Affirmed and Opinion filed August 31, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00459-CR

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ALEJO COVARRUBIAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 770,221

O P I N I O N

Charged by indictment with the offense of murder, appellant, Alejo Covarrubias, pled not guilty and proceeded to trial. A jury found him guilty and assessed punishment at confinement for fifty-five years in the Texas Department of Criminal Justice, Institution Division. Appellant filed this appeal, claiming the evidence was both legally and factually insufficient to prove beyond a reasonable doubt that he was not justified in using deadly force to defend a third party. For the following reasons, we affirm appellant's conviction.

STATEMENT OF FACTS

Appellant and his brother, Raymundo Covarrubias, were at Muni's Bar on the night of December 6, 1997. Appellant's tan truck was blocking several vehicles in the parking lot, including the vehicles of Rosendo Rodriguez and Rogelio Mendez, Rodriguez's nephew. Rodriguez was trying to leave with a man named Luis who asked appellant to move his truck. Edmundo Tijerina, the owner of the bar, was outside at the time and also asked appellant to leave.

According to the State's version of the facts, as related by Rodriguez and Tijerina, the tan truck pulled out of the parking lot, made a u-turn, and then came back into the parking lot, completely blocking the exit. Appellant then got out of the tan truck carrying a gun. He walked over to the passenger's side of Rodriguez's truck and tapped on the window with the gun. At that point, he saw Mendez and Raymundo fighting. As appellant began running towards the fight, he shot Mendez. As Mendez fell to the ground, he pulled Raymundo with him. Raymundo pulled out a knife from the front pocket of his jacket and began stabbing Mendez. Once appellant reached the two, he stood over Mendez and shot him in the body. Then, appellant grabbed Mendez by the hair, placed the gun directly to Mendez's head, and shot him again. Mendez did not have anything in his hands and did not use a weapon at any time.

Appellant presented a different version of the events. He testified that he never left the parking lot. Appellant claims he pulled out in his truck but stopped to look for a cassette tape. According to appellant, while he was looking for the tape, Mendez pulled up in a Bronco. Stopping on the passenger side of appellant's tan truck, Mendez asked for directions. Appellant gave him directions and went back to searching for the tape; when appellant looked up from getting the tape, the Bronco was gone. After appellant found the tape, he heard voices and whistling coming from behind him, so he got out of the truck to see if anyone was talking to him. Rodriguez asked appellant to move his truck again. Appellant contends that he neither walked over to Rodriguez's truck with a gun nor tapped on the window. Appellant testified that his gun was wrapped in a towel behind his seat.

Appellant claims that while he was talking to Rodriguez, Mendez drove back into the parking lot and parked about fifteen feet from appellant's truck. When appellant went to get back into his truck, he saw two men running towards it. The closest one, Mendez, grabbed Raymundo. Mendez hit Raymundo with what appellant believed to be a weapon; however, appellant could not see anything in Mendez's hands and could not explain what the object was. Raymundo fell backwards towards the ground. According to appellant, Raymundo suffered an injury and had blood on his face. Appellant claims he then ran behind his truck to the driver's side to get his gun. He pulled out his gun, put a clip in it, ran towards the fight, and fired the first shot as Mendez was sitting on top of Raymundo and beating him up. Appellant took a step closer and shot Mendez a second time. Appellant continued to move closer and shot Mendez for the third time from a distance of five or six feet. Appellant testified that he never saw Raymundo with a knife. Appellant went over to Raymundo and grabbed him by the shoulder to pick him up. Appellant and Raymundo then got into the tan truck and left.

The medical examiner, Dr. Tommy Brown, testified that Mendez suffered eight stab wounds and three gun shot wounds, including one contact wound to the head.[1] Detective Allen Beall testified that neither appellant nor Raymundo suffered any injuries.

