Affirmed and Opinion filed April 4, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-00804-CR

NICK RICHARD JACQUES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 10th Judicial District
Galveston County, Texas
Trial Court Cause No. 99CR0452

O P I N I O N

Appellant, Nick Richard Jacques, appeals from his conviction for the murder of Brenda Parker ("complainant"). A jury found appellant guilty and assessed punishment at ninety-nine years confinement in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant challenges the legal and factual sufficiency of the evidence to support the verdict. He also contends that the trial court abused its discretion by failing to conduct a hearing on his motion for new trial and by denying the motion based on the State's failure to reveal exculpatory evidence. We affirm the judgment of the trial court.

I. FACTUAL SUMMARY

Complainant's body was discovered inside her trailer home. She was wearing only a camisole that had been cut open and a pair of blood-stained socks. There was a great deal of blood on the floor, and there was blood smeared on complainant's chest. An autopsy showed four gunshot wounds, one of which was fatal, and a fatal knife wound to her chest. She had several defensive wounds on her hands and arms. The medical examiner who performed the autopsy believed that complainant had been dead from three days two one week. There was no indication that complainant had been sexually assaulted. There were two bloody footprints near complainant's body, indicating the impression was made with a tennis or athletic shoe.

DNA tests confirmed the following: a spot of appellant's blood was found near one of the bloody footprints; the blood discovered on complainant's socks was appellant's; a mixture of appellant's and complainant's blood was found under complainant's fingernails, that is, neither appellant nor complainant could be excluded as the source of the DNA; and DNA of George Etie, complainant's boyfriend, was found on cigarette butts in the ashtray.

Appellant's wallet was discovered in the grass just outside complainant's home. Several witnesses testified that appellant usually carried a knife.

Although no murder weapon was ever found, it was determined that the shots had been fired from the same weapon—a .32 caliber semi-automatic handgun. The autopsy was inconclusive as to whether complainant had fired the weapon.

Complainant had operated a small food service establishment located just outside her trailer home. Complainant's business, and the trailer in which she was living, were both owned by her boyfriend Etie, who allowed her to operate the business and keep the proceeds. Etie was married but testified that his wife knew about his relationship with complainant. Etie testified that he owned a .32 caliber handgun, that he kept it at the establishment, and that complainant often took it home with her for protection.

Defense witness Robert Kinney, who ate at the establishment every day, testified that he became concerned about complainant when her "taco stand" did not open for business at its usual time and remained closed for several days thereafter. On or about the second day it remained closed, Kinney stopped by the taco stand and found Etie sitting at a picnic table outside the establishment drinking alcohol. Kinney asked Etie about complainant; Etie replied that she had been missing, and he was afraid she was not coming back. Kinney offered to help find complainant, but Etie refused, and Kinney went home.

The next morning, however, Etie telephoned Kinney for help, and the two men met at the taco stand. Etie asked Kinney if he would go inside complainant's home to look for her. Etie made the request of Kinney because the front door was locked and the rear door was under construction, and, as Etie was a rather large man, Etie doubted that he could "get up in the house."

The rear door of the trailer home was off its hinges, and there was no landing or ramp leading to it. But with some difficulty, Kinney was able to jump up into the trailer through the doorway. Kinney found complainant's body and called 911. Both Etie and Kinney remained on the property until the police arrived. Each gave the police a voluntary statement.

Kinney testified that he thought it was very unusual that Etie would not "go into the trailer on his own," that he encouraged Etie to enter the home the evening before, and that he thought "something was up or [Etie was] telling [him] a cockamamy story." He also testified that he had seen Etie use a key to go in complainant's trailer many times, whether complainant was home or not.

Prior to the homicide, appellant had been living at his parent's trailer home, which was located only two houses from complainant's home. For approximately two weeks following the murder, appellant's whereabouts were unknown.

Detective Michael Barry, of the Galveston County Sheriff's Department, talked with several people the day complainant's body was discovered, including complainant's

estranged husband, at least one of complainant's children, and Etie, among others. All those who granted interviews with Detective Barry gave written consent to search their homes and vehicles. Nothing incriminating was recovered from any of the searches.

Some time later, Detective Barry received information that appellant had been shot and was attempting to self-medicate his wound. He also discovered that appellant had not gone to work in the days following the murder, and that his mother, Linda Muncey, had twice called appellant's supervisor, saying that appellant had received injuries working on his truck that required medical attention.

Based on this information, Detective Barry attempted to interview appellant's mother. He testified that Muncey was "very uncooperative." Therefore, the decision was made to set up surveillance of appellant's family members, hoping that they would lead to appellant. After this failed, Detective Barry asked Muncey and appellant's sister, Terri Clark, for an interview. Although they granted the interview, Clark was uncooperative, and Muncey seemed to be giving untruthful answers to the questions.

