Affirmed and Opinion filed July 19, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00482-CR

ANDRES AVILA MASCORRO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 786,378

O P I N I O N

Appellant, Andres Avila Mascorro, was indicted for capital murder. Over his plea of not guilty, a jury found appellant guilty of capital murder. The trial court assessed punishment at life imprisonment in the Texas Department of Criminal Justice, Institutional Division. Appellant appeals his conviction on eight points of error, four of which challenge the admission of hearsay testimony regarding statements by a co-defendant. The final four points of error challenge the sufficiency of the evidence to sustain the conviction for capital murder. We Affirm.

I.
Factual Background

According to the record, Darryl Kolojaco and Diamantina Salinas were married on August 10, 1996. At the time of his death, Darryl carried at least four life insurance polices worth over $100,000.00, wherein his wife, Diamantina was listed as the primary beneficiary. During the early morning hours of June 13, 1998, Darryl Kolojaco was found beaten to death in his home. He had suffered massive injuries to his head resulting from fifteen blows from a steel pipe.

When police arrived at the Kolojaco home, Diamantina and her sons were present. The back door was unlocked and the burglar bars were open. Diamantina initially told Detective Tabor that she believed Darryl was bi-sexual and that may have had something to do with his murder. No evidence was found to support this theory, so Detective Tabor wanted to have further conversations with Diamantina. Eventually, on June 15, Diamantina gave Detective Tabor a written statement in which she admitted that she had planned to remove her sons from the house the night Darryl was murdered, so that he would be home alone. She also stated that she wanted her husband killed so that she could receive the proceeds from his life insurance policies. Her statement implicated appellant. Diamantina was charged with capital murder for her involvement in her husband's death, but she was not tried in the same proceeding with appellant.

At some point during her marriage to Darryl, Diamantina met appellant, and the two began an affair. The appellant and Diamantina leased an apartment together, Diamantina's name appeared on the utility bills for the apartment, the furnishings were purchased in her name, and she also helped appellant purchase a car. During this time period, Diamantina was unemployed and on felony probation for welfare fraud.

Because Diamantina's written statement taken by Detective Tabor implicated appellant, a warrant for his arrest was issued. Appellant was arrested at the apartment that he shared with Diamantina. Later, when detectives told appellant that Diamantina had implicated him in

Darryl's death and showed him her confession, appellant signed a written confession, in Spanish, in which he confessed killing Darryl by beating him with a steel pipe. Appellant's confession did not implicate Diamantina.

II.
Confrontation Clause Violation

Appellant's first and third points of error challenge the trial court's admission of Detective Tabor's testimony as to what Diamantina, a party to the offense, told him about the murder. His challenges are based on the contentions that the testimony is inadmissible hearsay, and its admission violates the Confrontation Clause of the United States Constitution. We address the Confrontation Clause challenge in this part II, and the hearsay challenge in part III, below.

A. *Did a Confrontation Clause violation occur?*

The testimony about which appellant complains occurred during the direct examination of Detective Tabor who testified, among other things, about his suspicions that Diamantina's theory as to why Kolojaco was killed was not the truth. Detective Tabor also testified he employed other investigators to try to determine the truth of her story. Eventually her story that Darryl was killed because he enjoyed a bi-sexual lifestyle changed, and it is at this point during the trial that, during direct examination of Detective Tabor, appellant contends, the confrontation violations occurred:

> Q. Eventually, did she change her story?
>
> A. Yes.
>
> Q. All at once, or does it take a while—how does that take place?
>
> A. This is over a period of a couple hours.
>
> Q. Eventually, does she give you a statement regarding any involvement she had in Darryl's death?

A. Yes.

Q. Now listen to my question carefully if you could, and I know that you will: What does she tell you about what she did, not what anybody else did, about what she did in aiding in Darryl's murder.

[Defense Counsel] Your Honor, again, I would like to renew our objection to confrontation under the Texas U.S. Constitution, as well as hearsay and relevance.

[Court] That will be overruled.

[Defense Counsel] Thank you, your Honor. May I have a running objection?

[Court] Yes.

