**NUMBER 13-19-00336-CR**

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**ANDREW RAY FLORES,** **Appellant,**

**v.**

**THE STATE OF TEXAS,** **Appellee.**

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**On appeal from the 24th District Court**
**of Calhoun County, Texas.**

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# NUMBER 13-19-00383-CR

# COURT OF APPEALS

# THIRTEENTH DISTRICT OF TEXAS

# CORPUS CHRISTI – EDINBURG

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**ANTHONY REYES SERENA,** **Appellant,**

**v.**

**THE STATE OF TEXAS,** **Appellee.**

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**On appeal from the 24th District Court of Calhoun County, Texas.**

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# MEMORANDUM OPINION

## Before Chief Justice Contreras and Justices Benavides and Longoria
## Memorandum Opinion by Chief Justice Contreras

In a combined trial, appellants Andrew Ray Flores[1] and Anthony Reyes Serena[2] were convicted of the murder of Lupe Garcia, a first-degree felony. *See* TEX. PENAL CODE

[1] Appellate cause number 13-19-00336-CR.

[2] Appellate cause number 13-19-00383-CR.

ANN. § 19.02(b)(1). For each appellant, the jury assessed punishment of thirty-five years' imprisonment and a $10,000 fine. Appellants separately contend that the evidence adduced at trial was insufficient to support their convictions.

We will affirm the judgment as to Flores but, finding insufficient evidence as to Serena, reverse the judgment as to that appellant and render judgment of acquittal.

## I. BACKGROUND

A Calhoun County grand jury returned an indictment charging both appellants with capital murder. Specifically, the indictment alleged that Flores and Serena, acting alone or together, intentionally caused Garcia's death by shooting him with a firearm while in the course of robbing or attempting to rob him. *See id.* § 19.03(a)(2). The State did not seek the death penalty. Flores was twenty-two years old and Serena twenty years old at the time of Garcia's murder.

The Port Lavaca Police Department received a call at 10:55 p.m. on October 19, 2017, reporting a shooting at a house on Bonorden Street. The house is a communal residence with several bedrooms, a shared bathroom, and a shared living area. Officer Kyle Curtis testified that the house is commonly known as the "OK Corral" because police were "called there quite often for different disputes or people under the influence of narcotics or alcohol." That night, a man, alive but not responsive, was found lying face up across the doorway to Angel Trevino's bedroom. The man was identified as Garcia, another one of the house's residents. Garcia had a small-caliber gunshot wound in the upper left chest area, toward his side, and he was bleeding. He also had gunpowder burns on his chest above the gunshot wound, which Curtis said indicates that the shot was fired from close range. Garcia was taken to the hospital, where he later died at the age of thirty-

three. According to the medical examiner, the cause of death was a gunshot wound to the chest, there was no exit wound, and there were no injuries to Garcia's hands.

Officers located no bullet casings and did not recover any murder weapon. There was no indication of a struggle or physical fight prior to the shooting. Officers did recover two small baggies, each containing about half a gram of cocaine, from a drawer next to Garcia's bed. Officer Justin Klare recovered a gray knit cap or "beanie" with a star logo from the parking lot in front of the house. He said: "At the time I didn't know if it was important or not actually. I saw [it ly]ing outside on the ground. It was I thought very random . . . given the weather conditions at the time.[3] It did appear as I got closer that it—it was cut as in like a makeshift possible ski mask of some sort." When asked whether there were "eye holes cut in it," Klare replied: "Without physically picking it up at first glance it looked like there was a cut in one of the ends. That's displayed in that photo I believe."[4] Klare said the cap was dry to the touch when he picked it up, and he "wanted to collect that before it started raining . . . ." The forensic serologist who examined the cap for DNA said there were "makeshift eye holes" and that he swabbed the cap where he thought "possibly a face would be."

Upon questioning by investigators the next day, Flores admitted he was at the Bonorden house the night before, but he said it was only to purchase cocaine from Garcia. He told investigators he was at the house for fifteen to twenty minutes, that he used cocaine while he was there, and that Marissa Trevino picked him up from the house and

[3] The parties stipulated that the temperature was 72 to 77 degrees Fahrenheit on the day of the murder. Klare testified: "At the time it was humid. It was dry. It wasn't raining." Trevino testified: "That day it wasn't [raining], sir. It just started to pour down that night.

[4] Three photos of the cap as it appeared on the ground in front of the house were entered into evidence. The photos do not appear to show any holes in the cap.

drove him home. He gave police the T-shirt which he said he wore on the night of the shooting. Serena, Flores's friend and co-worker, could not be excluded as a contributor of the genetic material on both the cap and the T-shirt; however, Flores and Garcia could be excluded as contributors to both. Neither appellant's DNA was found on the shirt Garcia was wearing when he was shot. Officers also collected a rolled-up five-dollar bill at the scene; Flores could not be excluded as a contributor to the genetic material found on the bill.

