Affirmed and Memorandum Opinion filed May 3, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00252-CR

JUAN JOSE QUINTERO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 1390666

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

Appellant Juan Quintero appeals his conviction for the murder[1] of Ronald Stelly. Appellant presents two issues on appeal. We affirm.

Factual and Procedural Background

On June 4, 2013, John Hermesch met complainant Ronald Stelly at the Astro Inn in Houston. Hermesch and his friend, Lamar Davis, were staying the night at

[1] Tex. Penal Code § 19.02(b) (West 2015).

the motel and using drugs, including crack cocaine. The pair ran into Stelly, who was introduced to them as "Black." Stelly and Hermesch used cocaine together and wanted to obtain more. Stelly and Hermesch then encountered appellant outside of a motel room at the Astro Inn and asked appellant if he knew where to find drugs. Appellant told Hermesch and Stelly that he could get them drugs, but that the motel parking lot was too "hot" with police to carry out a transaction there. Hermesch testified that, at that time they made contact with appellant, appellant was in a car with a Hispanic girl with dark hair. Appellant asked Stelly to go with him around the corner of the motel to complete the drug transaction. Hermesch went inside to wait for Stelly. After he returned to the motel room, Hermesch heard two gunshots and a car peeling out of the motel area. Hermesch and Davis went outside to see what happened, but turned back and returned to the motel room, fearing for their safety. The pair then changed course and went back outside to investigate what had happened. Hermesch and Davis found Stelly lying in the median of the roadway next to the motel, injured from an apparent gunshot wound to his lower body. The medical examiner confirmed at trial that Stelly died as a result of a gunshot wound to the lower back. Hermesch testified that, when he found him, Stelly was bleeding from his mouth and asking for help. Davis ran to ask the night clerk of the motel to call the police, while Hermesch remained in the street, attempting to flag down cars passing by.

Officer J. Bonnin, who was dispatched to respond, stopped when he saw Hermesch waving him down in the street. Bonnin saw Stelly, lying in the median, turned on his side, with a cell phone in one hand. Bonnin testified that Stelly was not moving at this time. Bonnin placed Hermesch and Davis in separate police cars for questioning. Bonnin worked with Officer A. Barr to secure the crime scene. Officers M. Stahlin and B. Tesfay were dispatched to assist in recovering

evidence. Stahlin arrived after Stelly's body was removed from the scene. At the scene, Stahlin found a cell phone, bullet casings, a house shoe, and a five dollar bill. Stahlin testified that neither the bullet casings nor the five dollar bill was tested for DNA, but the five dollar bill was fingerprinted. The bill did not show any indication of being handled by anyone other than Stelly. Tesfay recovered surveillance video from the motel, which the jury viewed at trial. The video indicated that, earlier in the night, appellant had driven up to the night window in a white sedan to check into the motel. The video also showed Hermesch and Stelly speaking to someone in the same white car prior to the shooting.

Believing that the murder suspect was the person driving the white car that appeared on the surveillance video, police attempted to locate the vehicle. The car was located and the police pulled the car over for a traffic violation. Karen Reyes, appellant's sister-in-law, was driving the car when it was pulled over. Reyes told police that appellant had been driving the car the night of the shooting and that she had been with him at the Astro Inn. Police issued an arrest warrant for appellant. Appellant was arrested in San Antonio and brought back to Houston, where he was charged with Stelly's murder.

At trial, Reyes testified that she knew appellant had a firearm with him the night of the murder because appellant had showed it to her "earlier in the day." Reyes also testified that she and appellant had come across two men at the Astro Inn, one of whom was black.[2] After Reyes and appellant encountered these two men, appellant drove the car towards the street, where they stopped so that appellant could speak to the black man. Reyes testified that she heard gunshots during the time that appellant was outside of the car, but that she did not see the shooting. Reyes said that, as she and appellant were leaving the scene, she saw the

[2] The record reflects that Hermesch is a Hispanic man, and Stelly was a black man.

same black man by a tree, "about to lay down." Reyes never identified Stelly as the black man she had seen. On cross-examination, Reyes admitted that, due to taking Xanax that night, she did not remember traveling to the Astro Inn. Reyes also testified that she did not remember being in a room at the motel or walking from the room to the car, but that she did remember getting in the car, hearing gunshots while she was inside the car, and being driven away from the motel to her home.

