Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01084-CR

JARAY HENDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 724,029

O P I N I O N

Jaray Henderson appeals his conviction for capital murder. The trial court assessed his punishment at life imprisonment. In three points of error, appellant contends: (1) the trial court erred in allowing the prosecutor to communicate to the jury the content of a non-testifying co-defendant's confession; (2) and (3) the evidence is legally and factually insufficient to establish that appellant should have anticipated that his co-defendant would kill the deceased. We affirm.

At about 8:20 p.m., April 13, 1996, James Coker (Coker) and his friend, Jason Ramirez (Jason), drove to the San Jacinto Mall in Baytown in Coker's dark green Honda Civic with custom wheels. Coker observed three black males sitting in a parked Nissan pick-up truck staring at him; two males were in the cab, and one was sitting in the truck bed. After Coker and Jason finished shopping, Coker drove his

Honda to a Chevron station. After buying gas and cigarettes, Coker drove a short distance from the gas station and passed the Nissan pick-up truck he had seen earlier. Coker noticed the same black males in the pick-up truck staring at him. The trio in the Nissan were later identified as appellant, Tony Henry (Tony), and Chris Meullion.

Coker drove to James Grimes' house, parked in the driveway, and got out. Appellant parked the Nissan pick-up truck about 20 yards from Coker, and Chris Meullion (Chris) jumped out of the bed of the Nissan and ran toward Coker with a gun in his hand. Coker saw Chris running toward him wearing a baseball cap on his head and a blue bandana around his face. Chris stopped within two feet of Coker, stuck the gun to Coker's head, and told Coker that he and Jason were being carjacked. After ordering Coker to drive, Chris got in the back seat of Coker's Honda. Coker got in his car, backed out of James Grimes' driveway, and drove by appellant's Nissan pick-up truck. Coker then noticed appellant's Nissan following him, and Chris told Coker not to try anything stupid because his friends were following them.

Chris ordered Coker to drive to the Baytown Civic Center and park in the parking lot. After Coker stopped, appellant drove up in his Nissan truck and parked about 25 yards from Coker's Honda. Chris ordered Coker and Jason to lie down on their stomachs about 10 feet from the passenger side of Coker's Honda. Coker heard appellant and Tony get out of the Nissan and walk toward the Honda. Coker then heard the three of them whispering, but could not hear what they said. Coker stated that Chris tried to start the Honda while one of the other two held the gun on him. Either appellant or Tony then said: "Hurry up, somebody's coming. We've been here too long."

Chris could not start the Honda, and ordered Coker and Jason back in the car. Chris got in the back seat and ordered Coker to drive. While Coker was driving around as ordered, Chris took Coker's cell phone from the Honda's console and called someone. He said he had "two bitches" in the car, mentioned the name "Tony," and said he "was going to scoop somebody up because he needed them to drive a standard" [manual transmission]. Chris finally ordered Coker to turn into Holloway Park, make a U-turn, then park with the Honda facing out of the park. Appellant then drove in and parked his Nissan truck with the headlights facing Coker's Honda.

Chris ordered Coker and Jason to get out of the Honda and lay down on their stomachs by the front of the Honda. Appellant and Tony got out, and Coker heard the trio whispering, but he could not hear anything they said. Coker later stated on cross-examination that he could see three pairs of "tennis shoes" while laying on his stomach. Chris then told Jason and Coker to walk into the woods, and followed them with a flashlight. After walking a short distance into a wooded area, Chris ordered them to get on their knees with their hands behind their heads. Chris then shot Jason in the back of the head once, and Jason died at the scene. Coker got up and ran, and said he felt one bullet come through his back and out his chest, and the second one come through his arm and out his wrist. Coker was badly wounded, but he managed to get to Racoon Road where he was picked up by Dallas Spurlock and subsequently taken to the hospital.

After the shootings, appellant drove Tony to Terrance Arnold's house. Chris was not familiar with a manual transmission, but managed to drive Coker's Honda to Terrance Arnold's house a few minutes later. Kendall Cagan volunteered to drive the Honda for Chris, and drove Chris to Chris' grandparents' house. Once there, Chris told Cagan to park the Honda in a wooded area near the Meullions' house. Appellant and Tony then picked up Chris and Cagan, and took Chris home. Appellant, Tony, and Cagan then returned to Arnold's house, and appellant told Cagan that Chris shot somebody and stole the Honda. Once back at Arnold's house, appellant became very nervous and shouted: "This is murder one, capital murder."

