

Affirmed and Opinion filed December 30, 1999.



In The

Fourteenth Court of Appeals

NO. 14-98-00357-CR

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DWAYNE DAVID MALKA, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 182nd District Court
Harris County, Texas
Trial Court Cause No. 758,683;751,470**

O P I N I O N

This appeal finds its origins at a party that turned into a nasty melee resulting in a knife wound to complainant, Riley Mac Davis, and to the less fortunate complainant Robert Joel Bownds, a death by stabbing. The issues on appeal involve the quantum of evidence necessary for admission of co-conspirator statements and factual sufficiency. Appellant, Dwayne David Malka, was convicted by a jury of manslaughter and aggravated assault. The jury found a felony enhancement paragraph true in each case and imposed sentences of eighty and twenty years, respectively. Appellant presents five issues on this consolidated appeal: Issues 1, 2 and 3 assert the court erred in admitting statements made by an alleged

co-conspirator to three witnesses. Issues 4 and 5 contend the evidence is factually insufficient to support the convictions. We affirm.

Background

The scene of the crime was a party was held on the property of Butch Forest. Forest had hired Chad Rainey to work on a bar and a barbeque stand on his property. A dispute arose between the two over Rainey's compensation but was eventually settled with Forest's agreement to allow Rainey to throw a keg party using his facilities, charge admission, and keep the proceeds. Still, Forest remained upset with Rainey.

Several witnesses testified. Shirley Jones, Kimberly Hvornum, and Felicia Deason testified at trial about events shortly before the party. Jones and Hvornum stated that at a gathering several days before the party, they conversed with Joe Jacobs, who had helped Rainey work on Forest's property. Jacobs told them that Forest had hired him, appellant Malka, and another person to beat up Chad Rainey until he was in a coma. Jones testified that Jacobs unsuccessfully tried to recruit her fifteen-year-old son, Chuck McDaniel, to help beat up Rainey. Hvornum stated that Jacobs told her Malka was the person most likely to inflict the injury. Jacobs further related that because Malka had mental problems and could probably get off easier, he was the most likely person to do the harm to Rainey. Malka was not present when Jacobs made the statements, however, Jones testified that Malka told her on four or five occasions before the party that he could kill somebody and get away with it because he was crazy.

Deason testified that Jacobs told her, on the night of the party on April 25, 1997, in Malka's presence, Forest offered him money to beat up Rainey. When asked, "Did . . . Malka want a part of it or not?", she replied, "Yes."¹

¹ The disputed co-conspirator testimony of Malka's involvement in the plan to injure Rainey is cumulative of other admissible testimony by a friend of Malka, Clyde Taylor. He testified that Malka told him on more than one occasion that Forest was supposed to pay Malka several hundred dollars for beating up Rainey.

When Malka, Jacobs, and two other companions went to the party, Rainey was at the door collecting the cover charge. They refused to pay and Rainey called out to Brandon White. Malka attacked White and Rainey went to White's aid. At that point the fight became a free-for-all.

During the fight, Rainey saw Malka stab complainant Davis in the arm. Davis testified he did not see his assailant or the knife. While Rainey assisted Davis, he saw Malka swinging his knife back and forth, with people in close proximity to the blade.

Malka next fought with complainant Bownds. Bownds' roommate, Tyrone Stillwell, testified the two were fighting close together. Stillwell hit Malka twice and the fight ended. As Bownds and Stillwell walked away, Bownds collapsed. He had been stabbed in the chest. He died in minutes.

In all, four people had been stabbed by Malka, none of whom had been armed. That night, the officers, aided by portable floodlights, searched the grounds and buildings on Forest's property for weapons but found none. Officers later recovered a knife from Malka, which was stained with the blood of Bownds and Davis. Several knives were recovered from partygoers but none had blood of Bownds or Davis. At trial, the medical examiner testified that all of the four knives admitted into evidence could have been the one causing Bownds' fatal injury, but that Malka's was the one most consistent with the wounds. Malka admitted to cutting and slashing at anybody in his way and believed he cut three or four people.

Hvornum testified that after Jacobs had been released from jail after the party, he did not mention anything about Malka being stabbed. But in a second conversation with Jacobs, he told her that Malka had been stabbed in the thigh during the fight and that there was a pen knife behind a counter which he saw had been used by someone to stab Malka with. He then told her to not forget to tell police about the knife. At 6:28 a.m., Forest called police and told them he had found a knife behind a counter. However, another officer testified she had searched behind the counter the night before and the knife was not where it had allegedly been found that morning.

Co-Conspirator Statements

In his first three issues, Malka claims the trial court erred in allowing Jones, Kvornum, and Deason to testify about statements made by Jacobs. The court admitted the statements under TEX. R. EVID. 801(e)(2)(E). Under this rule, a statement is not hearsay if it is offered against a party and is a statement by a party's co-conspirator and made in furtherance of the conspiracy.

