Affirmed and Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-98-00314-CR

ERIC W. HEAD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 337th District Court
Harris County, Texas
Trial Court Cause No. 748,236

O P I N I O N

Appellant was convicted by a jury of murdering his brother-in-law and sentenced to ten years in the Institutional Division of the Texas Department of Criminal Justice. Appellant brings three points of error, complaining the evidence is legally and factually insufficient to support the verdict and the State gave an improper jury argument. We affirm.

Factual Sufficiency Point of Error Waiver

Before discussing appellant's factual insufficiency point of error, we must address the State's argument that appellant waived this point of error. The State argues appellant waived his factual sufficiency point of error because it was not brought as a separate point of error and cites *McDuff v. State*, 939 S.W.2d 607, 613 (Tex. Crim. App. 1997). *McDuff*, however, dealt with insufficient briefing. *Id*.

Here, appellant's factual sufficiency argument, which is brought as a separate point of error, states, *in toto*, "[t]he evidence was factually insufficient to support appellant's conviction." Under this point of error, appellant adopted the "facts, arguments, and authorities asserted in the previous point of error [for legal sufficiency] as if reproduced here in their entirety." Appellant also cites *Stone v. State*, 823 S.W.2d 375, 379 (Tex. App.–Austin 1992, pet. ref'd untimely filed) for the factual sufficiency standard of review and summarily concludes, "[t]he verdict in this case was contrary to the weight of the evidence and it should be overruled."

Appellate Rule 38.1(e) provides: "The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(e). This rule reveals "the intention of the Supreme Court to have all appeals judged on the merits of controversies rather than hypertechnical waiver issues" and represents "a major change in one of the most picayune areas of appellate law under the old [appellate] rules." John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 946-47 (1997). Thus, because appellant's point of error raises a factual sufficiency challenge, we will review the evidence in this case appropriately.

Legal and Factual Sufficiency

We will address appellant's legal and factual sufficiency points of error together.

In his first and second point of error, appellant asserts the evidence was both legally and factually insufficient to support his murder conviction. To test the legal sufficiency of the evidence, we review the evidence in the light most favorable to the verdict to see if any rational trier of fact could have found (1) the

essential elements of murder beyond a reasonable doubt and (2) against appellant on the self-defense issue beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). To review the factual sufficiency of the evidence, we view all 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. *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996).

The sufficiency of the evidence is determined from the cumulative effect of all the evidence; each fact in isolation need not establish the guilt of the accused. *See Alexander v. State*, 740 S.W.2d 749, 758 (Tex. Crim. App. 1987). The standards set forth above are the same for both a direct and circumstantial evidence case, and the prosecution need not exclude every other reasonable hypothesis except the guilt of the accused. *See Sonnier v. State*, 913 S.W.2d 511, 516 (Tex. Crim. App. 1995).

When the issue of self-defense is put to the jury, the State is not required to affirmatively produce evidence to refute a self-defense claim, but must prove its case beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 912; *McAllister v. State*, 933 S.W.2d 763, 766 (Tex. App.–Houston [14th Dist.] 1996, pet. ref'd). The issue of self defense is an issue of fact to be determined by the jury and the jury is free to accept or reject a defendant's evidence. *See Saxton*, 804 S.W.2d at 913-14; *McAllister*, 933 S.W.2d at 766. A verdict of guilty is an implicit finding rejecting a defendant's self defense theory. *See Saxton*, 804 S.W.2d at 914; *McAllister*, 933 S.W.2d at 766. Consequently, the jury, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury is free to believe or disbelieve any witness. *See id*. It may resolve conflicts in the evidence, accept one version of the facts, disbelieve a party's evidence, and resolve any inconsistencies in favor of either party. *See McIntosh v. State*, 855 S.W.2d 753, 763 (Tex. App.–Dallas 1993, pet. ref'd). Jurors are also entitled "to draw reasonable inferences from basic facts to ultimate facts." *Id*. The jury may use common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence. *See Wawrykow v. State*, 866 S.W.2d 87,

88-89 (Tex. App.–Beaumont 1993, pet. ref'd). If conflicting inferences exist, we must presume the trier of fact resolved any conflict in favor of the prosecution. *See Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

The following is some of the evidence that supported the verdict. Dr. Vladimir M. Paraungao, the Harris County Assistant Medical Examiner who performed the decedent's autopsy, testified "[i]t is my opinion that the deceased, Kenneth Ray Mairhofer, died as a result of asphyxia due to strangulation – asphyxiation due to lack of oxygen – because he was strangled." This testimony is consistent with appellant's testimony that he pressed his knee against the decedent's neck until the decedent passed out. Additionally, there was no evidence located on appellant's body of a struggle, other than a small scratch on his chin. Also, the following portion of appellant's written statement, admitted into evidence, supports the verdict:

> Kenny stood up and as soon as he stood up he ran towards me. While he was running at me I took the two fingers of my right hand and poked him in both his eyes. A little bit of blood came out of his eyes. I tackled him again and this time he was laying on his back beside the desk and between the desk and the wall. I was on top of him with my right knee on his throat and this time I was pressing pretty hard. I was holding onto the desk and pushing down with my knee. I kept asking him if he was gonna keep fighting me and he was nodding his head like he was saying yes so I kept pushing harder. I knew he was hurting but I kept pushing on his neck for about five minutes I did this. I got up when he quit fighting.