Debby Lochas, a friend of Clark, contacted Detective Barry with information about the case—specifically about the actions of appellant's sister and mother. She testified Clark came to her home the day before complainant's body had been discovered. Apparently, Lochas had some medical expertise or background, and Clark sought Lochas' advice, telling Lochas that her brother had been shot by the same person who had shot "some lady at the end of 517 and San Leon." Clark was concerned that the bullet may have hit an organ, so Lochas showed Clark a "medical book." Clark and Lochas then took the book outside to show appellant's mother, who was waiting in a car on the driveway. Lochas testified that Clark and Muncey began to discuss their plans to dismantle a handgun and dispose of the parts along the roadside.[1]

[1] At trial, Lochas' testimony about the conversation between Clark and Muncey regarding the weapon was objected to as hearsay, but the trial court admitted it for purposes of impeaching Clark's testimony.

Clark testified that appellant had come to her house one evening about three days before complainant's body was discovered, but left early the next morning. Clark claimed she did not see or hear from appellant for over two weeks thereafter. Clark further testified she never spoke to Lochas about appellant's wound and denied even knowing about the wound during that time. She also denied going to Lochas' home.

Muncey, appellant's mother, also denied ever going to Lochas' home or discussing appellant's medical condition with her. Additionally, she testified that she did not even know of appellant's gunshot wound until she was contacted by Detective Barry about two weeks after the murder. Muncey testified that although appellant had been living at her home at the time of the murder, she had not seen him since just a few days before complainant's body was found. She admitted to calling appellant's supervisor and leaving a voice message saying that appellant would not be able to come to work because he was injured while working on his car. However, she denied calling appellant's employer a second time, as testified to by the employer. She claimed that, even though she had not seen appellant, he had left a note for her explaining that he had been injured and was unable to work. After she found appellant's note, she testified she did not hear of his whereabouts until she received a call from Loretta Jordan, who said that appellant was at her home.

Jordan, a friend of appellant's, testified that appellant had appeared at her door about 5:00 a.m. one morning, almost two weeks after the police had begun searching for him. He asked to stay at her house and seemed scared and very tired. She allowed appellant to sleep in a spare bedroom. That afternoon, appellant told Jordan that he had been shot, but that he was taking care of the wound himself. Jordan suggested he seek medical attention but assisted him in attempting to care for the wound. Jordan testified that the wound was so infected that it emitted a strong, foul odor. Appellant stayed at Jordan's home throughout the day and overnight. Jordan called appellant's mother the next morning.

Muncey testified she and Clark went immediately to Jordan's home because they were very worried about appellant, even though she had previously said she did not know

appellant had been shot. Upon seeing appellant, Clark called for an ambulance. Muncey testified that, when she entered the room, "the smell was so bad, I couldn't stand it, so I started shaking"; that she had a very difficult time trying to wake appellant; and, that once she was able to wake him, he requested that Muncey get his bag and his tennis shoes. Not wanting any further involvement, Jordan left the house. The police arrived with the ambulance, and Muncey threw appellant's bag and tennis shoes back inside Jordan's house. The tennis shoes were never recovered.

Appellant was transported to Ben Taub Hospital for treatment and taken into custody. A police officer was assigned to guard him. Appellant's condition improved dramatically. After appellant had been recuperating at the hospital for about a week, he escaped while the guard was using the restroom.

The news of appellant's escape was broadcast on television. It was a very cold day, and appellant was barefoot and jogging down the street in the medical center. A woman who saw appellant became suspicious of his behavior. She then recognized his face from the broadcast pictures and called police.

Before police could locate appellant, he was able to hail a taxi. Explaining that he had been robbed of his car and his wallet, appellant assured the taxi driver that his cousin would pay the cab fare. After calling and confirming payment with the cousin, the taxi driver drove appellant to a grocery store where the cousin was to meet them. On the way out of the medical center, however, the cab driver noticed that each time the cab passed a police officer or a patrol car, appellant would duck down in the back seat of the cab to avoid being seen. After dropping appellant off with his cousin, the taxi driver called police. The cousin had already called police and took appellant to a nearby restaurant where police took him back into custody.

At trial, appellant testified in his own behalf, denying any involvement in the murder. He claimed he was acquainted with complainant from the taco stand. Appellant

characterized his further contact with the complainant as follows. Appellant first spoke to her when she approached him at a local store. She asked him to complete some work on her kitchen and back door that another contractor had begun but had not finished. Appellant agreed to bid on the work, met complainant at her trailer, looked briefly at the job, and went home. Over the course of the next three days, appellant returned to complainant's trailer to further assess the work that needed to be done and ultimately gave complainant a written bid.