To avail itself of the co-conspirator exception to the hearsay rule, the State must demonstrate that (1) a conspiracy existed; (2) the statement was made during the course of and in furtherance of the conspiracy; and (3) both the declarant and appellant were members of the conspiracy. *Crum v. State*, 946 S.W.2d 349, 363 (Tex. App.–Houston [14th Dist.] 1997, pet. ref'd). It is not necessary for the defendant to have joined or have been a part of the conspiracy at the time the statements were made by the co-conspirator as long as the statements were made in furtherance of the conspiracy. *United States v. Gonzalez-Balderas*, 11 F.3d 1218, 1224 (5th Cir.1994); *Rodriquez v. State*, 552 S.W.2d 451, 454 (Tex.Crim.App.1977). Where two or more persons participate in the commission of a felony, the co-conspirator exception to the hearsay rule is applicable. *Roy v. State*, 608 S.W.2d 645, 651 (Tex.Crim.App.1980). Declarations of one conspirator may be used against another conspirator if the declaration occurred during the course of the conspiracy. *Id.*

The existence of a disputed conspiracy must be proved by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775, 2778-89, 97 L.Ed.2d 144 (1987); *Callaway v. State*, 818 S.W.2d 816, 831 (Tex. App.–Amarillo 1991, writ ref'd). It may be established by direct or circumstantial facts and may be inferred from the evidence. *Bourjaily*, 483 U.S. at 175, 107 S.Ct. at 2778-89; *Callaway*, 818 S.W.2d at 831. A conspiracy includes everything within the contemplation of the conspirators, and a conspiracy is terminated only after every act subsequent to the commission of the offense within the plan and breadth of the conspiracy (or furtherance of the conspiracy) has been performed. *Callaway*, 818 S.W.2d at 831.

Malka groups the alleged co-conspirator statements into two categories: those made pre-arrest (pertaining to the conspiracy to injure Rainey) and those made post-arrest (pertaining to the penknife). He argues that none of the requirements of Rule 801(e)(2)(E) have been met for either category of statement. We disagree. The pre-arrest statements noted above, made by Jacobs to Deason, Hvornum, and Jones

sufficiently proved the existence of the conspiracy to injure Rainey. Deason testified that Malka himself wanted in on the conspiracy to injure Rainey. Overt acts showing existence and furtherance of the conspiracy were proved by testimony of Malka and the other co-conspirators gathering at Jacobs' home just before the party to discuss their plans, and their attempt to recruit young Chuck McDaniel into the conspiracy.²

Malka argues that no conspiracy existed because, days after the fight, Jacobs told Jones that Forest had changed plans and that no one would be beat up. Because of this, he contends, there was no meeting of the minds as to the goal of the conspiracy. This after-the-fact and self-serving statement of Jacobs, while providing some evidence the conspiracy had been terminated, by no means compels the court to have so held. The assertion that the conspiracy had been terminated is belied by the events at the party. There, Malka and his co-conspirators had initiated a direct confrontation with Rainey, the object of their conspiracy. Rainey called White over and Malka struck him. From this evidence, the trial court acted within its discretion in determining the conspiracy had not been terminated before the party.

Malka argues Jacobs' post-party statements to Jones were inadmissible because any conspiracy that may have existed had been terminated because Rainey had been assaulted. The State answers that Jacobs' statements are analogous to cases where a conspirator's instruction to dispose of a murder weapon or fruits of a crime have been held to be in furtherance of the initial conspiracy. *See, e.g., Helms v. State*, 493 S.W.2d 227, 230 (Tex. Crim. App. 1973); *Vasquez v. State*, 902 S.W.2d 627, 636 (Tex. App.—El Paso 1995) *rev'd on other grounds*, 919 S.W.2d 433 (Tex. Crim. App. 1996); *Denney v. State*, 558 S.W.2d 467, 469 (Tex. Crim. App. 1977).

Though these cases are not completely in point, we agree the underlying principle applies and controls here. The conspiracy to injure Rainey resulted in an attack on Rainey, injury to Davis, and death to Bownds. Jacobs' instructing Hvornum to inform the police of the knife that had been used to "stab" Malka served to conceal or obfuscate the commission of these crimes by attempting to make it appear a

² Statements that are made in furtherance of a conspiracy include those made with intent to induce another to join the conspiracy. *Williams v. State*, 815 S.W.2d 743, 746 (Tex.App.--Waco 1991), *rev'd on other grounds*, 829 S.W.2d 216 (Tex.Crim.App. 1992).

co-conspirator had merely been acting in self-defense. We therefore hold this was an act in furtherance of the initial conspiracy.

The trial court did not abuse its discretion in admitting the testimony of Deason, Jones, and Kvornum. Malka's first three issues are overruled.

Factual Sufficiency

In his fourth and fifth issues, Malka avers the evidence was factually insufficient to sustain his convictions for manslaughter and aggravated assault.

In reviewing factual sufficiency, we must 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 Cain v. State*, 958 S.W.2d 404, 407 (Tex.Crim.App.1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App.1996). When conducting a factual sufficiency review, we must observe the principle of deference to jury findings. *Cain*, 958 S.W.2d at 407. The jury is the judge of the facts, and an appellate court should only exercise its fact jurisdiction to prevent a manifestly unjust result. *Id.*; *Clewis*, 922 S.W.2d at 135.

The great weight of the evidence showed Malka came to the party with cold-blooded intent to cause serious bodily injury at the party to Rainey, someone he had no apparent quarrel with, for the lure of money. Once there, without any provocation, he assaulted a person trying to assist Rainey, which gave rise to the melee.

Malka places emphasis on the testimony of several witnesses that at one point prior to knifing the complainants, numerous partygoers "swarmed" around a person, kicking and fighting him while he was on the ground. This person was eventually able to get up and resume fighting. Malka claims that because of this, he was justified in using deadly force in self-defense against Bownds and Davis. We are pointed to no place in the record where this person was identified. However, even if the person were identified as Malka, it would not justify overturning the jury verdict. The jury could clearly find Malka was the aggressor that instigated the fight and he eventually cut four unarmed people, killing one.

The jury's verdict was not against the great weight of the evidence, clearly wrong and unjust, or biased. Points four and five are overruled.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed December 30, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig (J. Amidei not participating).

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