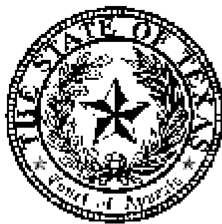
Affirmed and Opinion filed June 21, 2001.



In The

Fourteenth Court of Appeals

NO. 14-99-00842-CR

MICHAEL ANTHONY McCANN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause No. 811730

O P I N I O N

Appellant, Michael Anthony McCann, was charged by indictment with the offense of capital murder. Over his plea of not guilty, a jury found appellant guilty of the charged offense. *See* TEX. PEN. CODE ANN. § 19.03 (Vernon 1994). The trial court assessed punishment at life imprisonment in the Texas Department of Criminal Justice, Institutional Division. In eight points of error, appellant contends: (1) the evidence is insufficient to prove complainant was killed during the commission of a burglary of a habitation; (2) the evidence is insufficient to prove complainant was killed during the commission of a kidnapping; (3) the evidence was insufficient to prove complainant was killed during the commission of retaliation; (4) the trial court committed charge error; and (5) the charge

error violated his federal due process rights. We affirm.

FACTUAL BACKGROUND

In September, 1998, the complainant, Tina Michelle McCann and her children lived in an apartment complex in Houston. Complainant's fifteen year old daughter testified that the family moved there to avoid complainant's abusive husband. On July 10, 1998, appellant pled guilty to the charge of retaliation against Tina and was placed on deferred adjudication community supervision. A condition of the deferred adjudication community supervision required appellant to stay away from Tina and to have supervised contact with his children. Two day's prior to the murder, however, appellant approached his fifteen year old daughter, who was walking home, and told her to get into his vehicle. The daughter refused. Upon arriving home, the daughter told her mother of the encounter and Tina notified the police.

Two months later, on September 8, 1998, Officer Strickland was dispatched to an apartment complex on South Dairy Ashford. The officer arrived at approximately 2:10 p.m. Upon arrival Strickland interviewed a woman named Smith and was informed that there was a man in her apartment with a gun and that Tina was also inside. Strickland believed that a hostage situation had developed and requested assistance of police backup units.

Several witnesses observed the struggle between Tina and appellant on September 8. Appellant testified that he approached Tina with his .45 caliber handgun tucked into his swimming shorts. He testified that he only wanted to ask Tina about one of his children. Appellant's vehicle was positioned behind Tina's van, blocking her escape. Witnesses observed Tina sitting "half in and half out" of her van. Appellant was chocking Tina and she was screaming and struggling to get away. Eventually, Tina broke away from appellant and he fired several shots at her while chasing her. When appellant caught Tina, he fired the weapon into the ground, next to her head, as she crawled around trying to get away.

Suzana Smith, a resident of the apartment complex, was at home when she heard popping noises outside her apartment. Smith knew Tina because Tina worked for the apartment's leasing office. As Smith went to her window to investigate the noise, she saw Tina struggling with appellant and she noticed that appellant had a gun. She called 911.

Smith then went outside onto her patio to investigate, and she saw Tina running toward her. Smith could not see appellant. Trying to help, she told Tina to "come on" and quickly escorted Tina into her apartment, and locked the door. As she was locking the door she heard and saw "bullet's come through" the door. The bullets nearly struck Smith. Smith fled to her kitchen. After shooting at the locked door, appellant kicked the door open and entered Smith's apartment. Appellant then told Smith, "Get out. I don't have anything with you." Smith then began to back out of her apartment. Smith testified she heard appellant tell Tina, "If I can't see my children, you will not either." While departing, Smith saw appellant shoot at Tina again.

The Houston Police Department's SWAT team arrived on the scene at approximately 3:15 p.m. that day. Appellant did not surrender until 2:15 a.m. the next morning. During that period, he fired several shots in the direction of the SWAT team members. When officers entered the apartment, they found Tina on the floor in the bedroom. She had suffered two obvious gunshot wounds and had died. Several spent .45 caliber cartridge casings were found in the apartment, including one underneath Tina's body. Apparently, Tina sustained two gun shot wounds to her back, and bled to death from her wounds.

