

Affirmed and Memorandum Opinion filed February 2, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00095-CR

GEVONDOIS TERENCE WEBER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 300th District Court
Brazoria County, Texas
Trial Court Cause No. 73533**

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

Appellant Gevondois Terence Weber was found guilty of murder by a jury and sentenced to 37 years' confinement and a \$400.00 fine. Appellant previously pleaded guilty to aggravated robbery arising from the same incident and was sentenced to 20 years' confinement. In four issues, appellant challenges the sufficiency of the evidence supporting his conviction for murder, the failure of the indictment to allege criminal responsibility as a party to the offense, and the

correctness of the jury charge authorizing the jury to find appellant guilty as a party absent such allegations in the indictment. We affirm.

FACTUAL BACKGROUND

On February 12, 2013, appellant and two other men armed with handguns entered the trailer home of Renaldo (“Big Rey”) Garcia, Jr., intending to commit robbery. The complainant, Alberto Garcia, a 25-year-old family friend and neighbor, was killed when he attempted to intervene.

Big Rey lived in his house with his wife and two sons. One of his sons was Renaldo (“Little Rey”) Garcia, III, who was 26 years old. Also living at Big Rey’s house was Ashley Garcia, who was pregnant with Little Rey’s child. The house is located near the end of a county road in a rural part of Brazoria County in a small neighborhood of close-knit neighbors.

Around 8:45 that morning, Big Rey was sleeping in the master bedroom after arriving home from his job as a long-distance truck driver. Ashley was sleeping in another bedroom. No one else was home when three armed assailants entered the home yelling “Pearland PD! Get the fuck on the ground!”

A few minutes earlier, Alicia Garcia, the complainant’s sister, was on her way to work when she saw a black Cadillac she did not recognize drive down their street and park in front of Big Rey’s home. Alicia called Little Rey to ask if he knew someone who drove a black Cadillac, and he said he did not, but he was down the street and would be home in a few minutes. Alicia then went back inside and asked the complainant if he knew anyone who drove a black Cadillac, but he said he did not. Alicia left and began driving to work. When she heard the distinctive sound of the complainant’s truck starting, however, an uneasy feeling came over her and she decided to head back to Big Rey’s house.

Another neighbor, Jose Villegas, also saw the black Cadillac drive down the street, turn around at the end of the cul-de-sac, and pass by Big Rey's house three times. Villegas believed that the car stopped after it became apparent that Little Rey had left the house with a friend.

After the Cadillac stopped, appellant, his older brother Jamal Weber, and his cousin Andre Smith got out of the car and entered Big Rey's home. The driver, Julio Corrales, stayed behind the wheel.

Once inside, Jamal went into Ashley's bedroom, dragged her to the floor, and kicked her when she refused to lie face-down because she was pregnant. Jamal bound her hands with zip ties and left the room. In the other bedroom, Big Rey awoke to another assailant holding a gun to his head and demanding money. He told the assailant he had cash in a pair of blue jeans he had left in the kitchen. The assailant then bound Big Rey's hands with zip ties while appellant went to get the jeans. Big Rey struggled loose from the zip ties and reached for his own gun. Appellant saw him and screamed, "Oh, shit. He has a gun." One of the assailants then shot Big Rey in the leg before he could fire at them.¹

As the assailants attempted to flee, a gunfight erupted in front of the home between them and the complainant, who had driven to the scene moments earlier. Jose and Alicia both witnessed the exchange of gunfire. Appellant ran out of the house carrying the jeans containing Big Rey's money when he was shot in the buttocks. Appellant made his way to the Cadillac, which had begun to drive away but returned to pick him up. The complainant continued to exchange gunfire with Jamal and Andre until he was fatally shot in the chest.

Jamal and Andre then went back inside the residence, grabbed Big Rey, and

¹ Appellant testified that Andre fired two shots, but Big Rey testified that it was Jamal who shot him in the leg.

forced him outside with a gun to his head. The two walked Big Rey past the complainant's truck and, after reaching the street, released Big Rey and ran away. Big Rey went back inside and untied Ashley, who called 9-1-1.