The following day, the police found the Honda burning on the property adjoining the Meullions' house. The police recovered five shell casings at the murder scene fired from a .380 caliber automatic pistol, but the gun was never recovered. The police recovered a box of .380 caliber bullets from Terrance Arnold's house with five bullets missing.

In point one, appellant contends the trial court erred in allowing the prosecutor to communicate to the jury the content of a nontestifying co-defendant's confession, which the trial court had previously ruled was inadmissible. At a hearing out of the presence of the jury, the State called Chris Meullion as its final witness. The trial court had granted Chris use immunity in exchange for his testimony. Chris refused to testify, and the trial court held him in contempt. The State then offered into evidence those portions of

Chris' confession involving appellant's statements that he made during the furtherance of their conspiracy to rob and kidnap Coker and Jason. The State offered Chris' confession under the coconspirator and statement against interest exceptions to the hearsay rule. TEX. R. EVID. 801(2)(E) and 803(24). The trial court stated that appellant's statements and activities in Chris' confession were not admissible into evidence, and refused to admit Chris' confession into evidence. Thereafter, the jury was returned to the court room, the State rested, and appellant testified.

Appellant testified that Tony came over to his house around 6:00 p.m., and left at about 8:30 p.m. A short time later, appellant drove over to Tony's house and picked him up, then drove over to Chris' house and picked him up. The trio then went to the San Jacinto Mall and drove around looking for some friends, then parked and walked around the mall looking for someone they knew. After looking around, the trio returned to the truck and appellant started to drive out of the mall when Chris said "something about" [trial court sustained State's objection as hearsay as to what Chris actually said] Coker's car. Appellant followed Coker's car to a gas station, then pulled into a parking lot behind the car. Chris got out of appellant's truck and walked over to the gas-station store where Coker and Jason were, then returned to appellant's truck. Appellant, Tony, and Chris then left the station, but were not following Coker at that time. While appellant was driving down Garth, Coker passed him and Chris said "something" [hearsay objection by State sustained] to appellant. Appellant then followed Coker to James Grimes' house and parked on the shoulder of the road when Coker pulled into Grimes' driveway. Appellant stated that Chris jumped off appellant's truck and jogged over to Coker's car. Appellant stated that Chris talked to Coker then got in the Coker's car, and the car backed up into the street. The car's driver motioned to appellant to follow. Appellant denied the portion of his confession stating he observed Chris pull out a "chrome-plated semiautomatic pistol" when he jumped out of the truck and jogged over to Coker's car. He testified that he first saw Chris' pistol at the Baytown Civic Center.

Appellant followed Coker's car and parked about 10 feet from it in the Baytown Civic Center. He stated that he observed Coker and Jason get out of the Honda with their hands in the air, and he then noticed Chris' gun. When appellant saw Chris' gun, he yelled, "What are you doing." Coker and Jason laid down in the grass between the two cars, and Chris got into the Honda and tried to start it. Failing in his attempt to start the Honda, Chris ran over to appellant and said "something" [hearsay objection by

State]. Chris then told appellant to follow him, and appellant refused. Chris pointed a gun at appellant and said "something" about Chris being a little guy and appellant being a big guy. The gun-pointing incident was not in appellant's confession, and appellant testified that he told Officer Huron about it when Huron took his statement.

Appellant followed Coker's car to Holloway Park, and both cars parked side-by-side in the park facing the main street. Chris made Coker and Jason walk towards the woods, and appellant told Chris not to shoot them. Appellant stayed with the cars and heard the shots. Appellant then drove off with Tony to Arnold's house. Appellant admitted that he yelled "murder one" around Arnold's house when he found out one of the boys had been killed. Appellant denied taking anything from Coker or Jason.

Appellant argues the trial court erred in allowing the prosecutor to communicate to the jury the content of a nontestifying co-defendant's confession with "fact-laden" questions to appellant on cross-examination. He asserts that such questions put otherwise inadmissible evidence of Chris' confession before the jury and denied him his constitutional right of confrontation and a fair trial. Although appellant answered "no" to the prosecutor's questions, he contends the trial court improperly allowed the following specific questions asked him by the prosecutor on cross-examination:

> 1. You-all [appellant and Tony] **talked about going out and doing a jacking**; didn't you.
>
> 2. You-all went by to get Chris, because you-all wanted a third one to go along; right? And Chris was to be the **lookout man**, wasn't he?
>
> 3. And isn't it true, sir, that after you-all picked up Mr. Meullion that you'all went by Terrance Arnold's house?
>
> And the reason that you-all went to Terrance's was because you **wanted to get a gun**; isn't that true, Jaray?
>
> 4. When you got to Terrance's house, isn't it true that **Chris waited out in the truck while you and Tony went in to get**-- [appellant's counsel objected: 'It's assuming facts not in evidence.' Trial court overruled objection.]