Explaining his connection with complainant's murder, appellant testified that, the day after he had given her the bid, he stopped by complainant's home very late after work. He testified that on his way home from work, he experienced car trouble and had to make some repairs on the side of the freeway. It was dark, and he did not have the proper tools. After two hours, however, he was able to start the vehicle. Appellant drove the vehicle to his sister's house, asked to use her tools, worked on the vehicle for about an hour, and left to go to a gentleman's club. He stayed at the club for "a long time," drank two rums and coke, and then he went back to his mother's home.

He made himself some dinner, wrote a note to his mother asking her to call his employer because he had been injured while working on his car, and sat down to watch television. He then went outside to check on an apparent disturbance with the neighbor's chickens. After scaring a cat away from the chicken coop, he saw complainant and another man trying to repair the back door of her trailer home. He called over to complainant and the man saying he would be "right over" to help them. Appellant went back inside his mother's trailer, grabbed a flashlight and put on his tennis shoes, a pair of jeans, and a cap. He testified that he remembered putting his wallet in his jeans' pocket. It was about 3:30 a.m. and raining.

He went around to the back door of complainant's trailer, but complainant and the other person were no longer repairing the door. The door was off its hinges and leaning against the trailer. Appellant attempted to put the door back on alone. Unable to repair the

door, he called to complainant, but she did not respond. He tried to put the door on again, cutting his finger in the process. Determined to install the door, he jumped up into complainant's trailer, and pulled the door in after him. Appellant testified that he "almost had it in there," but he stopped because he "heard something." Turning toward the sound, he saw someone lying on the floor in the living room. It was complainant. Appellant testified that she was fully clothed and had no blood on her. Assuming that complainant was asleep, appellant reached down and shook her. At that point, appellant heard something, turned around, and was attacked by "an extremely strong" blonde female whom he could not identify. Appellant and the woman fell to the floor, landing on complainant. Another unidentified person with reddish hair, wearing a football jersey, and who "looked like Spence," emerged from the kitchen area and ran out of the back door. The unidentified woman shouted, "That's him!"

Appellant testified that he was ultimately able to free himself from the woman, so he got up and ran out of the back door. Once outside, he saw the person who "looked like Spence" running away. Appellant was scared. He ran toward his mother's home, but he fell to the ground while still on complainant's property. After he got home, he "got on the couch" and must "have nodded off."

Appellant testified that, when he got home, he was not aware that he had been shot, because earlier, while working on his vehicle on the side of the road, a gust of wind had slammed the door on his leg and side. Appellant thought the pain he was feeling was attributable to the prior injury.

Appellant also testified that he was unable to find the tennis shoes that he wore that night, and that he left his cigarettes, lighter and flashlight at complainant's home.

The next morning, appellant "was still scared" and called a friend to come get him. At this point, appellant realized that he had been shot. Appellant testified that he stayed with the friend "for days," but the friend "decided to cut me loose," that he "done put two and two

together." Appellant testified that once he left the friend's home, he walked four miles to Jordan's home. He claimed that he did not know about complainant's murder until then.

Appellant further asserted that he was not running from the police, but rather, he was "in fear of [his] life because "somebody shot [him] and [he] didn't know what happened after that." Appellant claimed that during the time he was at the friend's and Jordan's houses, he was not concerned with complainant's welfare because he "figured that everything was okay," and that the unidentified people had probably left complainant's trailer. Appellant also testified that he did not "escape" from the hospital, but rather, he only left to avoid any further medical treatment and was simply trying to get to the Galveston County Jail.

II. PROCEDURAL SUMMARY

Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), appellant filed a pretrial motion requesting the production of exculpatory evidence. After the verdict, appellant filed a timely motion for new trial, complaining that the verdict "is contrary to the law and the evidence." Attached to appellant's motion for new trial was an affidavit of defense witness Kinney. In the affidavit, he claims to have told an Assistant District Attorney about a conversation between he and Etie, wherein Etie had admitted to killing complainant and another woman on a prior occasion.

Appellant's motion for new trial was overruled by operation of law. Subsequently, the affidavit of Assistant District Attorney Clyde Burleson was filed with the trial court. In his affidavit, Burleson claims Kinney told him that, due to Etie's peculiar behavior prior to the discovery of complainant's body, he believed appellant was innocent and Etie was responsible for complainant's murder. However, Burleson further attested Kinney never told him about Etie's alleged admission, *i.e.*, that he had killed complainant and another woman. And, at trial, Kinney did not testify that Etie admitted to killing complainant or anyone else.

III. THE MOTION FOR NEW TRIAL

In his first three issues for review, appellant contends that the trial court abused its discretion by failing to conduct a hearing on his motion for new trial and by denying the motion. He also asserts that the trial court abused its discretion in failing to hear the motion because the State was in possession of exculpatory evidence but did not reveal that evidence to appellant before trial.

