Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01453-CR

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DEBRA GALE FORBES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 209th District Court
Harris County, Texas
Trial Court Cause No. 749,914

O P I N I O N

Appellant Debra Gale Forbes was convicted of murder and sentenced to twenty-five years' confinement. She presents one point of error, complaining of the jury's failure to find that she stabbed her housemate to death under the influence of "sudden passion." We find no error and affirm.

About 3:00 a.m. the morning of April 9, 1997, appellant came home from her employment as an exotic dancer at a Houston mens' club to find the deceased, her female housemate of a few weeks, moving out of the house. A physical fight ensued. Appellant's boyfriend, who had taken appellant to her house, tried to break the fight up, but appellant bit

him on the arm. The fighting stopped after a while, and appellant went into the house while the deceased remained outside. Appellant came back out, however, armed with a kitchen knife and tried to stab the housemate. The deceased took a nearby "for sale" sign and attempted to ward off appellant. Witnesses for the State testified that appellant looked angry and outraged; her boyfriend said she was "unstoppable" during the fight.

After a while the fighting again stopped, and appellant's boyfriend stated he thought everything was over. Appellant had gone back into the house and was washing her hands when she unexpectedly grabbed a second knife and ran back outside. She stabbed the deceased in the chest, slashing through her lung and severing her aorta. The housemate eventually bled to death in the driveway.

Following the stabbing, appellant washed up in the kitchen, put ice on her own injuries then checked into a motel with her boyfriend for the night. The next morning, the boyfriend called police.

Appellant's sole contention on appeal is that the jury's failure to find that appellant acted under influence of sudden passion is so against the great weight and preponderance of the evidence as to be manifestly unjust. At the punishment phase of trial, a special issue was submitted to the jury asking whether appellant caused the death of the deceased under the immediate influence of sudden passion arising from an adequate cause, to which the jury answered in the negative.

In *Meraz v. State*, 785 S.W.2d 146, 155 (Tex. Crim. App. 1990), the Court of Criminal Appeals set out the standard of review this court is to use when a defendant claims the jury's negative finding to an affirmative defense was not supported by the evidence:

> [W]hen the courts of appeals are called upon to . . . examine whether the appellant proved his affirmative defense or other fact issue where the law has designated that the defendant has the burden of proof by a preponderance of the evidence, the correct standard of review is whether after considering all the evidence relevant to the issue at hand, the judgment is so against the great weight and preponderance of the evidence so as to be manifestly unjust.

Id. The existence of "sudden passion" is a mitigating factor relevant to punishment, and the burden of proving sudden passion by a preponderance of the evidence during the punishment phase rests with the defendant. *Rainey s. State*, 949 S.W.2d 537, 541 (Tex. App. – Austin 1997, pet. ref'd), *cert. denied*, __U.S.__, 119 S. Ct. 186 (1998). It is an issue of fact to be determined by the jury. Thus, even though a defendant may produce some evidence of sudden passion, the jury is still free to choose to ignore the defendant's testimony if some other evidence supports its conclusion. See *Saxon v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991). Consequently in this case, even though appellant testified to a version of the events in support of her claim of sudden passion, the jury was free to disbelieve her version of the events. The question then becomes whether some other probative evidence existed to support the jury's finding. We find such evidence does exist. Appellant testified that the verbal fight commenced over the deceased using drugs in her house, but escalated when the deceased started beating appellant's head on the house. She testified she momentarily blacked out and "saw stars" after that, and was unable to recall much of what happened after that. She did not recall grabbing the second knife and stabbing the housemate in the chest, and did not recall having had the first knife.

While appellant contends that this issue must be reviewed under the standard set forth in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), we are compelled to note that the Texas Court of Criminal Appeals has not extended factual sufficiency review to any punishment issue. *See McGinn v. State*, 961 S.W.2d 161, 169 (Tex. Crim. App. 1998) ("As for punishment proceedings, this Court has not held that *Clewis* applies to any punishment issues, whether in capital or noncapital cases."). At least one court of appeals has opted to apply *Clewis* to the review of a sudden passion issue. *Naasz v. State*, 974 S.W.2d 418, 423 (Tex. App. – Dallas 1998, pet. ref'd) ("We see no impediment to factual sufficiency review under the new statute merely because sudden passion is now an issue in mitigation of punishment."). In light of *McGinn*, we decline to apply *Clewis* to the facts of this case without clear guidance from the Texas Court of Criminal Appeals.

We hold that the jury's finding that appellant did not act under the influence of "sudden passion" is not so contrary to the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Appellant's point of error is overruled.

The judgment is affirmed.

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Bill Cannon
Justice

Judgment rendered and Opinion filed January 13, 2000.

Panel consists of Justices Draughn, Cannon and Lee.[*]

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

[*] Senior Justices Joe L. Draughn, Bill Cannon and Norman Lee sitting by assignment.