Affirmed and Opinion filed February 3, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00423-CR

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GARY ROXBURG WORRELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 573,496

O P I N I O N

Appellant, Gary Roxburg Worrell, was charged with the felony offense of murder, to which he pleaded not guilty. After the jury found him guilty, the trial judge found an enhancement paragraph true, and assessed life imprisonment in the Department of Criminal Justice, Institutional Division. In three points of error, appellant challenges the legal and factual sufficiency of the evidence, and contends that the trial court abused its discretion by denying appellant's motion to testify free of impeachment. We affirm the judgment of the trial court.

In his second and third points of error, appellant challenges the legal and factual sufficiency of the evidence and argues the State did not establish an intent to kill. We disagree.

When reviewing the legal sufficiency of the evidence, this Court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); *See Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App.1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App.1995). On appeal, this court does not reevaluate the weight and credibility of the evidence, but we consider only whether the jury reached a rational decision. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App.1993).

In conducting a factual sufficiency review, this court must view all the evidence without the prism of in the light most favorable to the prosecution and must set aside the verdict only if it is so contrary to the weight of the evidence as to be clearly wrong and unjust. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). We will review the fact finder's weighing of the evidence and are authorized to disagree with the fact finder's determination. *Id*. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. *Id*.

The record shows that appellant went to his cousin's house for a birthday party. During the party, Albert Reyes and Miguel Levar began fighting. Friends of Reyes and Levar separated the two. Several witnesses then testified that appellant hit Levar with a gun, or a bottle, in the head. Bertin Alquicira, a friend of Levar, escorted him outside and asked him to leave before the situation grew worse. Levar got into a car, driven by Tisha Alvarez. The complainant, Anna Chavez, sat in the backseat. Alvarez then drove away from the party.

Many of the people at the party were outside the house after Levar left. They saw Tisha Alvarez turn the car around and head back toward the house. Appellant came outside of the house with a .9mm handgun. When the car passed him, he fired seven bullets in the direction

of the car. One of the bullets shattered the rear window and struck Anna Chavez in her back. The gunshot wound killed her.

Appellant was found in Florida several days after the shooting. He was in possession of the same handgun that was used to kill Anna Chavez.

Appellant testified that he fired the shots to scare the people in the car. He claims he did not intend to shoot anyone. He believed that when the car turned around and approached the house, a drive-by shooting would occur. His sister and cousin both believed that the people in the car were going to perform a drive-by shooting. They did not see appellant fire the handgun. Appellant also denied hitting Levar with a gun and said he only wrestled with Levar in order to break up the fight. He said that he had planned on moving to Florida for business reasons.

The evidence is legally and factually sufficient to show that the murder was committed intentionally. 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. *See Medina v. State*, 1999 WL 791567 (Tex. Crim. App. 1999); *Godsey v. State*, 719 S.W.2d 578, 580-581 (Tex. Crim. App. 1986). Firing a .9mm handgun, at close range, into a car with people inside was a "manner of use" in which death or serious bodily harm was likely to result. We overrule appellant's second and third points of error.

In his first point of error, appellant contends the trial court erred in overruling his objection to the State's use, for impeachment purposes, of his 1989 felony conviction for attempted murder. Appellant filed a motion requesting that he be allowed to testify free from impeachment with prior convictions. He argued that the prejudicial effect of allowing impeachment through his prior conviction would substantially outweigh any probative value. The court heard arguments and denied the motion.

When reviewing the trial court's ruling permitting the use of a prior conviction for impeachment purposes, we must accord the trial court wide discretion. *Theus v. State*, 845

S.W.2d 874, 881 (Tex. Crim. App. 1992). The trial court's decision will only be reversed upon a showing of a clear abuse of discretion. *Id*.

The credibility of a witness may be attacked by evidence that he has been convicted of a felony or a crime of moral turpitude. However, the trial court must determine whether the probative value of admitting the evidence outweighs its prejudicial effect. TEX. R. EVID. 609(a). The Court of Criminal Appeals established a five-factor test for evaluating the admissibility of prior convictions under TEX. R. EVID. 609. These factors include: (1) the impeachment value of the prior crime; (2) the temporal proximity of the past crime (relative to the charged offense) and the witness' subsequent history; (3) the similarity between the past crime and the offense being prosecuted; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue. *Theus*, 845 S.W.2d at 880.

As to the first factor, the impeachment value of crimes that involve deception is higher than crimes that involve violence, because crimes that involve violence have a higher potential for prejudice. *Id*. at 881. Appellant's prior attempted murder conviction is not one that directly relates to dishonesty or deception. Thus, the first factor weighs for exclusion.

The second factor, temporal proximity, will favor admission if the past crime is recent and the witness has demonstrated a propensity for running afoul of the law. *Id*. Here, appellant's prior conviction was less than two years before the murder charge. The evidence was introduced before ten years had elapsed. We find this demonstrates a propensity for running afoul of the law, and therefore favors admission.

The third factor also appears to weigh against admission. Appellant's prior conviction and the offense charged in this case both involve murders. This could lead the jury to convict on the perception of a pattern of past conduct. At the same time, a defendant should not be immunized from attacks on his credibility by proof of prior convictions because he keeps repeating the same offense. *See Norris v. State*, 902 S.W.2d 428, 441 (Tex. Crim. App. 1995), *cert. denied*, 516 U.S. 890, 116 S.Ct. 237, 133 L.Ed.2d 165 (1995).

The last two factors are interrelated. Both depend on the nature of a defendant's defense and the means available to him of proving that defense. *Theus*, 845 S.W.2d at 881. In our case, appellant testified and made an issue of his lack of intent to kill Anna Chavez. By doing so, he also made his credibility a critical issue for the jury to decide. *Norris*, 902 S.W.2d at 441. Therefore, the need to allow the State an opportunity to impeach the defendant became more important. Additionally, the trial court instructed the jury to use the prior conviction only on the issue of appellant's credibility which lessened the prejudice. *See Robinson v. State*, 701 S.W.2d 895, 899 (Tex. Crim. App. 1985). We find the fourth and fifth factors strongly favor admissibility.

After considered all of the facts and circumstances of this case, we hold that the trial court did not abuse its discretion in admitting appellant's prior conviction for impeachment purposes. Appellant's first point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Joe L. Draughn
Justice

Judgment rendered and Opinion filed February 3, 2000.
Panel consists of Justices Draughn, Cannon, and Lee.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Joe L. Draughn, Bill Cannon and Norman R. Lee sitting by assignment.