LEGAL SUFFICIENCY

In his first point of error, appellant claims the evidence was legally insufficient to prove beyond a reasonable doubt that he was not justified in using deadly force to defend a third party. In determining whether the evidence is legally sufficient, we view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We evaluate all of the evidence in the record, whether admissible or inadmissible. *See Johnson v. State*, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998) (en banc) (citing *Gardner v. State*, 699 S.W.2d 831, 835 (Tex. Crim. App. 1985)).

[1] A contact wound is caused when the gun is held directly to the skin of the victim and is fired.

When self-defense has been raised, we look to whether the evidence is legally sufficient to allow the jury (1) to find the essential elements of the offense beyond a reasonable doubt and (2) to find against appellant on the self-defense theory beyond a reasonable doubt, not to whether the State presented evidence to affirmatively refute self-defense. *See Benavides v. State*, 992 S.W.2d 511, 521 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd) (citing TEX. PENAL CODE ANN. § 2.03(d) (Vernon 1994); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991)). The State has the burden to show beyond a reasonable doubt that the force used was not reasonable or justified. *See Tucker v. State*, 15 S.W.3d 229, 235 (Tex. App.–Houston [14th Dist.] 2000, pet. filed) (citing *Saxton*, 804 S.W.2d at 913).

To prove murder, the State must show that a person either intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *See* TEX. PEN. CODE ANN. § 19.02(b)(1) & (2) (Vernon Supp. 2000). In this case, appellant shot Mendez three times with a gun. Appellant shot him once from across the parking lot, grazing Mendez's back. Appellant then shot Mendez a second time in the body. The final time, appellant grabbed Mendez by his hair, put the gun to Mendez's head, and shot him above his right eye. These events clearly show appellant intentionally or knowingly caused the death of Mendez or intended to cause serious bodily injury to him and that appellant committed an act clearly dangerous to human life that caused Mendez's death. We find the evidence is legally sufficient to prove the essential elements of murder beyond a reasonable doubt.

Next, we consider whether the evidence is legally sufficient to allow the jury to find against appellant on the self-defense theory beyond a reasonable doubt. Under the Penal Code, ". . . a person is justified in using deadly force against another to protect a third person" when the third person is threatened by circumstances that would entitle the actor to protect himself, and the actor reasonably believes his intervention is immediately necessary. TEX. PEN. CODE ANN. § 9.33 (Vernon Supp. 2000); *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996) (en banc). By this statute, the legislature placed the accused "in the shoes of the third person." *Hanley v. State*, 921 S.W.2d 904, 911 (Tex. App.–Waco 1996, pet. ref'd) (quoting

Hughes v. State, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986)). Therefore, in determining whether the accused was justified in using deadly force against another in defense of a third person, we must determine the reasonableness of the accused's beliefs that (1) another was using or attempting to use deadly force against a third person and (2) the force used to repel the other's attack against the third person was immediately necessary. *See Bennett v. State*, 726 S.W.2d 32, 38 (Tex. Crim. App. 1986) (en banc).

Mendez was the aggressor in the fight. He attacked Raymundo and initiated a fist fight between them. It is reasonable to find that appellant was justified in using some force to defend against Mendez's use of unlawful force. However, appellant used deadly force while Mendez did not. Mendez was unarmed when he attacked Raymundo. Mendez did not use a weapon at any time during the fight, and no weapons were found on or around his body. Appellant could not have reasonably believed Mendez was using or attempting to use deadly force against Raymundo.

Even if appellant's belief that Mendez was using or attempting to use deadly force against Raymundo were reasonable, such a finding is not sufficient by itself to establish justification for deadly force. Appellant must also have reasonably believed his intervention was immediately necessary to protect Raymundo. Appellant testified that even though Mendez was sitting on top of Raymundo and appeared to be winning the fight, appellant thought Raymundo might get Mendez off of him. If Raymundo could have escaped Mendez's hold, then Raymundo likely could have gotten away. Therefore, appellant could not have reasonably believed that his intervention with deadly force was immediately necessary.