After a jury trial, appellant was convicted and sentenced to life in the Texas Department of Criminal Justice, Institutional Division. Appellant timely filed this appeal. We affirm.

Analysis

Appellant presents two issues on appeal: (1) that the evidence adduced at trial is insufficient to demonstrate that he possessed the requisite culpable mental state for murder; and (2) that the trial court erred in denying appellant's motion for new trial. We address each in turn.

I. Sufficiency of the Evidence

Appellant concedes that "a combination of direct and circumstantial evidence combined with the inferences there from [sic] is sufficient" to establish that he possessed a gun at the time and location of Stelly's shooting. However, appellant contends that, despite this evidence that he possessed a gun, the evidence is insufficient to show that, assuming he actually fired the gun at Stelly and killed him, he possessed the requisite culpable mental state for murder—a conscious objective or desire to shoot Stelly and cause his death, awareness that shooting Stelly would cause his death, or a conscious objective or desire to commit an act clearly dangerous to human life. *See* Tex. Penal Code § 6.03(a), (b) (West 2015).

In evaluating the sufficiency of the evidence presented at trial, we "examine 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 offense beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Price v. State*, 456 S.W.3d 342, 347 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). "Although we consider everything presented at trial, we do not reevaluate the weight and credibility of the evidence or substitute our judgment for that of the fact finder." *Price*, 456 S.W.3d at 347. In order to convict a defendant of murder, the jury must find, beyond a reasonable doubt, that the defendant: (1) "intentionally or knowingly cause[d] the death of an individual"; or (2) "intend[ed] to cause serious bodily injury and comit[ted] an act clearly dangerous to human life that cause[d] the death of an individual." Tex. Penal Code § 19.02(b)(1), (2) (West 2015).

The jury is permitted "to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial." *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). Appellant concedes that the evidence supports an inference that he possessed a gun. The inference that appellant also fired the gun at Stelly is also reasonably supported by the evidence. Surveillance footage from the Astro Inn indicated that after speaking with appellant—who was inside the car at the time—Stelly and Hermesch parted ways, with Stelly walking away to meet appellant in order to complete the planned transaction. Shortly after Stelly walked away to meet appellant, Hermesch heard two gunshots and a car peeling away. Reyes's testimony likewise supports a reasonable inference that appellant shot Stelly. Reyes testified that appellant had driven towards the street in order to meet a black man, and while appellant was outside of the car, she heard gunshots. As appellant and Reyes drove away, Reyes saw a black man on the median "about to lay down." While neither the testimony at trial nor the

surveillance footage are direct evidence that appellant shot Stelly, they provide insight into "events occurring before . . . and after the commission of the offense" upon which reasonable inferences could rest. *Id.* at 13 (quoting *Cordova v. State*, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985)).