After this altercation, appellant dragged decedent's body in the garage and went to his mother's house. Appellant testified he did not take the deceased to the hospital because the deceased was too heavy and he was tired. While at his mother's house, appellant told his brother decedent was dead. However, appellant did not call the police at his mother's house because again, he was tired. The next morning, appellant told his parents about the incident – and they called the police.

Evidence that supported appellant's contention that he acted in self-defense consists only of his testimony the deceased communicated by nodding his head that he would continue fighting appellant. Even accepting appellant's version of the facts as true, this communication was not sufficient provocation for the

use of deadly force. *See* TEX. PEN. CODE ANN. § 9.31(b)(1) (Vernon Supp. 1999) (Verbal provocation alone does not entitle appellant to use deadly force).

The evidence detailed above, when viewed in the light most favorable to the verdict, is legally sufficient for a rational trier of fact to disbelieve appellant's self-defense testimony and to find beyond a reasonable doubt appellant committed murder. Upon reviewing the entire record, as detailed above, we cannot say the verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. *See Clewis*, 922 S.W.2d at 129. Accordingly, the evidence is legally and factually sufficient to support the conviction. Thus, we overrule points of error one and two.

Improper Jury Argument

In his third point of error, appellant argues the State committed reversible error in arguing about apparent inconsistencies in appellant's statements. The prosecutor stated, "[t]he fact is I'm going to tell you right now, as God is my witness, he's a damned liar." Appellant's objection to this remark was sustained and the trial court also granted his request to have the jury instructed to disregard the prosecutor's statement. However, the trial court denied appellant's request for a mistrial.

Proper jury argument is limited to a summation of the evidence, reasonable deductions from the evidence, an answer to argument by opposing counsel, or a plea for law enforcement. *See Wilson v. State*, 938 S.W.2d 57, 59 (Tex. Crim. App. 1996). A statement made during jury argument must be analyzed in light of the entire argument, and not only isolated sentences. *See Castillo v. State*, 939 S.W.2d 754, 761 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd); *Williams v. State*, 826 S.W.2d 783, 785-86 (Tex. App.–Houston [14th Dist.] 1992, pet. ref'd). An improper jury argument constitutes reversible error only if, "in light of the record as a whole, the argument is extreme or manifestly improper, violative of a mandatory statute or injects new facts, harmful to the accused, into the trial." *Felder v. State*, 848 S.W.2d 85, 95 (Tex. Crim. App. 1992).

Additionally, there is a general presumption "an instruction to disregard the evidence will be obeyed by the jury." *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987); *see Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998). We put "faith in the jury's ability, upon instruction, consciously to recognize the potential for prejudice, and consciously to discount the prejudice, if any, in

deliberations." *Gardner*, 730 S.W.2d at 696. Also, there has been no evidence presented the jury did not obey the trial court's instruction to disregard the statement. *See Colburn*, 966 S.W.2d at 520.

Here, the State was simply making a reasonable inference from the record. Wide latitude is allowed without limitation in drawing inferences from the evidence, so long as the inferences drawn are reasonable, fair, legitimate, and offered in good faith. *See Gaddis v. State*, 753 S.W.2d 396, 398 (Tex. Crim. App. 1988). Additionally, contrary to appellant's arguments, the prosecutor's statement did not "personally vouch[] for his case before God," and "invite the jury to speculate about matters not in evidence." *See, e.g., Gaffney v. State*, 937 S.W.2d 540, 543 (Tex. App.–Texarkana 1996, pet. ref'd); *Mock v. State*, 848 S.W.2d 215, 221 (Tex. App.–El Paso 1992, pet. ref'd); *Norwood v. State*, 737 S.W.2d 71, 73 (Tex. App.–Houston [14th Dist.] 1987, pet. ref'd) (Any alleged error from prosecutor's question that asked defendant "Who died and made you God?" was cured from trial court's instruction to disregard). In light of the entire argument, and after review of the record, these statements were reasonable deductions from the evidence. Accordingly, we overrule appellant's third point of error.

We affirm the judgment.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed October 14, 1999.

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

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

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