A. Presentment

A defendant must "present" a motion for new trial to the trial court within ten days of filing, unless the court allows it to be presented within seventy-five days from the date sentence is suspended or imposed in open court. TEX. R. APP. P. 21.6. Therefore, to preserve error, a defendant must not only properly file the motion, but must also present the motion to the trial court within the statutory time frame. *Id.*; *Carranza v. State*, 960 S.W.2d 76, 79 (Tex. Crim. App. 1998).

The filing of a motion for new trial alone is insufficient to show "presentment." *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993); *Butler v. State*, 6 S.W.3d 636 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd). And, on appeal, the record must demonstrate that the movant sustained his or her burden of actually delivering the motion to the trial court, or that the motion was brought to the court's attention. *Carranza*, 960 S.W.2d at 79-80. Examples of presentment include obtaining the trial court's ruling on the motion for new trial, the judge's signature or notation on a proposed order, or a hearing date noted on the docket. *Id*. (stating that the list is not exhaustive).

The trial court's decision to deny a motion for new trial cannot be disturbed absent an abuse of discretion, even if the trial court denies the motion without a hearing. *McIntire v. State*, 698 S.W.2d 652, 660 (Tex. Crim. App. 1985); *Birdwell v. State*, 996 S.W.2d 381, 384 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). However, a trial court cannot abuse its

discretion by denying a motion for new trial that was not timely presented. *Id*. (citing *Kiser v. State*, 788 S.W.2d 909, 915 (Tex. App—Dallas 1990, pet. ref'd)).

The record in this case is devoid of any showing that appellant presented the motion for new trial to the trial court. Instead, the record shows that appellant only filed a motion for new trial with the clerk of the trial court. This is insufficient to show presentment. *See Reyes v. State*, 849 S.W.2d at 815. Therefore, appellant failed to preserve any error related to the motion. *See Carranza*, 960 S.W.2d at 80. Finding that the record does not demonstrate "presentment," as required by Rule 21.6, we conclude that the trial court did not abuse its discretion in failing to rule on the motion. *See Birdwell*, 996 S.W.2d at 384. Consequently, we overrule appellant's first and second issues on appeal.

B. The *Brady* Complaint

To preserve *Brady* error, a complaint must be made as soon as the grounds for the complaint are apparent or should be apparent. TEX. R. APP. P. 33.1(a)(1); *Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999). Appellant chose to attach an affidavit complaining of a *Brady* violation to a motion for new trial, but he failed to present the motion to the trial court. Moreover, the face of the motion does not complain of a *Brady* violation or newly discovered evidence; rather, it preserves only a legal and factual sufficiency complaint for review. We overrule appellant's third issue for review.

IV. SUFFICIENCY OF THE EVIDENCE

In his fourth and fifth points of error, appellant alleges that the evidence is legally and factually insufficient to support the jury's verdict. We apply different standards when reviewing the evidence for factual and legal sufficiency. For a legal sufficiency review, this court must view the evidence in the light most favorable to the prosecution and determine whether 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. 2789, 61 L. Ed. 2d 560 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This standard of

review applies to cases involving both direct and circumstantial evidence. *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. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

In reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Evidence is 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*. The *Johnson* court reaffirmed the requirement that "due deference must be accorded the fact finder's determinations, particularly those determinations concerning the weight and credibility of the evidence." *Id*. at 9. We are mindful, however, that due deference is not absolute deference. *Id*. at 7.

A. Legal Sufficiency

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual. TEX. PEN. CODE ANN. § 19. 02 (Vernon 1994).

Appellant's blood was found underneath complainant's fingernails and on her socks. A drop of his blood was found near a bloody footprint at the crime scene. And, there was abundant circumstantial evidence pointing to appellant's guilt. Moreover, appellant mysteriously disappeared for over a week after he had been shot at complainant's home, and he escaped while in custody. Examining the evidence in the light most favorable to the verdict, we conclude that any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. at 319; *see also Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997). Accordingly, we overrule

appellant's complaint that the evidence against him is legally insufficient to support the verdict.

B. Factual Sufficiency

Considering all of the evidence in the record—not just the evidence supporting the verdict—we hold that the verdict is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Johnson v. State,* 23 S.W.3d at 7. Although there is testimony from appellant denying his involvement in the murder, and testimony from another witness suggesting suspicious behavior of Etie, the record does not reveal that a different result is appropriate. *See id.* at 8. Therefore, we defer to the jury's determination concerning the weight given to the contradictory testimony and overrule appellant's factual sufficiency complaint. *See id.*

The judgment of the trial court is affirmed.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed April 4, 2002.
Panel consists of Justices Hudson, Fowler, and Edelman.
Do Not Publish — TEX. R. APP. P. 47.3(b).