Later that morning, Jamal and Andre were apprehended by police a short distance away. Officers discovered clothing and a firearm the two had hidden under an abandoned trailer. Officers also discovered the black Cadillac in an overgrown lot several blocks away. There were four bullet holes on the outside of the car, and inside was found .45 caliber ammunition and zip ties similar to those used during the robbery. Appellant's DNA was recovered from the blood he left behind in the front passenger seat of the Cadillac.

Investigators eventually located appellant in a hospital with a gunshot wound. Although appellant told police that he had been shot during a mugging, Jamal's wife admitted that appellant had called her to pick him up at the location where the Cadillac was found, and she took him to the hospital.

At trial, appellant testified that early in the morning that day, he had gotten a "panicky" phone call from Jamal saying that he needed appellant "to have his back" because "something was going down with Julio" over what he believed was a drug deal gone bad between Jamal, Julio, and the people in Big Rey's house. Jamal and Andre picked him up in a black Cadillac, and they went to get Julio. After Julio got in the car with a bag, Julio, Jamal, and Andre each took out two guns. Julio also gave appellant a gun, and they drove to Big Rey's house. According to appellant, the gunfire began when the complainant arrived, and then he saw Big Rey go for his gun. Appellant testified that Andre fired two shots and threw him the jeans. Appellant began to run out of the house holding a firearm in one hand and the jeans in the other, when he tripped over the jeans and was shot by the complainant.

Although appellant admitted leaving Big Rey's house with a firearm, he denied shooting at the complainant. He also testified that he did not initially know that the plan was to commit a robbery that morning. Appellant acknowledged, however, that he participated in the robbery after the guns were passed out and Jamal and Andre covered their faces. He also acknowledged that he had been convicted of aggravated robbery in the case. On cross-examination, appellant further admitted that he understood that he was supposed to use the gun to protect himself or Jamal during the robbery, and he was aware that something could go wrong with five guns in a house where people may be present.

ANALYSIS OF APPELLANT'S ISSUES

I. Sufficiency of the Evidence

In his first and fourth issues, appellant contends that the evidence is legally and factually insufficient to prove that he committed murder by shooting a firearm at the complainant or that he acted as a party to such an offense. Appellant argues that there is no evidence he fired a gun at the complainant; that he solicited, encouraged, direct, aided, or attempted to aid another person to shoot the complainant; or that he acted with intent that the complainant be fired upon. Appellant also argues that the testimony and ballistics evidence concerning who shot the complainant is inconclusive.² Finally, appellant asserts that his testimony reflects that "the complainant's appearance on the scene and participating in a gun battle was not conduct or behavior that anyone could have anticipated."

² The State argued that Jamal Weber fired the shot that killed the complainant, based on testimony from the medical examiner and the firearms examiner linking the projectile taken from the complainant's body to the Taurus 9 millimeter Luger pistol with an obliterated serial number like the one that Jamal can be seen carrying on surveillance video. Andre Smith, in contrast, was seen holding a revolver.

A. Standard of Review and Applicable Law

We address appellant's sufficiency issues together because the Court of Criminal Appeals has instructed that legal sufficiency is the only standard used to evaluate whether the evidence is sufficient to support a criminal conviction beyond a reasonable doubt. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). When reviewing the sufficiency of the evidence, appellate courts consider all of the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, a jury was rationally justified in finding guilt beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979)); *Padilla v. State*, 326 S.W.3d 195, 200 (Tex. Crim. App. 2010).

The jury is the exclusive judge of credibility of the witnesses and the weight to be given to 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 to draw reasonable inferences from basic facts to ultimate facts. *Id.* This standard applies to both circumstantial and direct evidence. *Id.*

In this case, the jury was instructed that appellant could be found guilty of committing murder two ways. First, the jury was instructed that a person commits the offense of felony murder if the person commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, that person commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. *See* Tex. Penal Code § 19.02(b)(3). Next, the jury was instructed that a person commits the offense of murder if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *See id.* § 19.02(b)(2).

