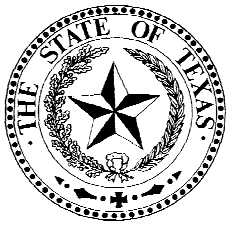
Affirmed and Opinion filed February 7, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00483-CR

NEIL EDWARD RICHARDSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 185th District Court
Harris County, Texas
Trial Court Cause No. 847,618

O P I N I O N

Neil Edward Richardson appeals a conviction for first degree felony murder[1] on the grounds that: (1) the trial court erred by admitting extraneous offense evidence; (2) the evidence was legally and factually insufficient to prove intent; and (3) the trial court erred in denying appellant's requested charge on criminally negligent homicide. We affirm.

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[1] A jury found appellant guilty and sentenced him to life in prison.

Extraneous Offenses

Appellant's first issue argues that the trial court erred by admitting extraneous offense evidence under Texas Rules of Evidence 403 and 404(b) because: (1) the evidence of his two previous attempts on the day of the charged offense to abduct young girls[2] was not relevant to his intent to shoot the complainant and was prejudicial; and (2) the trial court's limiting instruction in the charge[3] was not sufficient to overcome the inflammatory nature of the extraneous offenses.

We review a trial court's ruling on admissibility of evidence under an abuse of discretion standard. *Powell v. State*, No. 1244-00, 2001 WL 1504299, at * 2 (Tex. Crim. App. Nov. 28, 2001). Although evidence of other crimes is not admissible to prove the defendant's character in order to show that he acted in conformity with it, it may be admissible for other purposes, such as proof of intent or the lack of an accident. TEX. R. EVID. 404(b). Evidence that tends to refute a defensive theory is relevant, and the fact that such rebuttal evidence may include extraneous offenses does not itself preclude its admission into evidence. *Easley v. State*, 978 S.W.2d 244, 251 (Tex. App.—Texarkana 1998, pet. ref'd); *see* TEX. R. EVID. 404(b).

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2 Appellant complains about the admission of extraneous offense evidence that earlier on the day that he shot the complainant: (1) appellant tried to talk a 12-year-old girl into going with him in his truck before her uncle showed up; (2) appellant then asked a 14-year-old girl to come to his house to "interpret a letter" (which did not exist); (3) the 14-year-old girl's 10-year-old male cousin accompanied her to appellant's house; (4) appellant then waved a firearm at the two children and instructed the girl to tape up the boy; (5) according to appellant, he suddenly realized that what he was doing was wrong and decided to let the children go; (6) after a struggle for the firearm ensued, the girl ran out the front door, but the boy remained taped up in the house; and (7) appellant contends that he accidentally dropped the firearm and it fired a bullet a few inches from the bottom of the door after the girl had already run out the door.

3 The trial court instructed the jury in the charge that it could not consider extraneous offense evidence for any purpose unless it believed beyond a reasonable doubt that appellant committed the offense(s), and even then, could only consider the extraneous offense(s) in determining intent or absence of accident in connection with the charged offense.

If extraneous offense evidence is relevant, and a defendant specifically objects, a trial court must then determine if the probative value of the evidence is *substantially outweighed* by the danger of *unfair* prejudice.[4] *Salazar v. State*, 38 S.W.3d 141, 151 (Tex. Crim. App. 2001); *see* TEX. R. EVID. 403. In making this determination, the trial court should consider: (1) whether the ultimate issue to which the evidence pertained was seriously contested by the opponent of the evidence; (2) whether the State had other convincing evidence to establish that ultimate issue; (3) the compelling nature of the evidence, or lack thereof; and (4) the likelihood that the evidence was of such a nature as to impair the efficacy of a limiting instruction. *Salazar*, 38 S.W.2d at 152. In balancing probativeness and prejudice, a presumption exists favoring probative value. *Feldman v. State*, No. 73654, 2001 WL 147208, at *10 (Tex. Crim. App. Nov. 21, 2001).

