Affirmed and Opinion filed May 10, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00453-CR

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JOSE VICENTE TURCIOS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 798,853

O P I N I O N

A jury convicted appellant, Jose Vicente Turcios, of engaging in organized criminal activity and sentenced him to serve five years in the Texas Department of Criminal Justice, Institutional Division. In three points of error, appellant claims (1) the evidence is legally and factually insufficient and (2) the trial court erred by overruling appellant's hearsay objection to testimony about the activities of the Ruthless Assassins, a street gang. We affirm.

I. Background Facts

In the early morning hours of August 16, 1997, Patrol Officer Sanders was dispatched to investigate a possible gang-related shooting at an apartment complex in Pasadena. This apartment complex was described in testimony as the "turf" of the Ruthless Assassins, a gang which wears black and blue colors. The previous evening, the residents of apartment number forty hosted a birthday party for their one-year old daughter. The party was attended by members of a rival gang, the Riverview street gang, who wear red.

When the members of the two gangs saw one other, they began "flashing" gang signs at one another. This escalated into a brief verbal exchange, before an unspecified number of shots were fired in the direction of apartment 40. Several bullets traveled inside the apartment, wounding two of the occupants. A State's witness testified that he saw appellant fire a gun two times into number 40 before running away.

After appellant's arrest, appellant signed a statement admitting that, on the night in question, he went to the apartments because a fellow gang member told appellant that one of their "home boys" was going to get "jumped." Appellant said he understood this comment to be referring to an "R.A." home boy and that R.A. is an abbreviation for Ruthless Assassins. Appellant also admitted that when he was at the apartment complex that night, he fired his .22 caliber pistol twice and then ran away. He said he later sold the gun.

II. Legal and Factual Sufficiency

In his first two points of error, appellant argues that the evidence is legally and factually insufficient to support his conviction. Specifically, appellant attacks the evidence which purports to establish that the Ruthless Assassins continuously or regularly associate in the commission of criminal activities—an essential element of the allegation that the deadly conduct in which appellant engaged was part of an organized criminal activity.

In reviewing a legal sufficiency challenge, this court views the evidence in the light most favorable to the verdict. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992)

(en banc). Where an appellate court is faced with conflicting evidence, it presumes the jury resolved the conflict in favor of the State. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993) (en banc). This is true whether the evidence is direct or circumstantial. *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App. 1991) (en banc). The reason for this deferential standard is to further the policy of ensuring the role of the jury who, as the trier of fact, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences therefrom. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The issue that must be resolved is whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997) (en banc) (citing *Jackson*, 443 U.S. at 319).

In contrast, in ruling on a challenge to the factual sufficiency of the evidence, an appellate court "views all the evidence without the prism of 'in the light most favorable to the prosecution,' [*i.e.*, views the evidence in a neutral light,] and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000) (en banc) (citing *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (en banc)). Factual sufficiency may entail two considerations—verdicts supported by weak evidence or verdicts against the great weight and preponderance of the evidence. *Id*. at 11. Under the latter, the reviewing court essentially compares the evidence which tends to prove the existence of a fact with the evidence that tends to disprove that fact. *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). We review factual sufficiency challenges by examining all the evidence to determine if the verdict is so contrary to the overwhelming weight of the evidence that it is clearly wrong and manifestly unjust. *Clewis*, 922 S.W.2d at 129. This review, however, must also employ an appropriate degree of deference so as to prevent the appellate court from simply substituting its judgment for that of the fact finder's, and any evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *Jones*, 944 S.W.2d at 648.

Section 71.02 of the Texas Penal Code provides that one engages in organized criminal

activity if, "with the intent to establish, maintain or participate in a combination or in the profits of a combination or as a member of a criminal street gang, he commits or conspires to commit" any one of the enumerated offenses.[1] TEX. PEN. CODE ANN. § 71.02(a) (Vernon Supp. 2000) (emphasis added). Accordingly, to prove the disputed element of its case, the State was required to establish appellant intended to participate in the shooting, either as part of a combination or as a member of a criminal street gang. Here, the indictment charged appellant with the latter. A criminal street gang is one with "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." TEX. PEN. CODE ANN. § 71.01(d) (Vernon Supp. 2000); *see also Roy v. State*, 997 S.W.2d 863, 867 (Tex. App.—Fort Worth 1999, pet. ref'd) (citing TEX. PEN. CODE ANN. § 71.01(d) and § 71.02(a)(1) (Vernon 1999) and finding indictment made it necessary for State to prove defendant intended to participate in shooting as a member of a criminal street gang).