A. *The planning and the removing of the children, or having the children removed from the residence, so that Mr. Kolojaco would have been home alone at the time of the murder*. (emphasis added)(basis of points of error one and two).

Q. As best you can determine, were the two children living with Darryl?

A. Yes, they were.

Q. *And does she indicate why she wanted Darryl dead?*

A. *For the life insurance policies*.(emphasis added)(basis of points of error three and four)

Q. Eventually is she charged?

A. Yes.

Q. And is she charged with the same offense that this defendant is on trial for?

A. Yes.

Q. After that, did you obtain an arrest warrant for anybody else?

A. Yes.

Q. Who?

A. Andres Mascorro.

In the portion of his brief addressing the two parts of the testimony in italics above, appellant acknowledges that the testimony did not implicate appellant, but "the implication was clear that [Diamantina] had made this plan with the appellant." Appellant also contends Diamantina's statement regarding the motive violated the Confrontation Clause.

Appellant contends that the testimony of Detective Tabor about what Diamintina told him about the murder contravenes the rule articulated in *Bruton v. United States*, 391 U.S. 345 (1968). In *Bruton*, the trial court admitted into evidence the oral confession of George Bruton's non-testifying codefendant, Evans, that he and Bruton committed armed robbery together but instructed the jury not to consider the confession against Bruton. 391 U.S. at 124-25. The Supreme Court held that notwithstanding such an instruction, admission of a non-testifying codefendant's extrajudicial statement violates a defendant's confrontation right because:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Id. at 135-36.

The scope of *Bruton* was limited by the Court's opinion in *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Richardson*, the Court considered whether *Bruton* applies to a nontestifying codefendant's statement that has been redacted so as to omit not only the name

of the defendant, but all reference to her existence. Marsh and her codefendant, Williams, were tried jointly for felony murder. The prosecution introduced Williams's statement that, while traveling together in a car to the victim's residence, he and a third individual decided that they would rob and kill the victims. The State deleted all hint of Marsh's existence from this confession. After the State rested, Marsh testified that she had not intended to rob or kill anyone and, although she rode to the victims' house with Williams and a third person, she could not hear their conversation because the radio was too loud. *Id*. at 212-204. The Court distinguished Williams's statement from the "facially incriminating confession" in *Bruton* where the codefendant's confession "expressly implicated the defendant as his accomplice. By contrast, in *Richardson*, Williams' confession amounted to "evidence requiring linkage" in that it became incriminating in respect to Marsh only when linked with evidence introduced later at trial (the defendant's own testimony). The Court there held

> "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Id. at 211.

The Supreme Court has conceded that *Richardson* placed outside the scope of *Bruton's* rule those statements that incriminate inferentially. *Gray v. Maryland*, 533 U.S. 185, 195 (1998). Here, Detective Tabor's statements about what Diamantina told him about her planning of the murder do not implicate appellant at all. Diamantina's statement came in during the direct examination of Detective Tabor for purposes of laying out how the investigation of the murder progressed. Indeed, the predicate for the question to Detective Tabor by the prosecutor clearly stated that the answer was to contain just what Diamantina told Tabor about *her* involvement in the murder, not what anyone else did.[1] Neither is the testimony of Detective

[1] The carefully crafted direct examination by the prosecutor here was designed to elicit only the what Diamantina said to Tabor about her own actions, not the actions of appellant. This technique has been sanctioned by courts as an appropriate method to avoid contravening the *Bruton* rule. Specifically, in order to avoid trespassing on the defendant's Sixth Amendment right to confront witnesses, the State should, as (continued...)

Tabor a verbatim reading of Diamintina's written confession, a critical factor in *Richardson* and *Gray*. More importantly, for purposes of analysis under *Richardson*, it is a confession redacted to eliminate not only appellant's name but any reference to his existence. *Richardson*, 481 U.S. at 211. Simply put, the testimony about which appellant complains is merely hearsay testimony. The Confrontation Clause has never been held to bar the admission into evidence of every relevant extrajudicial statement made by a nontestifying declarant simply because it in some way incriminates the defendant. *Parker v. Randolph*, 442 U.S. 62 (1979). In *Richardson*, the factor moving the statement admitted there outside the rule in *Bruton* was that the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial. 481 U.S. at 208. Similarly, here, Diamantina's statements to Tabor did not inculpate appellant *per se*, but were incriminating when linked with appellant's written confession admitted earlier in the trial. Thus, the jury was well aware that appellant had confessed to the crime when Diamintina's statement inculpating only herself was introduced. Detective Tabor's testimony clearly suggested to the jury that Diamintina was involved in the murder, but any inference that appellant was involved came from his own confession, not from the hearsay testimony of Tabor as to what Diamantina told him about her involvement in her husband's death.