In this case, appellant's defense rested on his lack of intent to shoot the complainant, claiming instead that he intended to kill himself when he arrived at the complainant's trailer, the complainant tried to calm appellant down, and as appellant lowered the firearm, it went off by accident. Further, appellant testified that he took the complainant's 5-year-old daughter with him after he shot her father because he couldn't see leaving her crying near her dead father. Because appellant thereby contested intent, the State was entitled to present evidence to refute appellant's testimony. In that context, the extraneous evidence was relevant to show appellant's previous attempts, and thus motive, to abduct a child and his previous use of, and thus intent, to use the weapon to threaten and perhaps cause harm to others, *i.e*, besides himself.

As to the balancing of probative value and unfair prejudice, the issue of intent was not only strongly contested by appellant, it was the only defensive theory he asserted at trial. Although the State had the complainant's daughter's trial testimony to show intent, that

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[4] As contrasted from mere detriment to a defendant's case, *unfair* prejudice refers, among other things, to an undue tendency to influence a decision on an improper basis, such as conformity with character rather than actual evidence of guilt. *See* FED. R. EVID. 403 advisory committee's note.

testimony consisted of a young child's one word responses and nods which might have been less convincing.[5] In addition, the State's testimony from a neighbor[6] to show intent was disputed by appellant. The extraneous offense evidence was compelling in that it strongly refuted appellant's core contention that the only person he wished to harm was himself.[7] The evidence did not impair the efficacy of the limiting instruction that was given because it did not bear on any issues besides those which appellant contested and to which the instruction limited the jury's consideration. Moreover, because the extraneous offenses occurred on the same day as the charged offense, it was more probative of his frame of mind on that particular day than of his overall character. Therefore, appellant's first issue does not demonstrate that the extraneous offense evidence was inadmissible and is overruled.

Sufficiency of the Evidence

Appellant's second and third issues argue that the evidence was legally and factually insufficient to prove his intent to cause the death of the complainant because: (1) the complainant's 5-year-old daughter provided the only evidence of the actual shooting and her testimony consisted of nods and one word responses; and (2) appellant testified that he only intended to kill himself but the gun went off accidentally and hit the complainant.

When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements

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5 However, Harris County Sheriff's Department Detective Michael Holtke also testified that, on the day of the shooting, the complainant's daughter told him that: (1) appellant had shot her father without saying anything first; and (2) after appellant shot her father, he told her to "shut up" and that he was taking her to his house.

6 The neighbor testified that, when he came to the complainant's trailer immediately after the shooting, appellant pointed the gun at his head and chased him as he ran away.

7 The extraneous offense evidence also cast doubt on whether the firearm had fired accidentally in that appellant's father (who owned the firearm) testified that it had never gone off accidently before and a Harris County Sheriff's Department Forensics Firearms Examiner testified that the firearm worked properly and would not have fired unless it was cocked and the trigger was pulled. (The firearm was a single action revolver which could be fired only after manually pulling the hammer back to cock it.)

of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). Under a factual sufficiency analysis, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *King v. State*, 29 S.W.3d 556, 563 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

In this case, appellant was indicted for: (1) intentionally and knowingly causing the death of the complainant; and (2) intending to cause serious injury to the complainant and causing his death by intentionally and knowingly committing an act clearly dangerous to human life. *See* TEX. PEN. CODE ANN. § 19.02(b)(1), (2) (Vernon 1994). Under these allegations, the culpable mental state needed to establish guilt was: (1) intent or knowledge that death would occur; or (2) intent to cause serious bodily injury. *See Mims v. State*, 3 S.W.3d 923, 924 (Tex. Crim. App. 1999). A jury may infer an intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996).

The day before the shooting, appellant was fired from a job he had waited eight years to get after his employer received the results of appellant's criminal background check. The following day (*i.e.*, the day of the shooting), appellant loaded his truck with, among other things, a bag of clothes, a book identifying the types of calls made over police radios, $600 cash, and a loaded firearm which he had experience shooting at a firing range. Appellant also ingested most of the 40 Vicodins, 40 Somas, 10 Valium, 10 Xanax, and 1/16th ounce of cocaine that he had bought that morning.