5. And isn't it true, sir, that even before you and Tony picked up Christopher, the two of you-all had **already been up to San Jacinto Mall**; isn't that true?

And isn't it true while you-all were up there you-all [appellant and Tony] **saw a little red car** that you-all liked, and **you wanted to jack it**; isn't that true?

6. Isn't it true, Mr. Henderson, it was during this time that you-all [appellant, Tony, and Chris] were **cruising the mall** parking lot, looking for something else, another car. That's **when Jimmy and James just happened to drive up in James Coker's nice looking little Honda Civic with the pretty wheels**? Isn't that true, sir?

After this question, appellant's counsel objected out of the presence of the jury, as follows:

APPELLANT'S COUNSEL: We object to the district attorney **reading** from this obvious statement that he has in front of him, **as if he's reading from a statement to the jury that belongs to some witness.**

THE COURT: It's cross-examination. He can ask anything he wants to.

APPELLANT'S COUNSEL: I know, but I'm talking about having the statement three feet from the nearest juror.

PROSECUTOR: I'll move the statement back. I know the statement practically by heart.

THE COURT: **I don't know if it's a statement or not.**

APPELLANT'S COUNSEL: **He's been seeing statements here for the last three days.**

THE COURT: He hasn't offered it. Overruled.

APPELLANT'S COUNSEL: I object and I'd like to make a bill on it.

THE COURT: Okay.

The prosecutor then asked appellant "isn't it true": (1) that appellant, Tony, and Chris admired the rims on Coker's car; (2) that appellant, Tony, and Chris waited for Coker and Jason to get in the car and leave the mall; (3) that appellant, Tony, and Chris discussed committing the carjacking as they followed the men; (4) that Tony gave the gun to Chris; (5) that appellant told Chris to "get ready" when Coker's car pulled into the driveway at Grimes' house; (6) that appellant and Tony were admiring Coker's car as Chris took the men into the woods; and (7) that Chris gave the gun to appellant after the shooting.

After the prosecutor began a question about going into Terrance's house "to get--," appellant objected to the question on the grounds it was assuming facts not in evidence. The trial court overruled the objection. In his brief, appellant does not clearly indicate which objection, the first one (assuming facts) or the second (reading witness statement), was sufficient to preserve error to the entire line of questioning. He only asserts that his counsel did not object until the prosecutor had asked several questions from Chris' confession, but does not state which objection preserves error. We will address both objections.

On appeal, appellant asserts that the State effectively communicated the contents of Chris' confession to the jury which denied him his constitutional rights to confrontation of a witness and a fair trial. Because appellant's first objection at trial (assuming facts) does not coincide with the issue on appeal, appellant has not preserved this complaint for review. *Holland v. State*, 802 S.W.2d 696, 699-700 (Tex. Crim.App. 1991)(hearsay objection to out-of-court statement did not preserve claim on appeal of denial of right to confrontation).

Appellant contends his next objection, set out above in this opinion, referring to the use of a statement by the prosecutor to cross-examine appellant, was sufficient to preserve error. Appellant cites *Taylor v. State*, 653 S.W.2d 295 (Tex.Crim.App.1983) as authority for preservation of error. Appellant cites *Taylor, Sills v. State*, 846 S.W.2d 392 (Tex.App.–Houston[14th Dist.] 1992, pet. ref'd), and *Gannaway v. State*, 823 S.W.2d 675 (Tex.App.–Dallas 1991, pet. ref'd), as authority for his contention that the trial court erred in allowing the prosecutor to communicate to the jury the content of a nontestifying co-defendant's confession.

In *Taylor*, appellant's co-defendant, Marilyn Garrett Taylor (appellant's wife) was called by the appellant's counsel as a witness, and she testified in the presence of the jury that she did not want to testify

against appellant. *Taylor,* 653 S.W.2d at 298. The State was allowed to cross-examine Mrs. Taylor in the presence of the jury as to a statement she gave an officer. *Id*. at 299. The prosecutor asked her several questions that supplied "the jury with . . . facts that no admissible evidence could provide." Mrs. Taylor refused to testify under the Fifth Amendment after each question asked her by the State. The State elicited numerous out-of-context parts of her statement in the presence of the jury that incriminated her husband. The court of criminal appeals held that appellant preserved error because appellant objected, after the third question, "to this *line of questioning." Id.* at 302. In reversing the case, the court of criminal appeals found that the conduct of the prosecutor was manifestly prejudicial.