Appellant argues the State's evidence did nothing more than inject into the trial "bald accusations regarding the purported activities of this alleged gang." Appellant's confession, which was introduced during the State's case-in-chief, undercuts most of this complaint. The Ruthless Assassins are not an *alleged* gang: appellant's own statement acknowledged the Ruthless Assassins are a gang and that he is a member. Therefore, the only remaining question is whether the evidence introduced at trial was sufficient to support the jury's finding that the Ruthless Assassins continuously or regularly associate in the commission of criminal activities.[2] *See* TEX. PEN. CODE ANN. § 71.01(d) (Vernon Supp. 2000).

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[1]Here, the underlying offense the State sought to prove appellant committed was "deadly conduct." TEX. PEN. CODE ANN. § 71.02(a)(1) (Vernon Supp. 2000). Felony deadly conduct, in turn, requires proof that the defendant "discharge[d] a firearm at or in the direction of a habitation, building, or vehicle and [was] reckless as to whether the habitation, building, or vehicle [was] occupied." TEX. PEN. CODE ANN. § 22.05(b)(2) (Vernon 1994).

[2]Quoting *Nguyen v. State*, appellant argues that the State was required to prove that he and two or more people agreed to "work[] together in a continuing course of criminal activities." 1 S.W.3d 694, 697 (Tex. Crim. App. 1999) (en banc). However, the defendant in *Nguyen* was charged under the alternative provision of section 71.02, *i.e.*, participating in a combination. The Court of Criminal Appeals determined that

In order to prove this element, the State offered the testimony of three police officers from the Pasadena Police Department—Garza, Herrera, and Merritt. Officer Garza, a twelve-year veteran and a gang task force officer, testified that he had investigated and arrested other members of the Ruthless Assassins for criminal offenses such as assault, aggravated assault, burglary, and drive-by shootings. Similarly, Officer Herrera, an eight-year veteran and also a gang task force officer in Pasadena, testified that he had arrested members of the Ruthless Assassins for offenses ranging from capital murder to curfew violations. Finally, Officer Merritt, a gang task force officer who, pursuant to the resident officer program, lives in a city-owned home within the Ruthless Assassins's territory, testified that he had worked on cases involving other members of this gang on charges ranging from drive-by shootings and narcotics violations to disorderly conduct and public intoxication. Each police officer testified that, in his expert opinion, the Ruthless Assassins continuously and regularly associated in the commission of criminal activities.

This testimony is both legally and factually sufficient. The evidence is legally sufficient because, viewing the evidence in a light most favorable to the jury's verdict, a rational trier of fact could have found that the Ruthless Assassins are a criminal street gang as that term is defined in the Penal Code. *See McDuff*, 939 S.W.2d at 614. The evidence is factually sufficient because the only "controverting evidence" which appellant points us to is the fact that Officer Garza did not know exactly how many individuals belonged to the Ruthless Assassins. No such specificity is required, however. Moreover, Officer Garza did testify that the gang had about 50 members. Nor is this evidence too weak to support the jury's verdict. We overrule appellant's first two points of error.

III. Hearsay Testimony

In his final point of error, appellant complains that the State introduced inadmissible

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the phrase "collaborate in carrying on criminal activities" contained in the definition of combination required the State to prove more than an agreement to jointly commit a single crime. *Id.* at 697. There is no such requirement in the definition of criminal street gang. *Cf*. TEX. PEN. CODE ANN. § 71.01 (a) & (d) (Vernon Supp. 2000).

hearsay testimony about the Ruthless Assassins in an effort to establish that they are a criminal street gang. By not pointing to any particular testimony in the record about which he complains, however, appellant has waived this point of error. *See* TEX. R. APP. P. 38.1(h). Additionally, appellant has not shown where in the record this argument was preserved for appeal. *See* TEX. R. APP. P. 33.1(a). Moreover, a substantial portion of this section in his brief argues that the testimony was inadmissible character evidence in violation of Rule 404(b) of the Texas Rules of Evidence, a point never raised during trial. *See id.*; *Gutierrez v. State*, 36 S.W.3d 509, 510–11 (Tex. Crim. App. 2001).[3] We overrule appellant's third point of error.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed May 10, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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

[3]In any event, Officer Garza testified he had conversations with the leadership of the Ruthless Assassins wherein they told him how decisions for the gang are made, including decisions that involve the planning and commission of criminal offenses. These statements, as the trial court found, are admissible under Rule 703. *See* TEX. R. EVID. 703 (providing that an expert may base his opinion on any fact or data perceived by or made known to the expert at or before the hearing); *Ramirez v. State*, 815 S.W.2d 636, 650–51 (Tex. Crim. App. 1991) (en banc) (holding that an expert's testimony could be predicated solely upon inadmissible hearsay if it is of a type reasonably relied upon by experts in that field of expertise). Alternatively, these statements—about the planning and commission of criminal offenses—were admissible as an exception to hearsay. *See* TEX. R. EVID. 803(24) (statement against interest).