A defendant's right under the Sixth Amendment to confront the witnesses against him includes the right not to have the *incriminating* hearsay statement of a nontestifying codefendant admitted in evidence against him. *Bruton*, 391 U.S. at 136 (emphasis added). Here, however, Diamantina's hearsay statement read into the record did not incriminate appellant. We believe the key to the Confrontation Clause error asserted in point of error one lies in the rule in *Bruton* which is derived from the wording of the Clause itself. The clause

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[1] (...continued)
here, frame its question to call only for statements by the non-testifying co-defendant about her own actions, and should also "forewarn its witness not to stray, in answering, beyond the narrowly framed question." *United States v. Kirsh*, 54 F.3d 1062, 1069 (2d Cir.), *cert. denied*, 516 U.S. 927 (1995). By controlling the direct examination of Detective Tabor in this manner, appellant's right to confront the witnesses against him was not infringed.

provides that the *"accused shall enjoy the right. . .to be confronted with the witnesses against him*." Here, the statements of Diamantina, as related by Detective Tabor, did not directly or indirectly implicate appellant,[2] and because they did not, Diamintina was not a *witness against* appellant. Therefore, we conclude appellant was not deprived of his right of confrontation under the Confrontation Clause with regard to the testimony of Detective Tabor as to the statements made to him by Diamintina, and the trial court correctly overruled appellant's Sixth Amendment objection because no Confrontation Clause violation occurred.

However, even if the trial court erred in overruling appellant's objection to Tabor's testimony about out of court statements made by Diamantina, the error is subject to harmless error analysis. *Shelby v. State*, 819 S.W.2d 544, 546 (Tex. Crim. App. 1991) (holding violation of the Confrontation Clause is subject to harmless error analysis).

B. *Harmless Error Analysis*

A violation of the Confrontation Clause, like other federal constitutional error, is subject to a three prong harmless error analysis. *Deleware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431,1438, 89 L.Ed.2d 674 (1986). First, a reviewing court assumes that the damaging potential of the cross-examination is fully realized. *Id.* at 1438. Second, with that assumption in mind, we review the error in connection with the following factors:

1. The importance of the witness' testimony in the prosecution's case;

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[2] Diamantina's statement to detective Tabor suggests that another party was involved, but does not implicate appellant in any way. Nevertheless, the jury was able to understand that appellant was implicated by her statement because earlier, during appellant's arraignment, the prosecutor read the indictment, which states, in part:

> Andres Avilla Mascorro, hereinafter styled the Defendant, on or about June 13, 1998, did then and there unlawfully, intentionally and knowingly, for remuneration or the promise of remuneration from Diamantina Salinas Kolojaco, namely life insurance proceeds and inheritance proceeds, cause the death of Darryl Kolojaco, hereinafter styled the Complainant, by striking the complainant with a pipe and unknown blunt object.

2. Whether the testimony was cumulative;
3. The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;
4. The extent of cross-examination otherwise permitted; and,
5. The overall strength of the prosecution's case.

Id. at 1438. Finally, in light of the first two prongs, we must determine if the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 16, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *Van Arsdall,* 475 U.S. at 684.

1. The Analysis

Under *Van Arsdall,* we must focus on the testimony of detective Tabor and assume that the damaging potential of the cross-examination was fully realized. *Shelby v. State,* 819 S.W.2d 544, 550 (Tex. Crim. App. 1991). In other words, we must assume that the jury was fully informed that Diamantina and appellant planned Darryl's murder together, were motivated for remuneration or the promise thereof of insurance and inheritance monies, and apply the following five factors enumerated above.

