Affirmed and Opinion filed July 26, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00432-CR

JOSE LUIS ESCARENO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 806507

O P I N I O N

Appellant entered a plea of not guilty to the offense of capital murder. A jury found him guilty and the trial court assessed punishment at life in prison. In a single point of error, appellant claims the trial court erred in denying appellant's motion for instructed verdict. Appellant claims the evidence was legally and factually insufficient to show that he intended to kill the complainant and that he formed the intent to rob the complainant before or during the murder. We affirm.

Factual Summary

Before the murder, appellant met the complainant at the home of appellant's father-in-law, Rodrigo Alvarado. The complainant met with Alvarado to arrange a purchase of marijuana. Appellant obtained the complainant's telephone number from Alvarado's Caller ID box and phoned the complainant on his own. Appellant arranged to sell the complainant 125 pounds of marijuana at $425.00 per pound. Appellant and the complainant first met at a convenience store to exchange the marijuana for money. Appellant arrived at the meeting without the marijuana and requested the meeting be postponed because the complainant arrived with too many people. During this meeting, appellant purportedly phoned his supplier of the marijuana to tell him the exchange had been postponed. Robert Walker, a witness to the first meeting, testified that appellant only pretended to make the phone call. Appellant requested that the complainant meet him the next day and that the complainant come to the meeting alone.

Appellant met the complainant the next day at the convenience store. The two men traveled to appellant's mother-in-law's home to make the exchange. The complainant brought $42,000 in cash. Appellant did not bring any marijuana to the meeting. Appellant and the complainant were seated at the kitchen table in appellant's mother-in-law's home. Appellant counted the money the complainant had brought and became angry because the money was $10,000 short. The complainant then asked appellant if he had the marijuana. The two men began to argue over the marijuana and the money. Appellant testified that the complainant then reached for his gun. Appellant shot the complainant twice. Appellant testified that the complainant then sat down and pointed his gun at appellant. Appellant then shot the complainant several more times.

After killing the complainant, appellant and his brother-in-law, Francisco Alvarado, who had been outside, wrapped the complainant in a blanket. They cleaned up the blood from the floor and threw the bloody paper towels and the complainant's gun in the blanket with the body. Appellant and Francisco then placed the body, wrapped in the blanket, inside the complainant's van. Appellant drove the van approximately one mile from his mother-in-law's house and abandoned it. Appellant and Francisco then drove in another car back to the house where they

stole the $42,000. Appellant and Francisco then drove to a park where they threw the complainant's pager, cellular phone, and keys into a bayou. They also threw the gun used to kill the complainant into the bayou. Appellant and Francisco then drove to Mexico where they stayed two or three days before returning to Houston.

Several months later, appellant was asked to give a statement as a witness to the murder. In that statement, he said he knew the complainant was a marijuana dealer, but did not know how he had been killed. The day after giving that statement, appellant changed his story and gave a statement in which he admitted being present when a person named Pancho killed the complainant during a drug deal. Several hours after making his second statement, appellant made a third statement in which he admitted that Pancho did not exist, and it was he who had killed the complainant, but that it was in self-defense.

Standards of Review

Consistent with the Fourteenth Amendment guarantee of due process of law, no person may be convicted of a criminal offense and denied his liberty unless his criminal responsibility for the offense is proved beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). Because the jury is the sole judge of the weight and credibility of the evidence at a criminal trial, our task as an appellate court is to consider all the record evidence in the light most favorable to the jury's verdict, and to determine whether, based on that evidence and all reasonable inferences therefrom, any rational jury could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). If, given all the evidence, a rational jury would necessarily entertain a reasonable doubt as to the defendant's guilt, the due process guarantee requires that we reverse and order a judgment of acquittal. *Narvaiz v. State,* 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied,* 507 U.S. 975 (1993). Appellate courts are not fact finders, but act only as a final, due process safeguard ensuring the rationality of the fact finder. *See Moreno v. State,* 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

Appellant also challenges the factual sufficiency of the evidence to support his conviction. The courts of appeals are constitutionally empowered to review the judgment of the trial court to determine the factual sufficiency of the evidence used to establish the elements of the offense. *Johnson v. State,* 23 S.W.3d 1 (Tex. Crim. App. 2000). A factual sufficiency review dictates that the evidence be viewed in a neutral light, favoring neither party. *See Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). In this neutral light, the appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. *Id*. at 133. This review, however, must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *See Johnson,* 23 S.W.3d at 7. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Such an approach occasionally permits some credibility assessment, but usually requires deference to the jury's conclusion based on matters beyond the scope of the appellate court's legitimate concern. *Id.*

Appellant further claims that the evidence is insufficient because it does "not exclude every other reasonable hypothesis except that of the guilt of the defendant." The outstanding reasonable hypothesis construct is not employed by appellate courts in resolving sufficiency challenges unless the case was tried prior to the Court of Criminal Appeals decision in *Geesa v. State,* 820 S.W.2d 154, 161 (Tex. Crim. App. 1991), *overruled on other grounds, Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000). This case was tried in 2000, therefore, the analytical construct does not apply.

Intent to Cause the Death of the Victim

The 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. *Medina v. State,* 7 S.W.3d 633, 637 (Tex. Crim. App. 1999), *cert. denied,* 529 U.S. 1102 (2000). Therefore, the jury could infer from appellant's use of a deadly weapon that he intended to kill the complainant. A number of other factors could have led the jury to reasonably believe appellant's conduct was intentional, including: two bullet wounds to the

head, particularly their angle of entry and trajectory; bullet wounds to the top of the complainant's head, indicating appellant shot the complainant from above; and evidence that the wound to the complainant's right arm was a defensive wound. Viewing the evidence in a light most favorable to the verdict, we find a rational jury could have found beyond a reasonable doubt that appellant intended to kill the complainant.

Viewing the evidence in a neutral light, we note that appellant testified in his own defense. Appellant testified that he intended to complete the drug deal with the complainant and only shot the complainant in self-defense. Other evidence showed that appellant did not intend to undercut his father-in-law's marijuana business by actually selling marijuana to the complainant; that appellant requested the complainant be alone during the transaction; and that the complainant was attempting to defend himself when appellant shot him. A rational jury, as the sole judge of the weight and credibility of the evidence, could have rejected appellant's assertion that he acted in self-defense. We find the evidence is legally and factually sufficient to support the jury's finding that appellant intended to kill the complainant.

In the Course of Committing Robbery

In a capital murder prosecution for murder during the course of a robbery, the State must prove the defendant formed the intent to rob prior to, or concurrent with, the murder. *Williams v. State,* 937 S.W.2d 479, 483 (Tex. Crim. App. 1996). Intent to rob the victim can be inferred from the acts, words, and conduct of appellant. *Patterson v. State,* 980 S.W.2d 529, 531 (Tex. App.—Beaumont, 1998, no pet.). Evidence from which a rational jury could have inferred appellant's intent to rob the victim include: appellant's insistence that the complainant come alone to complete the marijuana transaction; the fact that appellant did not have the marijuana with him; and the unlikelihood that appellant would have undercut his father-in-law's drug business.

In his defense, appellant testified that he intended to complete the drug transaction and only shot appellant in self-defense. Therefore, it was not until he had disposed of the complainant's body and the gun used to kill the complainant that he thought to steal the

complainant's money. Applying the appropriate standards of review, we find the evidence legally and factually sufficient to support the jury's finding that appellant formed the intent to rob the complainant either before or during the murder. Appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed July 26, 2001.
Panel consists of Justices Anderson, Hudson, and Seymore.
Do Not Publish — TEX. R. APP. P. 47.3(b).