The jury charge also authorized the jury to find that appellant committed murder under each theory as either a principal or a party. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both. Tex. Penal Code § 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).

In determining whether the accused participated as a party, the court may look to events occurring before, during and after the commission of the offense, and may rely on actions of the defendant which show an understanding and common design to do the prohibited act. *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994) (op. on reh’g). Circumstantial evidence may be used to prove party status. *Id.* Although mere presence at the scene of an offense alone is not sufficient to support a conviction, it may be sufficient to prove guilt when combined with other circumstances. *Ahrens v. State*, 43 S.W.3d 630, 634 (Tex. App.—Houston [1st Dist.] 2001, pet. ref’d). When evidence shows that the defendant was physically present during the commission of the offense and that the defendant encouraged or aided the crime’s commission by either words, agreement, or other affirmative and supportive conduct, the evidence is sufficient to sustain a conviction under the law of parties. *King v. State*, 29 S.W.3d 556, 564 (Tex. Crim. App. 2000); *Ransom*, 920 S.W.2d at 302.

B. Application of Law to Facts

Appellant acknowledged at trial that he pleaded guilty and was convicted of participating in the aggravated robbery, but contends there is no evidence he acted as a principal or a party to murder. Although no evidence conclusively proves that

appellant fired the fatal shot, the evidence is sufficient to support a rational jury's finding that he committed an act that encouraged or aided in the crime's commission.

Much of the incident was captured on the home's surveillance videos. In the video showing the front door to the trailer, Jamal and Andre are seen entering quickly and then gesturing for appellant to come inside. A short time later, appellant is seen leaving the trailer, holding what appears to be a silver semi-automatic weapon in his right hand and a pair of jeans in his left hand. Appellant then disappears from view for a time. Shortly after that, Jamal and Andre can be seen repeatedly firing their weapons in the direction of the complainant from inside the doorway. They then come out of the house while holding Big Rey at gunpoint.

Although appellant is not seen firing his gun on the video, the semi-automatic pistol appellant he is seen carrying is consistent with three .45 caliber casings that were found at the scene, including one casing found in the area where appellant fell after he was shot and dropped the jeans.³ The lead investigator testified that this evidence led him to believe that appellant fired his gun while out of camera range. Further, Jose Villegas testified that he saw the three men go in the house, and after a few minutes, he heard two shots inside the house. Jose then saw the complainant drive his truck into the driveway and exchange gunfire with the appellant, who he described as the man who was outside and ran to the Cadillac. Although appellant denied firing his gun, he admitted voluntarily going to Big Rey's house armed with a weapon to protect himself and his brother while the men

³ Appellant's gun was never recovered, but by comparison to the firearms that were recovered and the process of elimination, the State's firearms expert concluded that the casing, as well as two found inside the house, most likely came from the same .45 caliber semi-automatic handgun. Although the expert could not say conclusively that none of the rounds came from a revolver, they "most likely" came from a .45 semi-automatic. Andre's revolver was not recovered.

robbed someone's house. Appellant then used that weapon during a post-robbery gunfight in which the complainant was killed. Based on this evidence, a rational jury could have found that appellant intentionally promoted or assisted in the commission of the complainant's murder. *See Ransom*, 920 S.W.2d at 302; *see also 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.”); *Cain v. State*, 976 S.W.2d 228, 234 (Tex. App.—San Antonio 1998, no pet.) (recognizing that, under the law of parties, the fortuity that only a bullet from a different shooter struck the victim will not absolve the defendant of criminal responsibility for murder).