Police recovered Garcia's cell phone, which contained recent text messages from Flores asking about purchasing cocaine. Garcia instructed Flores to contact him when he arrived at the house so Garcia could unlock the front door. At 10:51 p.m., Flores texted Garcia that he was "outside." The 911 call followed four minutes later.

Detectives also interviewed Serena. Serena told police that, on the night in question, he was driving around with Gavin Garcia (Gavin), Flores's younger half-brother. According to Hetherington, Serena "spoke about his itinerary for the night" but could not explain where he was during the murder. He agreed that Serena's "general alibi [was] that he was with Gavin Garcia smoking marijuana." Serena told police that his friend Kristen Hanzelka loaned him her car. He denied going to the county fair. Phone records showed many phone calls and texts between both appellants, Hanzelka, and Gavin leading up to the time of the murder. At 10:30 p.m., Hanzelka texted Garcia, asking if he was "still at home" and stating that she did not want to come by if Garcia "ha[d] people there . . . trying to start drama up again."

A resident of the house, Magi Salas, testified that she heard male voices arguing in the hallway just prior to hearing what she thought might be fireworks, but later realized

was a gunshot. When she looked out from her room, she smelled "[g]un smoke" in the hallway. She saw someone wearing "baggy clothes" and a "hoodie" standing over Garcia's body, but she "only saw the back" and could not identify the person. The person ran out of the house through the front door.

Salas testified that she and her girlfriend, Natalie Cervantes, left the house after police were called because she was not supposed to be with Cervantes due to a restraining order. As they were driving away from the house, Salas saw a man walking on Schooley Street, which adjoins Bonorden. She stated it appeared as if the man was trying to catch his breath from running. In a photo lineup presented by investigators and again at trial, Salas identified Flores as the man she saw walking on Schooley Street.

On cross-examination, Salas acknowledged that she did not tell police that she saw someone running down the street after the shooting. She agreed that she told police there were two other people standing by the front door of the house wearing hoodies—she doubted they were residents of the house, but she could not be sure. She conceded that one of the voices she heard arguing prior to the shooting could have been female.

Cervantes testified that she lived with Salas at the Bonorden house and the two were in their room on the night in question. She heard three or four people arguing for about ten or fifteen minutes, one of whom was Garcia, but she could not hear what they said. She then heard what she thought was a body hitting a wall, and gunshots. She told Salas she wanted to leave because of the restraining order. She left through the back of the house and waited in her truck for Salas. As she waited, she saw two "guys" wearing dark clothing running away from the front of the house toward an adjacent dead-end street. She could not identify the "guys" because it was dark, she did not have her glasses,

and she only saw them from the back. After Salas got in the truck and Cervantes began to drive away, Cervantes saw Flores walking on Schooley Street as if he had just stopped running.

Charles Gurley testified that he was with Garcia, his close friend, for about ten minutes up until around 10:15 p.m. on the night of the shooting. When he arrived at the Bonorden house Garcia told him that Hanzelka had just left. Gurley denied that he was supplying Garcia with "anything to sell." However, he said Garcia had "at least 3 or 4 grams" of cocaine on him when he left—Gurley said he knew this because he was "with [Garcia] that whole day" and had "seen what was purchased." According to Gurley, Hanzelka came to the door of his residence sometime between 11:30 p.m. and midnight, screaming and yelling and saying that "they had shot him." Gurley testified: "And I asked her who and she was just yelling and she was real incoherent."

Gurley stated that, a few days later, he picked up Flores in his car and asked Flores if he had anything to do with the shooting. According to Gurley, Flores appeared "real nervous and he didn't really give me anything other than him blaming other people." Gurley acknowledged that he has an extensive criminal record and is a member of Hermanos Pistoleros Latinos (HPL), a prison gang. On cross-examination, he conceded that he previously told a prosecutor that Garcia was a prospective member of HPL.

Marissa Trevino (Marissa) testified that Flores is her cousin, and he lived with her at the time of the shooting. She denied that she picked Flores up from the Bonorden house that night, as Flores told police. Instead, she said she was at her aunt's house when Flores called her and asked when she would be home. When she returned to her residence, somewhere between 10:13 and 10:30 p.m., Flores was sitting on the porch

using his phone. At trial, Marissa testified that Flores had not slept for “a couple” of days before the murder because he was using cocaine. She conceded that she initially told police that Flores had not slept in seven days and that he was hallucinating because he was “methed out.”