Before arriving at the complainant's trailer, appellant had tried to abduct two other young girls[8] and knew that the complainant had a five-year old daughter.[9] After driving to and entering the complainant's trailer, appellant cocked the firearm. The complainant's daughter testified that she was on the couch with the complainant watching television when appellant walked into their trailer and, without saying a word, shot her father once. After shooting the complainant, appellant took the complainant's daughter with him. Moreover, a neighbor testified that, when he came to the complainant's trailer immediately after the shooting, appellant pointed the gun at his head and chased him as he ran away. This evidence is legally sufficient to show that appellant intended to cause death or serious injury to the complainant.

Regarding factual insufficiency, the evidence controverting appellant's intent was appellant's testimony that: (1) he had the firearm pointed at his own head and when he lowered it at the request of the complainant, it accidentally went off; (2) he never intended to kill the complainant; (3) he could not remember how or why the firearm discharged; (4) he did not abduct the complainant's daughter, but could not see leaving her in the trailer with her dead father; (5) he had not tried to abduct the 12-year old girl, but instead was only taking groceries to her house; (6) he had not shot at the 14-year-old girl as she tried to escape from his house; and (7) he did not point the gun at the complainant's neighbor after he shot the complainant.

However, despite appellant's controverting testimony, the proof of guilt was not so obviously weak or so greatly outweighed by contrary proof as to be factually insufficient.[10]

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8 *See supra* note 2.

9 Appellant had known the complainant for a little over a year and had repaired computers for him.

10 In addition to the other evidence, the crime scene does not corroborate that the complainant was in the midst of trying to calm appellant down when he was accidentally shot. Harris County Sheriff's Deputy Arthur Wayne Nolley testified that he found the complainant sitting on a couch in a relaxed position, holding a pen in one hand and a piece of paper, on which he had written a toll free phone number, in the other.

Because appellant's second and third issues thus fail to demonstrate the legal or factual insufficiency of the evidence, they are overruled.

Charge

Appellant's fourth issue argues that the trial court erred in denying his requested charge on criminally negligent homicide because: (1) he testified that he had no intent to shoot the complainant and (2) he was harmed when the jury could not consider convicting him of that lesser offense.

A defendant is entitled to a lesser-included offense instruction if: (1) the lesser-included offense is included within the proof necessary to establish the offense charged, and (2) some evidence exists in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser included offense. *Wesbrook*, 29 S.W.3d at 113.

The required culpable mental state is what distinguishes murder from criminally negligent homicide.[11] Thus, as contrasted from having an intent to kill or cause serious injury, appellant would have been criminally negligent if he should have been aware of the risk of having a loaded, cocked firearm at complainant's trailer, but failed to perceive it.[12] Because criminally negligent homicide is thus a lesser-included offense of murder, the first prong of the test is satisfied. *See Cardenas v. State*, 30 S.W.3d 384, 392 (Tex. Crim. App. 2000).

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11 *Johnson v. State*, 915 S.W.2d 653, 657 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (noting that culpable mental state is intentional or knowing for murder and negligence for criminally negligent homicide).

12 *See id.* A person acts with criminal negligence with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. TEX. PEN. CODE ANN. § 6.03(5). The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint. *Id.*

As to the second prong, appellant testified that: (1) he knew the firearm was loaded; (2) he had cocked the firearm; (3) he had experience shooting this firearm at a shooting range; (4) he intended to kill himself with the firearm; and (5) the firearm had gone off accidentally earlier that day. However, if anything, this evidence shows that appellant had experience with this particular firearm, a recognition of its lethal capability, and thus no failure to perceive the risk associated with it being cocked and loaded, or its alleged ability to discharge accidentally. Accordingly, there is no evidence to show that if appellant was guilty, he was guilty of only criminally negligent homicide. Thus, appellant's fourth issue is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed February 7, 2002.
Panel consists of Justices Yates, Edelman, and Guzman.
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