Standards of Review For
Sufficiency of the Evidence Challenges

Appellant challenges the legal and factual sufficiency of the evidence to support his conviction of capital murder. Specifically, in his first six points of error he contends the evidence is insufficient to support each of the theories charged in the indictment, which were murder committed during the course of burglary of a habitation, kidnapping,

or retaliation.   When both legal and factual sufficiency points of error are raised, this court must first examine the legal sufficiency of the evidence. *Clewis v. State,* 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). When reviewing the legal sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 433 U.S. 307, 319 (1979); *Garrett v. State,* 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). This same standard of review applies to cases involving both direct and circumstantial evidence. *King v. State,* 895 S.W.2d 701, 703 (Tex. Crim. App. 1995). On appeal, we do not reevaluate the weight and credibility of the evidence, but rather, we consider only whether the jury reached a rational decision. *Muniz v. State,* 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

Factual sufficiency review in criminal cases now has two prongs. Specifically, an appellant's point of error challenging the sufficiency of the evidence used to establish the elements of the charged offense could claim that the evidence used to establish the finding of guilt was so weak as to be factually insufficient. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Alternatively, where the defendant has produced contrary evidence, on appeal the appellant can argue his evidence greatly outweighed the State's evidence to the extent the contrary finding by the jury is clearly wrong and unjust. *Id*. Thus, the complete standard a reviewing court must follow when conducting a *Clewis* factual sufficiency review of the elements of a criminal offense asks 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. *Id*. Because appellant testified at the guilt state of the trial, we will apply the second prong of the standard of review.

General Verdicts

The indictment in the instant case charged appellant with capital murder, setting out three alternative means by which that offense was committed. The different methods, or

theories, under which appellant was charged with capital murder were that he intentionally committed murder in the course of committing burglary of a habitation, kidnaping, or retaliation. The jury charge authorized conviction of capital murder if the jury found that appellant intentionally caused the death of Tina in the course of committing or attempting to commit burglary of a habitation, or kidnaping, or retaliation. The jury returned a general verdict of "guilty of capital murder as charged in the indictment." It is well settled that when a general verdict is returned and the evidence is sufficient to support a finding of guilt under any of the paragraph allegations submitted, the verdict will be upheld. *Fuller v. State,* 827 S.W.2d 919, 931 (Tex. Crim. App. 1992); *Aguirre v. State,* 732 S.W.2d 320, 326 (Tex. Crim. App. 1987). Thus the State need only have sufficiently proven one of the paragraph allegations to support the guilty verdict. *Fuller*, 827 S.W.2d at 931. We must, therefore, determine whether sufficient evidence supports the finding of guilt based upon any one of the paragraph allegations submitted to the jury. *Id.* We begin our sufficiency of the evidence analysis by examining the evidence supporting the charge appellant intentionally committed murder in the course of kidnapping Tina.

Elements of Capital Murder

A. Kidnapping

In point of error three, appellant contends the evidence is legally insufficient to support his conviction for capital murder based on the commission of an intentional murder during the course of a kidnapping. Point of error four attacks the factual sufficiency of the evidence supporting his conviction for murder during the course of a kidnapping. We will address these two points together, examining first the legal and factual sufficiency of the evidence to support the jury's finding of a kidnapping, and second the legal and factual sufficiency of the evidence to support the jury's finding of an intentional murder during the course of the kidnapping.

A person commits capital murder if he intentionally commits the murder in the course of committing the offense of kidnapping. TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994). A person commits the offense of "kidnapping" where the person

intentionally or knowingly abducts another person. *Id.*, § 20.03(a). The term "abduct" means to restrain a person with the intent to prevent his liberation by: (1) secreting or holding him in a place where he is not likely to be found; or (2) using or threatening to use deadly force. *Id.*, § 20.01(2); *Mason v. State*, 905 S.W.2d 570, 575 (Tex. Crim. App. 1995).[1] Kidnapping becomes a complete offense when: (1) a restraint[2] is accomplished, and (2) there is evidence that the actor had the specific intent to prevent liberation by secretion or the use or threatened use of deadly force. *Id.* at 575; *Brimage v. State,* 918 S.W.2d 466, 475-76 (Tex. Crim. App. 1994). Therefore, the State had the burden of proving a restraint was completed and that appellant evidenced a specific intent to prevent liberation by either secretion or deadly force. Significantly, an assailant need not restrain a victim for any certain period of time. *Sanders v. State,* 605 S.W.2d 612, 614 (Tex. Crim. App. 1980). In addition, intent may be inferred from the acts, words and conduct of the accused. *Dues v. State,* 634 S.W.2d 304, 305 (Tex. Crim. App. 1982).

Here the evidence supports the jury's conclusion appellant abducted Tina by restraining her with the intent to prevent her liberation by using or threatening to use deadly force. First, appellant initiated the contact with Tina by parking directly behind Tina 's car, blocking any movement by her vehicle and then preventing her escape. He testified that he approached her with his .45 caliber gun, which was tucked into his swimming shorts. In addition, he admitted that the second time the gun fired, he was the shooter and that he intended to fire the weapon. Further, he testified that after he shot his wife, he chased her into Smith's apartment, where she sought refuge. Appellant testified that he shot through Smith's locked apartment door and entered the apartment with the same .45 caliber gun. After Smith pled for her life, appellant allowed Smith to leave her

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[1] The elements of secretion and use of deadly force are part of the *mens rea* of kidnapping, not the *actus reus*. *Mason,* 905 S.W.2d at 575; *Brimage v. State,* 918 S.W.2d 466, 475-76 (Tex. Crim. App. 1994).