Within his first issue, appellant also argues that the indictment is fundamentally defective because it fails to allege the elements of the offense of engaging in organized criminal activity. *See Tex. Penal Code § 71.02; Nguyen v. State*, 1 S.W.3d 694, 697 (Tex. Crim. App. 1999). The appellant appears to suggest that the State's failure to prove the additional elements requires acquittal, citing *Carson v. State*, 71 S.W.3d 524, 528 (Tex. App.—Austin 2002, pet. ref'd) (holding that evidence was legally insufficient to sustain conviction for engaging in organized criminal activity when the evidence showed only a single criminal episode). But appellant was not indicted or tried for the offense of organized criminal activity; nor did the trial court's charge instruct the jury that appellant could be found criminally responsible for conspiracy under Penal Code section 7.02(b).

We conclude that the evidence is sufficient to support appellant's conviction for murder as a party under Penal Code section 19.02(b)(2). When, as here, a general verdict is returned and alternate theories of liability alleged, we may uphold the conviction if the evidence is sufficient under any of the theories

submitted. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004) (citing *Rabbani v. State*, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992)). We therefore overrule appellant’s first and fourth issues.

II. Sufficiency of the Indictment

In his second issue, appellant contends that his constitutional right to be fairly informed of the charge against him was denied by the indictment’s failure to allege that he was criminally responsible as a party to murder, given that he was indicted only as a principal but was tried on the theory that he was guilty as a party. Appellant argues that if the State proceeds on a theory of conspiracy party liability under section 7.02(b) of the Penal Code, the existence of a “conspiracy” is an “essential element” of the State’s case, citing *Solomon v. State*, 49 S.W.3d 356, 368 (Tex. Crim. App. 2001) (holding that defensive instruction on independent impulse was not required when the issue is not a statutorily enumerated defense and merely serves to negate the conspiracy liability element of the State’s case). Appellant asserts that the acts listed in section 7.02(a) are likewise essential elements which must be alleged in the indictment.

The Court of Criminal Appeals has held, however, that “both state and federal law specify that due process does not require a defendant’s culpability as a party to the offense to be plead in the charging instrument.” *Adames v. State*, 353 S.W.3d 854, 861 (Tex. Crim. App. 2011). Further, the courts have repeatedly held that the law of parties need not be alleged in the indictment. *See, e.g., Marable v. State*, 85 S.W.3d 287, 287 (Tex. Crim. App. 2002); *Montoya v. State*, 810 S.W.2d 160, 165 (Tex. Crim. App. 1989); *Garcia v. State*, 486 S.W.3d 602, 608 (Tex. App.—San Antonio 2016, pet. ref’d); *Hayes v. State*, 265 S.W.3d 673, 678–79 (Tex. App.—Houston [1st Dist.] 2008, pet. ref’d); *Hernandez v. State*, 171 S.W.3d 347, 359 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d). In *Montoya*, the

Court of Criminal Appeals specifically explained that this rule “applies not only to the law of parties found in Section 7.02(a)(2) but also the law of parties found in Section 7.02(b).” 810 S.W.2d at 165. Appellant cites no contrary authorities. We therefore overrule appellant’s second issue.

III. The Jury Charge

In his third issue, appellant contends that he was egregiously harmed because the jury charge authorized the jury to convict appellant as a party to the complainant’s murder when party liability was not alleged in the indictment. As noted above, however, the law of parties need not be alleged in the indictment. An instruction on the law of parties may be included in the jury charge when there is evidence to support it. *See, e.g., Swopes v. State*, 805 S.W.2d 442, 444 (Tex. Crim. App. 1991); *Ryser v. State*, 453 S.W.3d 17, 28 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d); *Miles v. State*, 259 S.W.3d 240, 244 (Tex. App.—Texarkana 2008, pet. ref’d); *Avila v. State*, 15 S.W.3d 568, 575 (Tex. App.—Houston [14th Dist.] 2000, no pet.). We have already explained that the evidence is sufficient to support appellant’s conviction as a party to the complainant’s murder. We therefore overrule appellant’s third issue.

CONCLUSION

Having overruled appellant’s issues, we affirm the trial court’s judgment.

/s/ Ken Wise
Justice

Panel consists of Justices Boyce, Busby, and Wise.
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