Affirmed and Opinion filed February 28, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01438-CR

ALBERTO CRUZ DELAROSA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 836, 492

O P I N I O N

Challenging his conviction and sentence for murder, appellant Alberto Cruz Delarosa asserts the following grounds for reversal: (1) the trial court improperly commented on the weight of the evidence; (2) the State made impermissible jury arguments; and (3) the evidence is legally and factually insufficient to support the offense of murder. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Rosemary Navarro often rode with her husband, Pedro Aviles, to his work place in the early morning. Pedro's brother, Felix Aviles, often accompanied them. One day, after driving her husband to work, Rosemary noticed a "fat, Hispanic man with a moustache" in a light blue car following her home. Four days later, at about 6:00 a.m., while Rosemary and Pedro were driving to work, Pedro noticed a car following them. Rosemary turned to see if it was the same man who had followed her home a few days before. She saw a man with glasses and a moustache, in the same blue car. Just as Rosemary turned back, she heard about six gun shots. Tragically, one of the shots struck and killed Pedro.

The first person to arrive on the scene was Judith Neilson, a passing motorist. Neilson saw the couple's car in the center of the street and asked a young man walking by to call the police. Rosemary's brother-in-law, Felix Aviles, and the police both arrived on the scene immediately. Felix Aviles told Houston Police Officer Mosqueda that he had been romantically involved with appellant's wife and that appellant might be a possible suspect.

The police, accompanied by Felix Aviles, arrived at appellant's home around 8:45 a.m. to question appellant. Officer Mosqueda testified that appellant appeared freshly showered and shaven, and seemed surprised that the police had arrived so quickly. Appellant informed the police that he had awakened around 6:00 a.m. that morning and walked his dogs, before going to Bally's Health Club to work out. Appellant stated that he arrived back at his home at approximately 8:00 a.m. that morning.

The officers arrested appellant and searched his home. The police found a light blue car in appellant's garage. Inside the car was a piece of paper with Pedro's license plate number on it. The police, however, did not find any weapon in appellant's car or home, nor did they find any evidence that a gun had been fired from inside appellant's car.

Appellant was indicted with the offense of murder "by shooting Pedro Aviles with a firearm." Appellant pleaded not guilty to the offense. A jury found appellant guilty as charged and assessed punishment at thirty years' confinement in the Texas Department of Criminal Justice, Institutional Division.

II. CHALLENGE TO TRIAL COURT'S COMMENT

In his first point of error, appellant complains the trial court erred by commenting on the weight of the evidence during the State's direct examination of Officer Mosequeda. The State counters that by failing to properly object to the trial court's comment, appellant has waived any error. Appellant's specific complaint is based on the following testimony:

> Q: [Prosecutor]; What time did you arrive at his [appellant] house?
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> A: [Officer Mosequeda]: Well, that's a good question. I know it had to have been right about the time when the other investigators–[sic]. I would say probably between 8:45 a.m. and 9:15 a.m. in that area, range area.
>
> Q: And the shooting occurred prior to 6:00, right?
>
> A: Yes.
>
> Q: So, that's at least how many hours? Three?
>
> A: At least three hours, two-and-a-half, three hours.
>
> Q: Three hours that somebody could have disposed of a weapon, correct?
>
> Defense: Objection.
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> The Court: Sustained the objection.
>
> Q: Is it possible somebody could have disposed of a weapon–
>
> Defense: Objection.
>
> The Court: Sustained. I'll bet the jury is smart enough to figure out the answer to these questions. Go ahead.

Notably, appellant voiced no objection after the trial court's last statement. Article 38.05 of the Texas Code of Criminal Procedure provides that a trial judge shall not comment on the weight of the evidence nor make "any remark calculated to convey to the jury his opinion of the case." TEX. CODE CRIM. PROC. ANN. Art. 38.05 (Vernon 1979). However, to preserve error, a party must make a timely objection. *See Fuentes v. State*, 991 S.W.2d 267, 273 (Tex. Crim. App. 1999); *Penry v. State,* 903 S.W.2d 715, 741 (Tex. Crim. App. 1995). Absent fundamental error, a defendant who fails to object waives this complaint on appeal. *See Cade v. State*, 795 S.W.2d 43, 45 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd). Fundamental error is error that is so egregious and creates such harm that the defendant has not had a fair and impartial trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984), *aff'd,* 724 S.W.2d 805 (Tex. Crim. App. 1986). Egregious harm "is present when the reviewing court finds that the case for conviction or punishment was actually made clearly and significantly more persuasive by the error." *Saunders v. State*, 817 S.W.2d 688, 692 (Tex. Crim. App. 1991).