In *Sills,* the trial court questioned the State's only eye witness to a murder (Chambers) outside the jury's presence. *Sills,* 846 S.W.2d at 396-397. Chambers persisted in his refusal to answer the prosecutor's questions even under threat of contempt. He did not claim the Fifth Amendment privilege. The trial court recalled the jury to the court room.

The prosecutor then questioned Chambers in the presence of the jury by reading each sentence from the written statement. The prosecutor prefaced the reading of each sentence by asking Chambers "isn't it true you told police," "isn't it true your statement reads," or "isn't it true you further stated." The prosecutor read aloud all of Chambers's statement. The witness refused to agree or disagree with any of the statements. Chambers's answers were consistently, "I refuse to answer."

In *Gannaway v. State,* 823 S.W.2d 675, 677-678 (Tex.App.--Dallas 1991, pet. ref'd), Terre Rice, in a statement to police, said Gannaway admitted shooting the victim. Rice had heard Gannaway describe the murder and she included the details of the murder in her statement. At trial, Rice refused to testify about certain matters. She answered some preliminary questions and admitted she gave a statement to police. She invoked her fifth amendment rights and the State offered her testimonial immunity.

The court held a hearing outside the presence of the jury. Rice agreed some of the facts in her statement were true and some of the facts were false. She repeatedly refused to answer certain questions about the murder. The court instructed the prosecutor to ask Rice about her statement in summary form. The prosecutor read Rice's statement by first prefacing the statement with the question "Is this true" and ended the reading of Rice's statement by asking "Is that true or not true, the statement you gave the

Richardson Police Department?" Rice responded "I can't answer that question." The court held her in contempt and instructed the bailiff to remove her from the court room.

In the presence of the jury, the trial court allowed the State to introduce Rice's edited statement implicating Gannaway in the murder although Rice did not say the statement was wholly true, did not fully testify, and was not cross-examined about the statement. The Dallas Court of Appeals, in reversing and remanding, said "[A]dmitting Rice's statement was a 'back-door' way for the State to get facts into evidence which Rice refused to testify about at trial." *Id*. at 678.

In this case, appellant's second objection to the prosecutor's cross-examination was that the prosecutor was "reading from this obvious statement that he has in front of him, **as if he's reading from a statement to the jury that belongs to some witness."** The record does not disclose whose statement the prosecutor was supposedly reading, or whose statement was sitting on the prosecutor's table near the jury, and the statement, if any, was never shown the judge. The trial judge stated on the record that he did not know if the prosecutor was reading from a statement, and the statement, if any, was not offered into evidence. The trial court told appellant that the prosecutor could "ask anything he wants to." Appellant made no attempt to clarify the issue at trial court and made no further objections, nor did he ask for a "running objection" to the State's *line of questioning*.

The objection in *Taylor*, relied upon by appellant in this case to preserve error, was to the "line of questioning" by the prosecutor. *Taylor*, 653 S.W.2d at 302. In this case, appellant made no such objection to the "line of questioning" by the prosecutor. Appellant's objections were: (1) assuming facts not in evidence, and (2) reading from an unknown witness' statement. There was no doubt in *Taylor* that the prosecutor was questioning Mrs. Taylor about *her* statement in front of the jury after she had refused to testify. *Id*. at 298-299. By getting her refusal to agree or disagree with each incriminating fact in her voluntary statement, there was no doubt the prosecutor was placing inadmissible hearsay before the jury. *Id*. at 303-304. *Taylor* and *Sills* involved the same conduct by the prosecutor where a witness was questioned in the presence of the jury as to the contents of his or her out-of-court statement. In *Gannaway*, the prosecutor read the witness' statement to the jury after she refused to testify at a hearing out of the presence of the jury. Here, there is nothing in the record to show the State was reading from

Chris' statement or *any* witness' statement. We find that *Taylor, Sills,* and *Gannaway* are factually dissimilar to this case and are not authority for appellant's point of error.

Chris' refusal to testify and the contents of his statement to the police implicating appellant were heard out of the presence of the jury. No attempt was made by the prosecutor to actually read Chris's statement to the jury. The jury was not told that Chris made any statement. Appellant did *not* refuse to answer the State's questions; he denied the truth of each question by the State. In this case, the questions posed by the prosecutor properly phrased the questions in a leading fashion for purposes of impeachment, as permitted by rule 611(c), Texas Rules of Evidence. *See Mock v. State*, 848 S.W.2d 215, 220 (Tex.App.–El Paso 1992, pet. ref'd).