(a) The Importance of the Witness' Testimony in the Prosecution's Case

The testimony of detective Tabor was obviously important to the prosecution's case. He was designated the chief investigator of the murder. As such he was permitted to relate to the jury statements made by Diamantina Kolojaco, appellant's co-defendant, during his interrogation of her. The statements support the allegations in the indictment and are different from the statements made by the appellant to the police in his confession. Additionally, Tabor testified that Diamantina stated that she and appellant had an affair. Finally, Tabor identified that Daimantina admitted to commingling her finances with the appellant concerning an apartment, a car, utility and phone bills.

(b) Whether the Testimony Was Cumulative

The testimony of detective Tabor was cumulative in some regards. However, in the instant case, appellant confessed to having an affair with Diamantina and that he went to the complainant's home on the night of the alleged offense. Appellant got into a fight with the complainant and struck the complainant with a pipe. Dr. Patricia Moore, an assistant Harris County Medical Examiner, testified for the State. Testifying from an autopsy report, she stated that the complainant died from blunt trauma to the head and that the complainant's wounds were consistent with being struck with a pipe. Furthermore, Carolyn Eversole, the complainant's aunt, testified for the State. She told the jury that the complainant had four life insurance policies, naming Diamantina and her children as beneficiaries.

(c) The Presence or Absence of Evidence Corroborating or Contradicting the Testimony of the Witness on Material Points

The appellant suggests in his confession that he did not go to the complainant's house to kill him. He testified that the complainant was drinking and became angry with the appellant. Hence, appellant struck the complainant in anger to quiet him.

(d) The Extent of Cross-Examination Otherwise Permitted

Appellant fully cross-examined detective Tabor.

(e) The Overall Strength of the Prosecution's Case

The prosecution's case must be considered strong in light of the evidence admitted at trial. In the instant case, the medical report indicated that Darryl's death was caused by a blunt trauma to the head. The appellant admitted that he had engaged in an ongoing affair with Diamantina, and evidence established that appellant financially benefitted from the relationship. Finally, the appellant signed a confession admitting striking the complainant with a steel pipe. Overall, the State's case was strong against the appellant, with or without detective Tabor's testimony.

The final step of the analysis requires a reviewing court to determine, in light of the foregoing explanation, whether the error was harmless beyond a reasonable doubt. *Chapman,* 386 U.S. at 24. Significantly, the mere finding of a violation of the *Bruton* rule in the course of a trial, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error. *Schneble v. Florida,* 405 U.S. 427, 430 (1972).

Not only is the independent evidence of guilt apparent in the record, but the allegedly inadmissable statements of detective Tabor at most tended to corroborate certain details of appellant's confession. From the remaining evidence in this case, namely the autopsy report, testimony regarding the decedent's life insurance policies, and appellant's affair with the complainant's wife, the jurors had a rational basis to find appellant guilty. Judicious application of the harmless-error rule does not require that the court indulge in assumptions when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions, stares us in the face. *See Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 504-05 (1957). Unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. *See Chapman,* 386 U.S. at 24. We conclude that the "minds of an average jury" would not have found the State's case significantly less persuasive had the testimony as to Tabor's admissions been excluded. The admission into evidence of these statements, therefore, was at most harmless error. Thus points of error one and three are overruled.

III.
Hearsay

In points of error two and four, appellant contends the testimony of Detective Tabor regarding Diamantina's two statements, set forth above in part II, were inadmissible hearsay, and the trial court erred in overruling appellant's objections to Detective Tabor's testimony

regarding statements made by Diamantina. This issue is addressed separately from the Confrontation Clause challenge because it constitutes a separate basis for excluding the evidence, and appellant briefed the issue separately from his Sixth Amendment challenge.[3] This separate examination is legitimate inasmuch as in *Bruton*, the Court stated that the reason for excluding the statements of co-defendants as an evidentiary matter also requires its exclusion as a constitutional matter. 391 U.S. at 136 n. 12.