Hanzelka testified that she has known Serena for about five years and is very close friends with him; she also knew Flores from having attended school with him. She had been dating Garcia for about two weeks as of the time of his death. She denied that she was “using [Garcia] for drugs.” She conceded, though, that she sent a text message to her friends stating: “I don’t care for [Garcia] like that I used his ass . . . and dumbass got my name tatted on him like who does that lmao.” She said Garcia “was right there next to me” when she sent the text. She denied that she “set up a hit on” Garcia.

According to Hanzelka, on the night of the shooting, she drove Gavin and Serena to the county fair, dropped them off there, then went to Gurley’s house where she picked up Garcia. She took Garcia to the Bonorden house and stayed there with him for thirty to forty-five minutes. She said she left around 9:30 p.m., picked up Gavin and Serena from the fair, and drove them to the house where she lived with her mother. At around 9:45 p.m., Gavin and Serena took her car and left while she put her four children, including a one-month-old infant, to bed. Hanzelka said that, at the time of the murder, she was at her home with her mother and her children. She denied that she went to the Bonorden house that night with Gavin, Serena, or Flores, but she agreed that she let Gavin and Serena use her car. Hanzelka said Gavin and Serena returned after 11:00 p.m. She then took them to their house “to get them some money” but, on the way, passed by the Bonorden house because she was concerned that Garcia was not answering her texts.

At the house, she saw "cop lights," but she did not stop there because she had "warrants out for [her] arrest." Instead, she "then took [Gavin and Serena] to the store" and "drove around." They returned to her house at around 12:30 a.m., at which point she "went to Gurley[']s to see if he knew about [the shooting] and he said he was sleeping." She admitted telling Gurley that Garcia had been shot, but she denied telling him that "they" shot Garcia.

Angel Trevino testified that his bedroom was directly across the hallway from Garcia's room. On the night in question, he heard a female voice talking to Garcia at around 8:00 or 9:00 p.m. Garcia asked the woman to come back later and the woman agreed to do so. Later, he heard a gunshot and "some banging in the hallway," and then "they busted through my door." Trevino testified:

> And there was—the guy was on top of Lupe. Facing down. I looked at the guy and me and him looked at each other and the guy—and I popped up on my feet and I was like, well, I don't mean to cuss or nothing but I was like what the hell.
>
> I got up, you know, and I was—looked at—I was going to chase the guy. I started to chase the guy and the guy pushed himself off of Lupe because he had Lupe by the shirt right here on the inside and Lupe had him on the outside right here.
>
> And when he landed on top of him he was down like that.

He said the man on top of Garcia was facing down and wearing a "gray hoodie."[5] Trevino and the man briefly looked at each other. Trevino said he started to chase the man, but he then turned back to check on Garcia. The man ran out of the house through the front door. Trevino could not identify the man in a police lineup or at trial. Trevino said there

[5] According a police incident report by Klare which was entered into evidence, Trevino told officers that the man he saw over Garcia "was wearing a grey hoodie and possibly a grey beanie." At trial, Trevino was not asked whether any of the men wore a beanie or face mask, and he did not volunteer that information.

were two other people wearing hoodies that were near the front entrance to the house. On cross-examination, Trevino testified that the man he saw on top of Garcia was neither Flores nor Serena.

The jury was instructed on the indicted offense of capital murder, the lesser-included offenses of murder and manslaughter, and the law of parties. *See id.* §§ 7.02(b), 19.02(b)(1), 19.03(a), 19.04(a). Both appellants were found guilty of murder and sentenced as set forth above. These appeals followed.

## II. DISCUSSION

### A. Standard of Review and Applicable Law

To satisfy constitutional due process requirements, a criminal conviction must be supported by sufficient evidence. *See Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). In reviewing evidentiary sufficiency, we consider the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Griffin v. State*, 491 S.W.3d 771, 774 (Tex. Crim. App. 2016); *see Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The jury is the exclusive judge of the facts, the credibility of the witnesses, and the weight to give their testimony. *Brooks*, 323 S.W.3d at 899; *see* TEX. CODE CRIM. PROC. ANN. art. 38.04. Thus, we defer to the jury's resolution of any evidentiary conflicts. *See Brooks*, 323 S.W.3d at 899.

We measure the legal sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge for the case. *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). Here, such a charge would instruct the jury to

find each appellant guilty of murder if he intentionally or knowingly caused Garcia's death by shooting him with a firearm. *See* TEX. PENAL CODE ANN. § 19.02(c). A person acts intentionally with respect to the result of his conduct when it is his conscious objective or desire to cause the result. *Id.* § 6.03(a). A person acts knowingly with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b).