Finally, the jury could have reasonably relied on the evidence and prior inferences to infer that appellant intended to cause Stelly's death because he used a firearm against him. Appellant argues that, because there was no evidence of what occurred between him and Stelly in the moments before Stelly was shot, there is no evidence that appellant intentionally or knowingly caused Stelly's death or that he intended to cause seriously bodily injury to Stelly. But a defendant's culpable mental state can be—and is most often—proven through circumstantial evidence. *Cavazos v. State*, 382 S.W.3d 377, 384 (Tex. Crim. App. 2012); *Mayreis v. State*, 462 S.W.3d 569, 572–73 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd); *Mouton v. State*, 923 S.W.2d 219, 223 (Tex. App.—Houston [14th Dist.] 1996, no pet.). In this case, intent to kill could be inferred from the use of a firearm, which is a deadly weapon *per se*. Tex. Penal Code § 1.07(a)(17)(A) (West 2015); *Mouton*, 923 S.W.2d at 223 ("Specific intent to kill may be inferred from the use of a deadly weapon. A handgun is a deadly weapon *per se*."). Likewise, intent to kill may be inferred from the act of pointing a gun at an individual and firing it. *Manuel v. State*, No. 14-0100061-CR, 2002 WL 834537, at *3 (Tex. App.—Houston [14th Dist.] May 2, 2002, pet. ref'd) (mem. op., not designated for publication); *see Juarez v. State*, 961 S.W.2d 378, 384 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd). We therefore conclude that a rational jury could have, through multiple reasonable inferences, found the essential elements of the offense of murder—that appellant shot Stelly and that he possessed the requisite culpable mental state when doing so. The proof of appellant's guilt offered at trial is not "so

obviously weak or greatly outweighed by contrary proof as to indicate that manifest injustice has occurred." *Manuel*, 2002 WL 834537, at *2 (citing *Goodman v. State*, 66 S.W.3d 283, 285 (Tex. Crim. App. 2001)). We overrule appellant's first issue.

II. Denial of Appellant's Motion for New Trial

Appellant next argues that the trial court erred in denying his motion for new trial without a hearing based on an improper finding that appellant had not complied with the "presentment" requirement in the Code of Criminal Procedure. Appellant filed a motion for new trial claiming that his trial counsel was "constitutionally ineffective for failing to investigate the facts of the offense and failing to prepare for the punishment hearing." In a written order, the trial court denied appellant's motion because it was "not presented to [the] Court within ten days of filing, as required by Rule 21.4(a) of the Texas Rules of Appellate Procedure." Appellant contends that this finding was erroneous because he contacted the court coordinator to request a hearing seven days after he filed the motion, therefore timely "presenting" the motion to the court. Appellant asks this court to reverse the trial court's order and remand for a hearing on the motion.

We review the trial court's denial of a hearing on a motion for new trial for abuse of discretion and may only reverse if "no reasonable view of the record could support the trial court's finding." *Rodriguez v. State*, 329 S.W.3d 74, 81 (Tex. App.—Houston [14th Dist.] 2010, no pet.). A movant is not entitled to a hearing on his motion for new trial "unless he establishes the existence of reasonable grounds showing that [he] could be entitled to relief." *Smith v. State*, 286 S.W.3d 333, 339 (Tex. Crim. App. 2009). Therefore, in a motion for new trial alleging ineffective assistance of counsel, the movant "must allege facts that would reasonably show that his counsel's representation fell below the standard of

professional norms and that there is a reasonable probability that, but for his counsel's conduct, the results of the proceeding would have been different." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). In his motion for new trial, appellant contended that his trial counsel was ineffective for two reasons: (1) he failed to investigate the facts of the case, including any facts potentially supporting a theory of self-defense; and (2) he inadequately prepared for the punishment phase of trial by failing to discuss with appellant which witnesses may have provided helpful mitigation testimony. Because we find that appellant failed to establish reasonable grounds for ineffectiveness on either of these bases, we hold that the trial court did not abuse its discretion in denying the motion without a hearing. Therefore, we withhold judgment on whether appellant's email to the court coordinator constituted proper presentment and affirm the trial court's order.

A. Failure to investigate and pursue a theory of self-defense

In his affidavit accompanying the motion for new trial, appellant stated that, after consulting with appellate attorneys, he believed that he may have had a valid theory of self-defense that he never discussed with trial counsel. The motion itself makes several more statements regarding this self-defense theory that are completely unsubstantiated by the appellant's affidavit. For example, the motion states that appellant explained to trial counsel that he had been stabbed and that Stelly's shooting was "an immediate result of that stabbing." Appellant does not corroborate this statement in his affidavit; he refers only generally to "injuries" that could have been photographed in support of a self-defense claim. However, appellant's affidavit does not indicate that he ever apprised trial counsel of these wounds.