In *Ohio v. Roberts*, 448 U.S. 56, 62 (1980), the Court considered the relationship between the Confrontation Clause and the hearsay rule with its many exceptions. The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." Read literally, this language would require, on objection, the exclusion of any statement made by a declarant not present at trial. *Id*. at 63. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme. *Id*.

The historical evidence leaves little doubt, however, that the Clause was intended to exclude some hearsay. *Id*., citing *California v. Green*, 399 U.S.149, 156-157, and nn. 9 and 10 (1970). The Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that a primary interest secured by the Clause is the right of cross-examination. *Id*.

In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to be confronted with the witnesses against him. *Lilly v. Virginia*, 527 U.S. 116, 123 (1999). The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. *Id*. A

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[3] The concurring opinion by Justices Thomas, which Justice Scalia joined, in *White v. Illinois* contains an interesting examination of the relationship between the constitutional right of confrontation and the hearsay rules of evidence. 502 U.S.346, 359 (1992).

narrow exception to the Confrontation Clause rule arises where the veracity of the statements by the nontestifying witness is sufficiently dependable to allow the untested admission of the statements. *Roberts*, 448 U.S. at 66. Two methods have been utilized to test the veracity of such statements: (1) the evidence falls within a firmly rooted hearsay exception, or (2) the evidence contains particularized guarantees of trustworthiness to such an extent that adversarial testing would be expected to add little, if anything, to the statement's reliability. *Lilly*, 527 U.S. at 122; *Roberts*, 448 U.S. at 66.

A hearsay statement may be introduced against a defendant if the statement bears sufficient indicia of reliability. *Guidry v. State*, 9 S.W.2d 133, 149 (Tex. Crim. App. 1999), *cert. denied*, 121 S.Ct. 98 (2000). A hearsay statement is *per se* reliable under the Confrontation Clause if it falls within a firmly rooted exception to the hearsay rule. *White v. Illinois*, 502 U.S. 346, 356 (1992) (stating where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied). Because statements firmly rooted in hearsay exceptions have substantial probative value, to exclude such statements under the strictures of the Confrontation Clause would be the height of wrongheadedness, given that the Confrontation Clause has as a basic purpose the promotion of the integrity of the fact finding process. *Id*

A statement against penal interest is a firmly rooted hearsay exception. *Dewberry v. State*, 4 S.W.3d 735, 751-54 (Tex. Crim. Appeal 1999). Texas Evidence Rule 803(24) is the hearsay exception for statements against the declarant's penal interest.[4] The statement here by Diamantina to Detective Tabor was against her penal interest inasmuch as it described the actions that she, and no one else, took to aid in her husband's murder. Such statements

[4] Rule 803(24) provides as follows: "A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in declarant's position would not have made the statement unless believing it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

implicated Diamantina as a person criminally responsible as a party to the offense. *See* TEX. PEN. CODE ANN. § 7.02(a)(2) (Vernon 1994) (a person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs or aids the other person to commit the offense). Thus, Diamantina's hearsay statement, introduced at trial, was against her own penal interest and thus firmly rooted in the exception to the hearsay rule contained in the Rule 803(24).

In *Guidry*, Gipp was the girlfriend of co-defendant Prystash. *Guidry*, 9 S.W.3d at 147. Gipp testified to statements made to her by Prystash about his and appellant's roles in the murder. *Id*. The *Guidry* Court held Gipp's testimony as to statements made by Prystash that were against his own penal interest were admissible because those statements were *per se* reliable and thus admissible under the Confrontation Clause as statements falling within a firmly rooted hearsay exception. *Id*. at 150. The holding in *Guidry* is a *per se* rule of admissibility for hearsay statements which are firmly rooted in a hearsay exception, and specifically Rule 803(24). Because it is a *per se* rule, no further analysis is required. As the Court in *Guidry* carefully explained: "If a hearsay statement falls within a firmly rooted hearsay exception, it is *per se* reliable. No additional analysis as to its reliability need be made." *Id*., n. 13. Because the testimony by Detective Tabor involving statements made to him by Diamantina was admissible, the trial court properly overruled appellant's objection to such testimony on hearsay grounds. We therefore overrule appellant's second and fourth points of error.

