Affirmed and Opinion filed April 27, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00095-CR

CARLOS RENEE AFANE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 177th District Court
Harris County, Texas
Trial Court Cause No. No. 751,842

O P I N I O N

A jury convicted Appellant Carlos Renee Afane of capital murder and assessed punishment of life imprisonment. In four points of error, Appellant claims that (1) there is legally insufficient evidence of his intent to cause death; (2) there is factually insufficient evidence of his intent to cause death; (3) there is insufficient evidence that he acted as a party to arson; and (4) the trial court reversibly erred in admitting the prior consistent statement of a witness. We overrule his points of error and affirm.

BACKGROUND

Carlos Afane picked up a twenty-year-old male prostitute in the Montrose area of Houston and solicited sex. The prostitute, Clayton "C.C." Workman, who appeared to be a woman, told Appellant the price was $50. Appellant only had $30. Therefore, C.C. secretly intended to take Appellant's money and not perform. To this end, C.C. persuaded Appellant to take him to a nearby apartment, promising to return to Appellant's truck in a few minutes. Instead, C.C. passed through the apartment building to another detached apartment in the rear. When C.C. left an hour later, Appellant was no longer waiting outside.

The property manager of the apartments through which C.C. passed lived on the second floor with his family. Around 3:00 a.m., he, his wife, and his stepdaughter awoke to smoke, fire crackling, and the sound of fire alarms. They jumped out their window and started helping other tenants out of the second floor apartments. They could hear another second floor tenant, Jerrie Taylor, screaming, but could not see her at her window. When the firefighters arrived, they tried to save Jerrie Taylor, but could not reach her. It took fifty-five firefighters and sixteen fire trucks to extinguish the blaze. When it was out, they found Jerrie Taylor dead. She had been overcome by heat and smoke and been asphyxiated by carbon monoxide and soot inhalation.

After the fire, arson investigators determined that it had been intentionally set in the front entrance to the building by a wooden stairwell. Further, a liquid accelerant, like gasoline, had been used to start the fire. The point of origin was particularly dangerous to the apartment tenants because it limited access to both exits of the building and the wooden staircase acted as a chimney to spread the fire to the second story.

Two weeks after the fire, Liberty County constables arrested a man named Robert McComb. McComb had been convicted of two counts of aggravated assault with a deadly weapon, retaliation, and failure to appear. He had forfeited his bond and had been at large for about a year. Immediately upon his arrest, McComb told the Liberty constables that he knew about a fire in Houston in which a woman had died. He implicated Appellant as the man who had set the fire, intending to kill a prostitute who had stolen money from him. Appellant was picked up and he gave two statements, each alleging McComb started the fire. At trial, C.C. identified Appellant as the man who had solicited sex from him.

SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

In points of error one and two, Appellant challenges the sufficiency of the evidence to establish that he intended to cause death. In point of error three, he claims that if the jury found him guilty as a party, there is insufficient evidence of his intent to assist or promote arson. When reviewing the legal sufficiency of the evidence, we look at the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995); *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). The jury is the exclusive judge of the credibility of witnesses and the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.* This standard of review is the same for direct and circumstantial evidence cases. *See Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986).

When reviewing 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." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential so as to avoid substituting our judgment for that of the jury. *See id.* at 133; *Roberts v. State*, 987 S.W.2d at 163.

B. Capital Murder

The State indicted Appellant under two theories of capital murder: that he was the primary actor and that he was a party to the offense. Under Texas law, a person commits capital murder if he or she intentionally causes the death of another while committing or attempting to commit arson. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (Vernon 1994). A person may be guilty as a party to an offense if "acting with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." TEX. PENAL CODE ANN. § 7.02(a)(2). "Before the accused may be convicted of capital murder for the conduct of another, it must be established, beyond

a reasonable doubt, that the accused harbored a specific 'intent to promote or assist the commission of' the intentional murder." *Lawton v. State*, 913 S.W.2d 542, 555 (Tex. Crim. App. 1995); *see Tucker v. State*, 771 S.W.2d 523, 530 (Tex. Crim. App.1988). Appellant's intent to cause death can be inferred from his acts, words, and conduct. *See Mouton v. State*, 923 S.W.2d 219, 223 (Tex. App.–Houston [14th Dist.] 1996, no pet.).

C. Evidence of Intent to Cause Death

We first review the record to determine whether there is sufficient evidence of Appellant's intent to cause death as the primary actor to the crime. McComb testified that Appellant was angry the night of the fire because the prostitute took his money and ran into the apartment building. After the prostitute ran away, Appellant went to Robert McComb's apartment and told him that nobody "screwed over him" and that he would "kill them." The next morning, McComb claims Appellant told him he had burned some people down the road. When McComb did not believe him, Appellant showed him a plastic pitcher that smelled of gasoline. This testimony is consistent with that of arson investigators, who concluded a small amount of liquid accelerant had been used in the fire. We hold that this circumstantial evidence is both legally and factually sufficient to show that Appellant, if acting as the primary actor, intended to cause the prostitute's death.

