Affirm and Memorandum Opinion filed June 9, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00587-CR

DARRYL EUGENE JACKSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 1388686

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

This is an appeal from a conviction for murder. The sole question is whether the evidence is legally sufficient to support the conviction. We conclude that the evidence is sufficient, and we affirm the trial court's judgment.

BACKGROUND

On May 15, 2013, the complainant, Richard Fisher, was shot and killed outside the Preet Inn in Harris County. Police responded within minutes to a 911 call reporting the shooting. Upon arrival, police found the complainant lying on the sidewalk already deceased. There was a crowd of people gathered at the scene, but police were only able to identify one witness, Michelle Tucker, who had seen anything.

Tucker testified at trial that she was at the hotel with the complainant at the time of the shooting. Tucker, who had known the complainant for many years, said she had run into the complainant at a nearby store and accompanied him back to the Preet Inn. Tucker said that while she was in the complainant's hotel room for approximately fifteen minutes, he received multiple calls on his cellphone. Following these phone calls, the complainant put some marijuana in a bag, and then the two of them walked downstairs and out the side door of the hotel. Tucker testified that when they got outside, a man was waiting there and immediately began yelling in Tucker's face asking why she was there, apparently angry the complainant had not come alone. The complainant then told Tucker to leave, and she immediately began walking away from appellant and the complainant toward the back of the hotel. She said that she heard gunshots as soon as she turned the corner. Tucker then ducked behind some bushes, waiting about ten minutes before coming out of hiding. Tucker testified that when she got up, she ran into the hotel lobby to tell someone to call 911. Tucker went back outside to where she had left the complainant once the police had arrived. Tucker told the police what happened and gave an initial description of the man she saw.

Sergeant Craig Clopton of the Harris County Sheriff's Office was the lead investigator in this case. Clopton received an anonymous call from someone giving

him appellant's name as a possible lead in this case. Based on this tip and Tucker's initial description, Clopton put a photograph of appellant into a photo lineup. When Clopton presented Tucker with the photo lineup, she identified appellant as the man she saw outside of the hotel. Tucker also identified appellant in the courtroom at trial. During his investigation, Clopton also received information that there were rumors in the neighborhood that the complainant and a person called "Foe Foe" had "an ongoing beef. . . for prior drug dealings." After further investigation, Clopton was able to rule out Foe Foe as a suspect for the complainant's murder.

Cellphone records established a connection between appellant and the murder. Police found the complainant's cellphone next to his body at the scene. Sergeant Clopton examined the phone and found that the complainant had been communicating with a contact saved as "Choppa." Clopton found that the number saved under this name was registered to appellant's grandmother and that appellant was known by the nickname Choppa.[1] Clopton also found that phone calls and text messages had been exchanged between the complainant and Choppa throughout the day until the shooting; the calls and texts from Choppa ceased after the 911 call reporting the shooting. Records from the service provider showed that, according to cell towers accessed with each use, Choppa's cellphone was moving toward the Preet Inn before the shooting; was in the same area as the complainant immediately before the shooting while the complainant's and Choppa's cellphones were accessing the same tower; and was moving away from the scene immediately after the shooting.

[1] Evidence of appellant's nickname included recorded jail calls during which appellant's sister refers to him as "Choppa" and appellant refers to himself as "Little Choppa" when instructing his sister to approach Foe Foe on his behalf. Additionally, there is evidence that appellant has a tattoo of an AK-47 rifle across his neck. Clopton testified that an AK-47 is referred to as a "choppa" in street slang.

Nina Millender, the complainant's ex-girlfriend, testified at trial that she had been communicating with the complainant throughout the day and night before he was shot. Millender testified that the complainant sold drugs regularly but was suspicious and nervous about the drug deal he was negotiating for that night.

The medical examiner testified that the complainant had two gunshot wounds—one on his chest and one on his right shoulder—that caused his death. Police found four shell casings from a 9-mm handgun at the scene. The murder weapon itself was not recovered.

Appellant was arrested on May 24, 2013. While appellant was in jail, he made phone calls that were recorded and turned over to Clopton on his request. Parts of these recordings were played for the jury. In the recordings played for the jury, appellant can be heard telling someone to provide an alibi for him by telling police they were together the night of the murder.[2] Appellant also can be heard telling the same person to get his gun back from Foe Foe. In another call, appellant can be heard telling his sister to go to an apartment complex, find Foe Foe, and get his "tool" from him.

Appellant did not call any witnesses or testify at trial. The jury convicted him of the charged offense and assessed punishment at forty-five years' imprisonment.

[2] Clopton testified as follows regarding appellant's recorded phone calls:

> Q: At the very beginning of the conversation, what is he telling that person he needs them to do?
>
> A: If the homicide people come and talk to her, he needs her to tell the homicide people that he was with her the day that happened.