[2] Section 20.01(1) of the Texas Penal Code defines "restrain" as restricting a person's movement without consent, so as to interfere with his liberty, by confining him or moving him from one place to another. The restraint is 'without consent' if it is accomplished by force, intimidation, or deception."

apartment. As she was leaving, Smith saw appellant shoot at Tina. Appellant remained in the apartment with his wounded wife for twelve to thirteen hours and never once allowed his wife to seek medical care. An ambulance and medical team arrived within five minutes from the time appellant took over the apartment. Indeed, appellant used deadly force to prevent her liberation by firing shots at the members of the SWAT team to prevent any approach to the apartment. "Restrain" means to restrict a person's movements without consent, "so as to interfere substantially with his liberty, by moving him from one place to another, or by confining him." TEX. PEN. CODE ANN. § 20.01(1) (Vernon 1994). Restraint is accomplished without the victims consent, if deadly force, intimidation, or deception is used. *Earhart v. State,* 823 S.W.2d 607, 618 (Tex. Crim. App. 1991), *vacated on other grounds,* 509 U.S. 917, 113 S.Ct. 3026, 125 L.Ed.2d 715 (1993) (holding the only requirement for restraint is that the interference with liberty be substantial).

We conclude appellant's act of holding his wife in Smith's apartment against her will with a firearm for a period of ten hours was a sufficient act of restraint to constitute abduction, the gravamen of the offense of kidnapping. A kidnapping becomes a completed offense when a restraint is accomplished, and there is evidence that the actor intended to prevent liberation and that he intended to do so by secretion or the use of deadly force. *Brimage*, 918 S.W.2d at 475. For a conviction the State must prove a restraint was completed and that the actor evidenced a specific intent to prevent liberation by either secretion or deadly force. *Id.* at 476. In *Brimage*, the court held restraint was demonstrated where appellant dragged the complainant by her hair to the bedroom where she was bound, gagged and murdered. *Id.* Here, once Tina and appellant were inside Smith's apartment, he had restricted her movements without her consent and interfered with her liberty by confining her by using deadly force. TEX. PEN. CODE ANN. § 20.01(2)(B) (Vernon 1994) (defining "abduct" to mean the restraint of a person with intent to prevent her liberation by using or threatening to use deadly force).

The State must also prove appellant had the intent to prevent liberation by either secretion or deadly force. *Id.* Normally evidence of intent is circumstantial. Here,

however it is largely direct in that appellant was wielding and discharging a high caliber weapon, and had wounded her prior to their entry into the apartment. From this evidence, a rational jury could have inferred appellant restrained Tina in Smith's apartment with deadly force with the intent to prevent her liberation. Indeed, the fact that appellant and Tina remained in the apartment for such a long time constitutes circumstantial evidence from which a jury could infer that appellant had the intent to prevent Tina from escaping to the safety of the SWAT team outside the apartment. Viewing the evidence in the light most favorable to the verdict, we conclude that a rational juror could have found beyond a reasonable doubt that appellant intended to restrain his wife's liberty by the use of deadly force. *Jackson,* 443 U.S. at 319. Therefore, we hold the evidence was legally sufficient to support the jury's determination that appellant committed the offense of kidnapping.

Moreover, we have reviewed all of the evidence, including appellant's testimony, and we cannot say the proof of guilt is greatly outweighed by contrary evidence. Appellant's third point of error is overruled.

We now turn to an examination of the legal and factual sufficiency of the evidence to support the jury's finding appellant intentionally murdered Tina during the course of the kidnapping.

B. Intentional Murder

A person commits capital murder if he intentionally commits murder in the course of a kidnapping. An accused's intent may be inferred from his acts, words, and conduct. *Mouton v. State*, 923 S.W.2d 219, 223 (Tex. App.—Houston [14th Dist.] 1996, no pet.). Specific intent to kill may be inferred from the use of a deadly weapon in a deadly manner. *Adanandus v. State,* 866 S.W.2d 210, 215 (Tex. Crim. App. 1993). A handgun is a deadly weapon *per se*. TEX. PEN. CODE ANN. § 1.07(a)(17)(A) (Vernon 1994). If a deadly weapon is used in a deadly manner, the inference is almost conclusive that the defendant intended to kill. *Adanandus*, 866 S.W.2d at 215.