Here, the trial judge's remark was more of a common sense observation than a comment on the weight of the evidence. In any event, the alleged error is clearly not fundamental. Thus, appellant's failure to object constitutes waiver of his complaint. *See Sanchez v. State,* 434 S.W.2d 133 (Tex. Crim. App. 1968). Accordingly, we overrule appellant's first point of error.

III. JURY ARGUMENT

In his second point of error, appellant contends that portions of the State's closing argument were impermissible and injected new facts not deduced from the evidence. The State counters that by failing object at trial to the complaints he raises on appeal, appellant has waived appellate review.

Appellant's specific complaints are based on the following statements in the State's closing argument:

The State: He [appellant] thinks he's really intelligent, ladies and gentlemen. He thinks he's got you fooled. He thinks he so smart that he's having to convince one of you that he did not do this.

. . . .

The State: He didn't have the gun. Why is - - [sic] he says; No, I could not have been there because I was at Bally's working out.

Well, ladies and gentleman, take those records back with you. He didn't check into Bally's until after 6:45. The shooting happened between 5:30 and 6: 00. If he was wearing a fake moustache or whatever, he could get to Bally's and check in and look like nothing happened.

. . . .

The State: Defense counsel wants [sic] to believe all the pieces aren't there. Well, they are there. All the pieces are there. You've got Rosemary Navarro, who on the early morning hours of February 15, 2000, is in her car, on the way to work. Her husband notices that a car is following him. She turns around and he asks her, [sic] he says: Rosemary, is that the car that followed you last Friday, that followed you home from work?

He turns off. She [Rosemary] turns and looks and recognizes it as the same car. She said they were driving side by side for almost two blocks as her husband rolled down the window for her to get a second look at the individual that's been following her previously.

She gets a good look at him for two blocks; at which point he raises the pistol. She didn't have any doubt, ladies and gentleman, when she pointed him out in this courtroom, the gentleman sitting, snickering at the counsel table.

Defense Counsel: Your honor, I object to–

The Court: Sustain the objection.

In order to preserve error in jury argument for appellate review, a party must have made a timely objection. *See Cook v. State,* 858 S.W.2d 467, 473 (Tex. Crim. App. 1993). If the objection is sustained, then the party must pursue that objection to an adverse ruling, by asking for an instruction to disregard and making a motion for mistrial. *McGinn v. State,*

961 S.W.2d 161, 165 (Tex. Crim. App. 1998). This rule is applicable even if an instruction to disregard could not have cured an erroneous jury argument. *See Compos v. State*, 946 S.W.2d 414, 416 (Tex. App.—Houston [14th Dist.] 1997, no pet). A defendant's "right" not to be subjected to incurable erroneous jury arguments is one of those rights that is forfeited by a failure to insist upon it. *See id*. Because appellant failed to secure an adverse ruling on his objection to the last instance of alleged improper jury argument, and failed to object at all to the first and second instances, he failed to preserve any error. Accordingly, we overrule appellant's second point of error.

IV. LEGAL AND FACTUAL SUFFICIENCY OF EVIDENCE

In his third point of error, appellant contends the evidence is both legally and factually insufficient to prove he committed the offense of murder. More specifically, he complains the evidence is insufficient to show that he was the man who shot Pedro Aviles because he did not have a moustache on the day of the murder and the only eyewitness to the shooting, Rosemary Navarro, testified that the shooter had a moustache.

In evaluating a legal sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that the defense's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1994). Nor is it our duty to re-weigh the evidence based on a cold record; rather, it is our duty to act as a due process safeguard, ensuring only the rationality of the fact finder's decision. *Williams v. State*, 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The jury, as the trier of fact, "is the sole judge of the credibility of witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting

evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In contrast, when evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is "so contrary to the overwhelming weight of the evidence to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 6-7 (Tex. Crim. App. 2000) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996)). This concept embraces both "formulations utilized in civil jurisprudence, *i.e.*, that evidence can be factually insufficient if (1) it is so weak as to be clearly wrong and manifestly unjust or (2) the adverse finding is against the great weight and preponderance of the available evidence." *Id.* at 11. Under this second formulation, the court essentially compares the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). "In conducting the factual sufficiency review, we consider the fact finder's weighing of evidence and can disagree with the fact finder's determination." *Clewis*, 922 S.W.2d at 133. However, we must employ appropriate deference so that we do not substitute our judgment for that of the fact finder. *See Jones*, 944 S.W.2d at 648. Our evaluation should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1997).