We find that appellant has not preserved error because his second objection was not specific and does not comport with appellant's complaint on appeal. TEX. R. APP. P. 33.1(a); *Holland*, 802 S.W.2d at 699. We also find that by failing to specifically and timely object to each question the State propounded, or obtain a "running objection" to the State's line of questioning, appellant has failed to preserve his complaint on appeal. *Sattiewhite v. State*, 786 S.W.2d 271, 283-284 (Tex.Crim.App. 1989). For these reasons, we overrule appellant's point of error one.

In points two and three, appellant contends the evidence is legally and factually insufficient to establish that he should have anticipated that Chris would kill Jason. Appellant argues the evidence fails to show that he should have anticipated that Chris would kill someone in the course of the kidnaping and the robbery.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245

(Tex. Crim. App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex. Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but acts only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex. Crim. App. 1982).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, the court of appeals views all the evidence without the prism of "in the light most favorable to the prosecution" and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is 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*. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. *Id*. The appropriate remedy on reversal is a remand for a new trial. *Id*.

The trial court instructed the jury on criminal responsibility for the conduct of another as follows:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipating as a result of the carrying out of the conspiracy.

TEX. PEN. CODE ANN. § 7.02(b) (Vernon 1994 & Supp. 2000).

Appellant does not challenge the sufficiency of the evidence with respect to appellant's involvement in the conspiracy to rob or attempt to rob Coker. Appellant attacks only the sufficiency of the evidence

to show that he should have expected Chris would murder Jason as a result of the carrying out of the conspiracy.

In his statement, appellant stated he first saw Chris' gun when Chris got out of appellant's truck at the Grimes' residence and ran over and held it on Coker. He denied that he had made such a statement when he testified. Appellant stated he first saw Chris' gun when they stopped in the Baytown Civic Center. At that point, he asked Chris, "[W]hat are you doing?" In Holloway Park, appellant stated Chris pointed the gun at appellant and made some reference to appellant being a "big guy" and he (Chris) was a "small guy." When Chris walked Coker and Jason towards the woods, appellant stated he told Chris not to shoot them, just knock them out.

Coker testified that Chris pointed a gun at him at Grimes' house, and told him this was a carjacking. After Coker drove Chris and Jason to the Civic Center, Chris told Coker and Jason to lay face down on the ground. Coker heard appellant and Tony get out of the Nissan and walk towards the Honda. Coker then heard the three of them whispering, but could not hear what they said. Coker stated that Chris tried to start the Honda while one of the other two held the gun on him. Either appellant or Tony then said: "Hurry up, somebody's coming. We've been here too long." When they got to Holloway Park, Chris again ordered Jason and Coker to lie on their stomachs. Coker stated he heard appellant, Tony, and Chris whispering, and Coker could see three pairs of "tennis shoes." Then Chris walked Jason and Coker to the woods and killed Jason and severely wounded Coker.

The jury could choose not to believe appellant's testimony about not seeing the gun until they arrived at Baytown Civic Center, and could choose to believe appellant's confession wherein he knew Chris had a gun when he "carjacked" Coker at the Grimes' residence. *Flanagan v. State*, 675 S.W.2d 734, 746 (Tex.Crim.App.[Panel Op.] 1984)(opinion on rehearing). The factual dispute is to when appellant first became aware of Chris' gun, not the fact that Chris had a gun. Because appellant admitted that he knew Chris had a gun, the shootings could have been anticipated. *See Flores v. State*, 681 S.W.2d 94, 96 (Tex.App.-Houston [14th Dist.] 1984), *affirmed*, 690 S.W.2d 281 (Tex.Crim.App. 1985).

We hold that a rational trier of fact could have found beyond a reasonable doubt that the murder should have been anticipated by appellant as a result of the carrying out of the conspiracy. Appellant's point of error two is overruled.

In point three, appellant contends the same evidence is factually insufficient to show the murder should have been anticipated by appellant. Appellant's testimony conflicts with his voluntary confession about when he first knew Chris had a gun at which point he should have anticipated a shooting. Coker's testimony indicates the three conspirators talked at the Civic Center and one of them held a gun on Coker and Jason while Chris tried to start Coker's Honda.

The facts were in dispute as to when appellant actually knew Chris had a gun. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State*, 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. After reviewing the record, we conclude the jury's finding that appellant should have anticipated a shooting is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. We find the evidence is factually sufficient to sustain appellant's conviction, and we overrule his point of error two.

We affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Draughn, Lee, and Hutson-Dunn.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Joe L. Draughn, Norman Lee, and D. Camille Hutson-Dunn sitting by assignment.