Appellant's statements do not demonstrate reasonable grounds to believe that trial counsel shirked his duty to investigate a theory of self-defense. "Counsel

has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. However, counsel's duty to investigate is limited to what is reasonably available to him and whether that evidence "would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 524, 527 (2003). It does not appear from the motion and the affidavit that proof of appellant's alleged injuries was available to trial counsel. Appellant does not aver that trial counsel knew of these injuries. Nor does the record indicate that self-defense was a theory that a reasonable lawyer would pursue in this case. If there is little direct evidence indicating that appellant shot Stelly, there is even less evidence—direct or circumstantial—indicating that Stelly stabbed appellant or otherwise threatened him in any way. There were no weapons found at the scene, nor was there any indication that Stelly had a weapon at any time throughout the night. Stelly was also shot in the back, tending to indicate that, even if he did attack appellant in some way, he was likely retreating, meaning that deadly force was not immediately necessary. *See generally* Tex. Penal Code § 9.32 (West 2015). Even if trial counsel would have known about appellant's alleged injuries, there is little indicating that a reasonable lawyer would pursue the defense at trial, given the state of the record.

Further, appellant's consultation with other appellate attorneys who allegedly told him he could have a plausible self-defense claim does not dictate the standard for effective representation in this case. Even if these unspecified attorneys were sufficiently familiar with the facts of the case, "ineffectiveness is not to be determined after the fact by comparison with how other counsel *might* have tried the case." *Cantu v. State*, No. 14-94-01081-CR, 1996 WL 515466, at *4 (Tex. App.—Houston [14th Dist.] Sept. 12, 1996, no pet.) (mem. op., not

designated for publication) (citing *Benoit v. State*, 561 S.W.2d 810, 818 (Tex. Crim. App. 1977)). Appellant has not demonstrated reasonable grounds for a claim that trial counsel failed to adequately investigate a self-defense theory or that such an investigation would have changed the outcome of the case in any way.

B. Failure to prepare for punishment phase

Finally, in his motion for new trial, appellant alleges that trial counsel was constitutionally ineffective because he did not meet with appellant to discuss the "types of witnesses who would be the most beneficial to testify in the event that the jury found him guilty." The only witness at appellant's punishment was his mother, but appellant's affidavit states that, if asked, he would have given trial counsel the names of potentially helpful witnesses, such as previous employers. Appellant also avers that he never discussed with trial counsel the possibility of retaining an expert to testify as part of a mitigation strategy.

A claim for ineffective assistance based on trial counsel's failure to interview other witnesses cannot succeed "absent a showing of what the interview would have revealed that reasonably could have changed the result of the case." *Stokes v. State*, 298 S.W.3d 428, 432 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). A bare allegation that other witnesses could have been called to aid in the defense does not demonstrate reasonable grounds for a claim of ineffectiveness. *See Jordan v. State*, 883 S.W.2d 664, 665 (Tex. Crim. App. 1994). Appellant failed to identify any specific person that could have provided helpful testimony or served as an expert, nor did he explain how such people would have changed the outcome of the punishment phase. We therefore conclude that appellant has not shown reasonable grounds for relief for ineffective assistance of counsel resulting from failure to investigate or call witnesses for the punishment phase of his trial.

We conclude that the denial of a hearing on appellant's motion for new trial

was not an abuse of discretion.

Conclusion

Having overruled both of appellant's issues, we affirm the conviction and the judgment of the trial court denying appellant's motion for new trial.

/s/ Marc W. Brown
Justice

Panel consists of Justices Jamison, Donovan, and Brown.
Do Not Publish — TEX. R. APP. P. 47.2(b).