A person commits the offense of murder if he: (1) intentionally[1] or knowingly[2] causes the death of an individual or (2) intends to cause serious bodily injury and commits an act

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[1] A person acts intentionally with respect to the result of his conduct when it is his conscious objective or desire to cause the result. *See* TEX. PEN. CODE ANN. § 6.03(a) (Vernon 1994).

[2] A person acts knowingly with respect to the result of his conduct when he is aware his conduct is reasonably certain to cause the result. TEX. PEN. CODE ANN. § 6.03(b) (Vernon 1994).

clearly dangerous to human life that causes the death of an individual. TEX. PEN. CODE ANN. §§ 19.03(b)(1) and (2) (Vernon 1994). The question of intent to kill is a question of fact for the jury. *Hemphill v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974). The jury may "infer intent and/or knowledge from an accused's acts, words, and conduct as well as from any facts in evidence which, to the jurors' minds, prove the existence of an intent to kill." *Patrick v. State*, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995); *see also Hernandez v. State*, 819 S.W.2d 806, 810 (Tex. Crim. App. 1991). The jury may also infer intent to kill from the extent of a victim's injuries. *Patrick*, 906 S.W.2d at 487.

The standard of review on legal sufficiency of the evidence is the same for both circumstantial and direct evidence. *King v. State*, 29 S.W.3d 556, 565 (Tex. Crim. App. 2000). Moreover, it is not necessary that every fact point directly and independently to appellant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances. *See Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993).

Appellant argues that the evidence is insufficient to prove that he murdered Pedro Aviles because (1) Rosemary Navarro told the police that the man who shot her husband had a moustache, and, at trial, certain defense witnesses testified that appellant had shaved his moustache weeks before the murder and (2) no gun or gun residue was found in his vehicle. The record contains conflicting evidence. It is up to the jury to resolve these conflicts; and the jury can accept or reject all or part of the testimony presented by both the State and defendant. *See Murillo v. State*, 839 S.W.2d 485, 492 (Tex. Crim. App. 1992). There was sufficient evidence presented at trial to identify appellant as the gunman. Moreover, there is both direct and circumstantial evidence placing appellant at the scene of the murder.

An eyewitness to the murder, Rosemary Navarro positively identified appellant as the man who shot her husband, in both a photo line-up and at trial. She also identified appellant's car as the same car that had followed her home four days before the shooting.

In addition to this eyewitness testimony, there is other evidence that links appellant

to the crime. The police found a light blue car matching the description of the shooter's car in appellant's garage. The victim's brother, Felix Aviles had been romantically involved with appellant's wife, and, on occasion, would ride with his brother and sister-in-law in the mornings. Appellant had both the motive and opportunity to shoot at appellant's car. A piece of paper with Pedro Aviles's license plate number was found inside appellant's car. Although, a gun was not found or introduced into evidence at trial, this fact is not dispositive in light of the other evidence against appellant. *See Rogers v. State*, 795 S.W.2d 300, 302 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd); *see also Garza v. State*, 794 S.W.2d 497, 498-99 (Tex. App.—Corpus Christi 1990, pet. ref'd).

A rational jury could have found beyond a reasonable doubt that appellant intentionally and knowingly caused Pedro Aviles's death or intended to cause serious bodily injury and committed an act dangerous to human life which caused his death. *See* TEX. PEN. CODE ANN. § 19.02(b) (Vernon 1994). Accordingly, we conclude the evidence is legally sufficient to support appellant's conviction for murder.

Turning now to appellant's challenge to the factual sufficiency of the evidence, we note that the jury, as factfinder, could believe the State's evidence and disbelieve appellant's statements. *See Scott v. State*, 934 S.W.2d 396, 399 (Tex. App.—Dallas 1996, no pet.). Apparently, the jury did not believe appellant's version of events or his proffered explanations of the evidence that tied him to the murder. When, as here, the physical evidence connecting appellant to the crime is sparse, the evaluation of eyewitness credibility and demeanor is crucial in determining the appropriate verdict. *See Johnson*, 23 S.W.3d at 8. Under these circumstances, we defer more readily to the jury's verdict in conducting our factual sufficiency review. *Id*. (holding that the degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record). Based on the evidence in the record, we conclude the jury's findings were not so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust, and thus, we find the evidence is factually sufficient to support appellant's conviction.

Having found the evidence legally and factually sufficient to support appellant's conviction, we overrule appellant's third point of error.

We affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed February 28, 2002.

Panel consists of Chief Justice Brister and Justices Anderson and Frost.

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