We find the evidence is legally sufficient to allow the jury to find against appellant on the self-defense theory beyond a reasonable doubt. Having found that the evidence is legally sufficient to allow the jury (1) to find the essential elements of murder beyond a reasonable doubt and (2) to find against appellant on the self-defense theory beyond a reasonable doubt, we overrule appellant's first point of error.

FACTUAL SUFFICIENCY

In his second point of error, appellant claims the evidence was factually insufficient to prove beyond a reasonable doubt that he was not justified in using deadly force to defend a third party. When reviewing the factual sufficiency of the evidence, we consider all of 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 as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (en banc). Three major principles guide appellate courts when conducting a factual sufficiency review. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (en banc) (construing *Clewis*, 922 S.W.2d at 129). The first principle requires deference to the jury's findings, especially those concerning the weight and credibility of the evidence. *See Johnson v. State*, 2000 WL 140257, at *6 (Tex. Crim. App. Feb. 9, 2000) (en banc) (construing *Cain*, 958 S.W.2d at 404). Appellate courts "'are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable.'" *Clewis*, 922 S.W.2d at 135 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)). Disagreeing "with the fact finder's determinations is appropriate only when the record clearly indicates such a step is necessary to arrest the occurrence of a manifest injustice." *Johnson*, 2000 WL 140257, at *6. The second principle requires a detailed explanation of a finding of factual insufficiency. *See Cain*, 958 S.W.2d at 407. The final principle requires the court of appeals to review all the evidence. *See id.* If there is sufficient competent evidence of probative force to support the finding, a factual sufficiency challenge cannot succeed. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.—El Paso 1996, no pet.).

"Self-defense is subject to a factual sufficiency review." *Tucker*, 15 S.W.3d at 235 (citing *Shaw v. State*, 995 S.W.2d 867, 868 (Tex. App.–Waco 1999, no pet.)). In conducting this review, we look at all the evidence in the record which is probative of self-defense to decide if the finding of guilt and finding against self-defense are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Vasquez v. State*, 2 S.W.3d 355, 359 (Tex. App.–San Antonio 1999, pet. filed) (citing *Reaves v. State*, 970 S.W.2d 111, 116 (Tex. App.–Dallas 1998, no pet.) (combining standards set out in *Clewis* and

Saxton to review the factual sufficiency of a self-defense issue)). All who testified, including appellant, agree that appellant shot Mendez three times with a gun. Thus, the finding that appellant committed murder is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Even though Mendez provoked the encounter, there is very little evidence in the record to suggest that appellant could have reasonably believed Mendez was using or attempting to use deadly force against Raymundo. Both Tijerina and appellant testified that Mendez was winning the fight. However, Tijerina testified that Mendez was unarmed. Although appellant testified that he saw Mendez hit Raymundo in the head with a weapon and that Raymundo's face was bloody, he further testified that he could not tell whether Mendez had a weapon, could not see anything in Mendez's hands, and could not explain what the object was. No weapon was found on or around Mendez's body. Additionally, according to Detective Beall, Raymundo suffered no injuries.

Nothing in the record suggests that appellant could have reasonably believed that the amount of force he used to repel Mendez's attack was immediately necessary. According to Tijerina, appellant was armed with a gun and Raymundo was armed with a knife, both of which were in clear view and used against Mendez. Although appellant testified that he never saw Raymundo use a knife, and that Mendez was on top of Raymundo hitting him, appellant further testified that he thought Raymundo might be able to get Mendez off of him. Therefore, the evidence does not support a finding that appellant reasonably believed the amount of force he used against Mendez was immediately necessary. Reviewing all the evidence in the record which is probative of self-defense, we do not find that the jury's finding of guilt and finding against self-defense are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellant's second point of error.

We affirm the judgment.

/s/ Kem Thompson Frost

Justice

Judgment rendered and Opinion filed August 31, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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