Proof of a mental state almost always depends upon circumstantial evidence. *Mouton*, 923 S.W.2d at 223. To determine culpability for an offense, the jury is entitled to consider events that occurred before, during, and after the commission of the offense. *Id*. The jury must review all of the evidence and may reasonably conclude from the circumstantial evidence that requisite mental state existed.

The record reflects that appellant admitted he shot Tina twice. Smith testified that as she left her apartment, she heard the appellant tell Tina, "If I can't see my children, you will not either." Smith further testified, that out of her peripheral vision, she saw the appellant shoot at Tina again. Thus, the evidence reflects appellant used a deadly weapon in a deadly manner. Specifically, he shot at his wife with a high caliber handgun on numerous occasions, and on one occasion fired blindly through a door that Tina had run through without regard to whether she was standing directly behind the door. Moreover, appellant knew that police were outside the apartment and could obtain medical assistance, but he would not let her leave. Accordingly, we hold that any rational trier of fact could have found the evidence sufficient to support a finding that appellant acted intentionally in causing the death of Tina, which satisfies the intentional murder element of capital murder. Moreover, the jury's finding that appellant intended to cause the death of Tina is not greatly outweighed by contrary proof. Accordingly, appellant's fourth point of error is overruled.

We hold there is both legally and factually sufficient evidence to support appellants conviction of intentional murder committed during the course of kidnapping Tina Michelle McCann. An intentional murder during the course of a kidnapping is a capital murder. TEX. PEN. CODE ANN. § 19.03(a)(2) (Vernon 1994) Because the jury's verdict of guilty was general, and the evidence is sufficient under the kidnapping paragraph, we will uphold the verdict. *Fuller*, 827 S.W.2d 931. Accordingly, we need not address appellant's points of error challenging the sufficiency of the evidence to support the other paragraphs of the jury charge permitting a conviction for capital murder based on an intentional murder during the course of a burglary of a habitation, or during retaliation. Appellant's points

of error one, two, five and six are overruled.

Charge Error

In his seventh point of error, appellant argues that the evidence is insufficient to support his conviction of capital murder where the trial court's charge to the jury failed to define what offense he intended to commit or attempted to commit, in order to constitute the underlying offense of burglary. We have already addressed the issue of the effect of a general verdict of guilty where the jury charge contains paragraphs corresponding to the counts in the indictment. *Fuller*, 827 S.W.2d at 931. Here, appellant's indictment contained three counts. Similarly, the jury charge tracked the paragraphs in the indictment. Thus, the State need only have sufficiently proven one of the paragraph allegations to support the verdict of guilt. *Id.* Because we have held the evidence submitted in this case to be legally and factually sufficient for a rational jury to find appellant guilty of the commission of an intentional murder in the course of a kidnapping, we need not address questions about the evidence to support a capital murder conviction based on an intentional murder in the course of committing a burglary. Point of error seven is overruled.

In point of error eight, appellant contends his conviction for capital murder under the first paragraph of the indictment violates his federal due process rights because the verdict cannot be supported under the theory of law and fact submitted to the jury. In support of this contention, appellant cites footnote 3 in *Malik v. State*, 953 S.W.2d 234, 238 n.3 (Tex. Crim. App. 1997). In footnote three, the *Malik* court recognized that due process prevents an appellate court from affirming a conviction based upon legal and factual grounds that were not submitted to the jury. *Id*. Here, appellant's conviction for capital murder can stand based on the sufficiency of the evidence to support the jury's belief beyond a reasonable doubt appellant intentionally murdered Tina during the course of kidnapping her. Whether or not the evidence also supports his conviction for capital murder based on the intentional murder of Tina during the course of a burglary is of no moment inasmuch as we are authorized to uphold the jury's guilty verdict based on the

capital murder/kidnapping charge. *McDuff v. State,* 939 S.W.2d 607, 614 (Tex. Crim. App. 1997). Moreover, footnote three also states that the *Malik* court's belief that due process is not necessarily violated by affirming a conviction in which the jury charge contains extra, unnecessary elements that are not supported by the evidence. 953 S.W.2d at 238 n.3.

The court considered a similar challenge in *Bailey v. State*, 532 S.W.2d 316, 322 (Tex. Crim. App. 1976). There, appellant contended the trial court erred in submitting all six counts of the indictment to the jury, in that there was no evidence to support three of the counts. *Id.* The court overruled that error by reciting the well known analysis applicable to such arguments: where a general verdict is returned and the evidence is sufficient to support a finding under any of the counts submitted, no error is shown. *Id.* at 323. As in *Bailey*, *Fuller, and McDuff*, we too find no error. Appellant's eighth point of error is overruled.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed June 21, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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