A hypothetically correct jury charge would additionally instruct the jury that, under the law of parties, a person is criminally responsible for an offense committed by another's conduct if, acting with intent to promote or assist the commission of the offense, he solicited, encouraged, directed, aided, or attempted to aid the other person to commit the offense. *Id.* § 7.02(a)(2). Party participation may be shown by events occurring before, during, and after the commission of the offense, and may be demonstrated by actions showing an understanding and common design to do the prohibited act. *Salinas v. State*, 163 S.W.3d 734, 740 (Tex. Crim. App. 2005).

The State concedes that the evidence adduced at trial as to both appellants was entirely circumstantial, but "[c]ircumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt." *Winfrey v. State*, 393 S.W.3d 763, 771 (Tex. Crim. App. 2013). The question we must ask is whether, based upon the cumulative force of all of the evidence, the necessary inferences made by the jury are reasonable. *Griffin*, 491 S.W.3d at 774; *Hooper v. State*, 214 S.W.3d 9, 17 (Tex. Crim. App. 2007). "[J]uries are not permitted to come to conclusions based on mere speculation or factually unsupported inferences or presumptions." *Id.* at 15. "Speculation is mere theorizing or guessing about the possible

meaning of facts and evidence presented." *Id.* at 16. On the other hand, "an inference is a conclusion reached by considering other facts and deducing a logical consequence from them." *Id.* "A conclusion that is reached by speculation may not seem completely unreasonable, but it is not sufficiently based upon facts or evidence to support a conviction beyond a reasonable doubt." *Id.* "A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012).

**B. Analysis**

Flores contends that the evidence merely established his presence at the scene and did not show that he had anything to do with Garcia's death. He notes that there were no eyewitnesses to the shooting, and the only witnesses who observed a suspect in close proximity to Garcia could not identify that suspect. Trevino affirmatively stated that Flores was not the man he saw "on top of" Garcia shortly after the shooting.

However, the evidence against Flores included text messages found on Garcia's phone, showing that Flores arrived at Garcia's house to buy cocaine at 10:51 p.m., only four minutes before the 911 call was placed reporting that Garcia had been shot. Residents reported hearing a verbal and physical altercation immediately before the gunshot. Flores's DNA was found on a five-dollar bill recovered from Garcia's room, though that is consistent with his statement to police that he used cocaine there. And Salas and Cervantes both testified that, shortly after the shooting, they observed Flores walking away from the Bonorden house, and he appeared as if he was catching his breath

from running.[6]

When Flores spoke to police, he voluntarily provided the shirt he was wearing that night for testing. He also stated that he was only at the Bonorden house to buy drugs and that Marissa picked him up from the house. Marissa vehemently denied picking him up. The jury was entitled to believe Marissa and could have reasonably inferred from her testimony that Flores lied to investigators about how he returned home that evening.

Although no witness testified that they saw Flores inside the Bonorden house on the night of the murder, and none of his DNA was found at the scene, the circumstantial evidence firmly established that he was there and that he interacted with Garcia within minutes of the time Garcia was shot. The jury was entitled to disbelieve Trevino's testimony that the man he saw "on top of" Garcia was not Flores. And the jury may draw an inference of guilt from the circumstance of flight. *Clayton v. State*, 235 S.W.3d 772, 780 (Tex. Crim. App. 2007). Mere presence or flight will not support a finding of party liability, *see Gross*, 380 S.W.3d at 186, but here, the jury could have concluded beyond a reasonable doubt that Flores was guilty as a principal based on the evidence set forth above.

The evidence against Serena was also purely circumstantial. It primarily included the gray knit cap which was found by police in the front parking lot of Garcia's house, and the T-shirt worn by Flores on the night of the murder, both of which were found to contain

[6] Flores argues on appeal that Salas "simply was not a credible witness" because (1) she could not be sure whether the people she heard arguing with Garcia prior to the shooting were male or female, and (2) she was able to identify Flores at trial even though she claimed not to see the assailant's face. In fact, at trial, Salas did not identify Flores as the person she saw from the back standing over Garcia's body; rather, she stated that Flores was the man she saw walking down Schooley Street out of breath shortly afterward. In any event, the jury is the exclusive judge of the credibility of witnesses and the weight to be given their testimony. *See Griffin v. State*, 491 S.W.3d 771, 774 (Tex. Crim. App. 2016).