ANALYSIS

When reviewing the legal sufficiency of the evidence, we examine all of the 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. *Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). The evidence is insufficient when the record contains no evidence, or merely a "modicum" of evidence, probative of an element of the offense. *Garcia v. State*, 367 S.W.3d 683, 687 (Tex. Crim. App. 2012).

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. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). Because the jury is the sole judge of the credibility of witnesses and the weight given to their testimony, any conflicts or inconsistencies in the evidence are resolved in favor of the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). Our review includes both properly and improperly admitted evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We also consider both direct and circumstantial evidence, as well as any reasonable inferences that may be drawn from the evidence. *Id.* Circumstantial evidence is as probative as direct evidence in establishing the guilt of an actor, and circumstantial evidence alone can be sufficient to establish guilt. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

To obtain a conviction for murder, the State was required to prove that appellant intentionally or knowingly caused the death of the complainant or, with the intent to cause serious bodily injury, performed an act clearly dangerous to human life that resulted in the complainant's death. *See* Tex. Penal Code § 19.02(b)(1)–(2).

Appellant contends his conviction should be set aside because there is no evidence that he shot the complainant. He argues that the evidence is legally insufficient because there is no direct testimony establishing he shot and killed the complainant; according to appellant, the evidence demonstrates at most that he was present near the scene.

Although no eyewitness testified in court to seeing appellant shoot the complainant, the State may prove appellant's identity and criminal culpability by either direct or circumstantial evidence, coupled with all reasonable inferences from that evidence. *See Gardner v. State*, 306 S.W.3d 274, 285 (Tex. Crim. App. 2009). We permit juries to draw multiple reasonable inferences from facts as long as each is supported by the evidence presented at trial. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Hooper*, 214 S.W.3d at 16–17. The jury is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt. *Temple*, 390 S.W.3d at 360. When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and therefore defer to that determination. *Jackson*, 443 U.S. at 326. Courts of appeals should apply the *Jackson* standard and determine whether the necessary inferences are reasonable based on the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict. *Hooper*, 214 S.W.3d at 16–17.

The circumstantial evidence against appellant was strong. A witness testified that she saw appellant with the complainant just moments before the shooting and that the encounter was hostile. That witness was able to give a description to the police on the night of the shooting, pick appellant out of a photo lineup, and identify appellant in the courtroom. Phone records established that appellant had called the complainant just before the complainant went downstairs that night and

was in fact near the scene of the crime when the complainant was shot. Evidence also supported the inference that the complainant was shot in the course of a drug transaction that complainant had been wary about throughout the day. A rational jury reasonably could have inferred from this evidence that appellant shot the complainant. *See Gilbert v. State*, No. 14-15-00310-CR, — S.W.3d —, 2016 WL 889314, at *4 (Tex. App.—Houston [14th Dist.] Mar. 8, 2016, no pet. h.).

Other evidence supported a determination that appellant had means, motive, and opportunity. Although motive and opportunity are not elements of murder and are not sufficient to prove identity, they are circumstances indicative of guilt. *Temple*, 390 S.W.3d at 360; *Clayton*, 235 S.W.3d at 781. The recorded phone calls tended to show appellant had possible motive and means in that appellant knew Foe Foe, who was rumored to be feuding with the complainant over drug dealings, and that appellant had a gun which Foe Foe was holding for him. The evidence that appellant was at the scene at the time of the shooting, paired with the witness testimony that she left appellant and the complainant alone after appellant yelled at her, establishes that appellant had the opportunity to shoot the complainant without anyone seeing him do it.

The recorded phone calls also tended to prove appellant attempted to secure a false alibi for the night of the murder. Appellant was recorded asking someone from jail to tell the police that he had been with her on the night of the murder, but cellphone records showed appellant traveled to and from the scene at the time of the shooting and Tucker's testimony placed appellant at the Preet Inn. The jury could have inferred guilt from this evidence because an attempt to procure a false alibi is some evidence of guilt. *See Longoria v. State*, 154 S.W.3d 747, 757 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

Finally, the evidence is sufficient to support the mens rea element as well. Intent may be inferred from the surrounding circumstances. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004). The evidence showed that four shots had been fired at the scene. The medical examiner testified that the complainant was shot twice—in the chest and shoulder—and that these gunshot wounds caused his death. The jury could have reasonably found that appellant intended to cause death or serious injury when he fired a deadly weapon at the complainant multiple times. *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)); *Gilbert*, 2016 WL 889314, at *5. Accordingly, the evidence is sufficient to support the jury's finding that appellant intentionally or knowingly caused the complainant's death.

Viewing the record in the light most favorable to the verdict, we conclude the evidence is sufficient to support appellant's conviction.

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Justice

Panel consists of Justices Boyce, Christopher, and Jamison.
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