). Accordingly, the trial court did not abuse its discretion by refusing to submit criminally negligent homicide as a lesser-included offense. We overrule appellant's third issue.

IV. CONCLUSION

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

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Donovan, and Brown.
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