Serena's DNA. The cap, which was entered into evidence, had holes cut out of it which were described by witnesses as "eye holes." If the jury believed that these holes were in fact "eye holes," then it could have reasonably inferred that Serena wore the cap at the house with the intent to conceal his identity, which would indicate a consciousness of guilt. *See Ransom v. State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1994) (op. on reh'g) (holding that criminal acts that are designed to reduce the likelihood of prosecution, conviction, or incarceration for the offense on trial are admissible because they show a consciousness of guilt); *see also Harris v. State*, 645 S.W.2d 447, 456 (Tex. Crim. App. 1983) (internal quotation omitted) (noting that "consciousness of guilt" is "perhaps one of the strongest kinds of evidence of guilt").

On the other hand, as Serena points out, no witness testified at trial that Garcia's assailant was wearing a cap, a "beanie," or any type of face covering. Serena further notes correctly that, according to the analyst's testimony, there is no way to tell from DNA analysis when or where the genetic material was deposited on the item. Thus, the mere fact that Serena's DNA was found on the cap and on Flores's T-shirt does not necessarily mean that he was present at the time and place of the murder. Serena argues that any such conclusion from this evidence would not be a reasonable inference and instead amounts to impermissible speculation.

In response, the State emphasizes the close relationship between Serena, Flores, Hanzelka, and Gavin. Evidence established that these four individuals were well-acquainted and communicated frequently with each other in the hours immediately preceding the shooting. The State emphasizes that, according to a police report which was entered into evidence, Trevino told officers that the man he saw "on top of" Garcia

immediately after the shooting was wearing "a grey hoodie and possibly a grey beanie."[7] Finally, the State observes that Serena offered "no verifiable alibi." Serena told police he was smoking marijuana with Gavin on the night of the murder. And Hanzelka testified that she loaned her car to Serena and Gavin at around 9:45 p.m. on the night of the murder and that they returned after 11:00 p.m.

This evidence, even when taken in the light most favorable to the verdict, does not support a finding that Serena intentionally or knowingly caused Garcia's death. The presence of Serena's DNA on the cap indicates, at most, that Serena was in the parking lot of the Bonorden house at some point prior to the shooting. Unlike the evidence against Flores, the DNA on the cap does not show that Serena was present at the house within minutes of the murder.[8] Similarly, the presence of Serena's DNA on Flores's T-shirt indicates, at most, that Serena was in close proximity to Flores on the day of the murder—it does not show that Serena participated in the murder so as to make him liable as a principal.[9] It would be unreasonable to conclude beyond a reasonable doubt, from the DNA evidence alone, that Serena participated in the murder as a principal.

The evidence also did not establish Serena's culpability as a party to the offense.

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[7] The State contends that "[i]t is an entirely reasonable inference that the jury placed more weight on [Trevino's] statement to [Klare] the night of the offense in conjunction with the DNA evidence on the beanie than on [Trevino's] non-identification remembered some 20 months later at trial." We disagree. Klare's police incident report set forth that "Trevino advised the suspect was wearing a grey hoodie and possibly a grey beanie." But other police reports contained in the record state merely that Trevino reported the suspect was wearing a hoodie, not a beanie. As noted, Trevino did not testify at trial that the suspect was wearing a beanie or face covering, and no other witness testified that Trevino ever said that. Moreover, though Klare's report was entered into evidence, the record does not reflect that the report was ever published to the jury.

[8] Klare testified the beanie was dry to the touch when he recovered it, and Trevino testified it rained later that night, but neither witness testified that it rained *before* the beanie was recovered. Accordingly, the fact that the beanie was dry to the touch could not lead to a reasonable inference that it had been deposited recently.

[9] We note that, according to a police report, Serena initially declined to provide a DNA sample to investigators because he said he had been using cocaine with Garcia a few days before his murder.

Although there was extensive communication between Flores, Serena, Hanzelka, and Gavin on the day of the murder, there was no evidence adduced as to the content of those communications. The fact that Flores and Serena were friends and associated with each other does not mean that Serena is responsible for all criminal acts that Flores may commit. Even assuming that the presence of Serena's DNA on the gray cap meant that he was at the Bonorden house around the time of the murder, "mere presence of a person at the scene of a crime, . . . without more, is insufficient to support a conviction as a party to the offense." *Gross*, 380 S.W.3d at 186. For the jury to conclude that Serena participated as a party to the murder would be no more than speculation. *See Hooper*, 214 S.W.3d at 16.

We conclude that the jury could have reasonably inferred Flores's guilt from the evidence adduced at trial. However, the evidence was insufficient to convict Serena, either as a principal or as a party to the offense.

## III. Conclusion

We affirm the trial court's judgment in appellate cause number 13-19-00336-CR. The trial court's judgment in appellate cause number 13-19-00383-CR is reversed and we render judgment of acquittal.

DORI CONTRERAS
Chief Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
16th day of July, 2020.