Further, even if acting only as a party to the offense, the evidence is legally and factually sufficient to show that Appellant intended to cause the prostitute's death. In Appellant's statement to the police, he claimed that McComb decided to kill the prostitute when he learned that she had stolen Appellant's money. Knowing this, Appellant drove McComb to the apartment where he had previously left the prostitute. En route to the apartment, McComb reiterated, "I'll kill her." Appellant believed this declaration. He waited as McComb set the fire and then drove him home. Appellant's assistance in driving McComb to kill the prostitute is ample evidence from which a jury could infer his own intent to cause death. The fact that a different person than the prostitute died as a result of his conduct is immaterial to whether he is criminally responsible for the death. TEX. PENAL CODE § 6.04(b). Accordingly, we overrule points of error one and two.

D. Evidence of Intent to Promote or Assist Arson

Appellant maintains in point of error three that if the jury found him guilty as a party, there is insufficient evidence of his intent to assist or promote arson. As delineated previously, to be guilty as a party, a defendant must act with the intent to promote or assist the commission of the offense. TEX. PENAL CODE ANN. § 7.02(a)(2). A person commits arson if he starts a fire with the intent to damage any building that is located on property belonging to another. TEX. PENAL CODE ANN. § 28.02(a)(2). A person has the requisite intent with respect to the nature of or result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. TEX. PENAL CODE ANN. § 6.03(a).

Appellant testified that before he drove McComb to the apartment, he saw McComb retrieve a pitcher from the kitchen. He testified that although McComb normally drank alcohol from this pitcher, this time he did not drink from it, but instead carefully placed the pitcher between his feet on the truck's floorboard. Appellant further testified that when McComb exited the truck at the apartment, he carried the pitcher in his hands. Appellant knew there was something red inside the pitcher. He kept watch as McComb entered the apartment building with the pitcher, and he then saw flames coming out the door. When McComb got back into the truck, Appellant testified that he saw a container of charcoal lighter fluid upside down in the pitcher. Appellant drove them home, where McComb disposed of the empty charcoal fluid bottle and put soap in the pitcher. Although Appellant claimed that he did not know what the pitcher contained when McComb exited the truck at the apartment, the jury was entitled to disbelieve this portion of his testimony. *See Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). After reviewing the evidence, both with and without the prism of "in the light most favorable to the verdict," we find that a rational jury could have inferred from Appellant's actions that his intent was to assist in the arson. Accordingly, we overrule point of error three.

PRIOR CONSISTENT STATEMENT

In his fourth point of error, Appellant contends the trial court erred in allowing the testimony of Steve McComb to prove a prior consistent statement made by his brother, Robert McComb. Steve McComb testified that Robert told him the day after the fire that Appellant had set the fire to "get back at" the prostitute. Appellant contends, however, that Robert had an improper motive to hide his own role in the offense and that this improper motive arose before he implicated Appellant to his brother. Because

Robert's statement to his brother allegedly occurred after his improper motive arose, Appellant argues the statement is inadmissible as a prior consistent statement.

Texas Rule of Evidence 801(e)(1)(B) states that a statement is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." However, a statement made after the alleged motive to fabricate arose does not rebut the allegation. *Haughton v. State*, 805 S.W.2d 405, 408 (Tex. Crim. App. 1990). Thus, a statement is not admissible as a prior statement if it is made after the fabrication or improper motive arose.

Although Appellant now argues that Robert McComb's motive to fabricate existed before the statement to his brother was made, the record does not reflect this. Instead, Appellant's cross-examination of Robert McComb shows that McComb fabricated his story after his arrest by Liberty County constables. First, Appellant implied that McComb fabricated the story to earn leniency for the felony convictions for which he was "on the lam." Second, Appellant implied that McComb fabricated his story to earn a $5000 reward. Third, Appellant implied that McComb fabricated the story when arrested to preempt Appellant from turning him in first. All of these implied fabrications or improper motives arose after the statement to McComb's brother, Steve. Thus, it was proper to admit the prior consistent statement to rebut these implied charges of improper motive and recent fabrication. *See Dowhitt v. State*, 931 S.W.2d 244, 263-64 (Tex. Crim. App. 1996). We overrule point of error four.

Having overruled all four points of error, we affirm the judgment of the trial court.

/s/ Ross A. Sears
Justice

Judgment rendered and Opinion filed April 27, 2000.

Panel consists of Justices Robertson, Sears, and Lee.[*]

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

[*] Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.