IV.
Sufficiency of the Evidence

In points of error five and six, appellant contends the evidence is legally and factually insufficient to support his conviction. We will address the legal sufficiency of the evidence first.

A. Legal Sufficiency

Appellant's fifth point of error asserts the evidence was legally insufficient to support the verdict because the State failed to prove appellant caused the complainant's death for remuneration. In a legal sufficiency review, an appellate court must view 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. *Jackson v. Virginia,* 433 U.S. 307, 319 (1979); *Clewis v. State,* 922 S.W.2d 126, 132 (Tex. Crim. App. 1996); *Garrett v. State,* 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). The appellate court reviews the evidence, as a matter of law, to determine whether the case should have been submitted to the jury. *Clewis,* 922 S.W.2d at 133. The appellate court is not to reevaluate the weight and credibility of the evidence, but acts only to ensure the jury reached a rational decision. *See Muniz v. State,* 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). The jury, as the trier of fact, is the sole judge of the credibility of the witnesses. *See Soto v. State,* 864 S.W.2d 687, 691 (Tex. App.–Houston [14th Dist.] 1993, pet. ref'd). Because the question of whether the evidence satisfies the *Jackson* test is a question of law, as an analytical tool, the *Jackson* review is used to determine whether there is a fact issue at all. *Clewis,* 922 S.W.2d at 132-33. The *Jackson* standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See id.* Under this standard a reviewing court, faced with a record of facts supporting conflicting inferences, must presume that the trier of fact resolved any such conflicts in favor of the prosecution, and we must defer to that resolution. *See Jackson,* 443 U.S. at 326.

Section 19.03(a)(3) of the penal code provides in relevant part that a person commits a capital offense if he "commits . . . murder for remuneration or the promise of remuneration." TEX. PEN. CODE ANN. § 19.03(a)(3) (Vernon 1994). The appellant does not challenge the sufficiency of the evidence proving that he murdered his victim, so we need not concern ourselves with that element of § 19.03(a)(3). Rather, it is appellant's contention the State failed to prove that he murdered for remuneration or the promise of remuneration.

The penal code does not define "remuneration," but those terms are not limited to murder-for-hire situations. *Beets v. State,* 767 S.W.2d 711, 734 (Tex. Crim. App. 1987, op. on reh'g). Rather, those terms "encompass[] a broad range of situations, including compensation for loss or suffering and the idea of a reward given or received because of some act." *Id.* Under the remuneration section, the State has the heavy burden of demonstrating that the murder was performed for the reason of pecuniary gain. *Rice v. State,* 805 S.W.2d 432, 435 (Tex. Crim. App. 1991). Therefore, when the State seeks to prove that the accused murdered for remuneration or the promise of remuneration, it "is obligated to offer some evidence of the defendant's intent or state of mind as related to an expectation of [tangible] remuneration." *Id*. at 434.

Appellant's intent or state of mind is most often demonstrated by circumstantial evidence, and one's actions are generally reliable circumstantial evidence of one's intent. *Parrish v. State*, 950 S.W.2d 720, 722 (Tex. App.—Fort Worth 1997, no pet.). In the instant case, the evidence and reasonable inferences therefrom established that the appellant was receiving a benefit before he killed the complainant. At the time of the offense, the appellant, a carpenter, was involved in a sexual relationship with Diamantina, the complainant's wife. She would, periodically, stay in appellant's apartment for one or two nights. She also paid for the furniture and televisions in the apartment. Moreover, Diamantina held title to the car appellant was driving, and paid the bills for electric and telephone service at appellant's apartment. The apartment was leased in appellant's name. Penal Code section 19.03(a)(3) uses the terms "murder for remuneration or the promise of remuneration." In *Urbano v. State*, the Court observed that because there was no evidence at trial that Urbano received any benefit *before* he killed his victim, it was not proved that he killed *for remuneration*. 837 S.W.2d 114, 116 (Tex. Crim. App. 1992) (emphasis in original). Thus, the phrase "for remuneration" in § 19.03(a)(3) encompasses the concept of a benefit received by the defendant before the murder is carried out. Here, appellant was receiving benefits from Diamantina before the murder. Accordingly, we hold the evidence was legally sufficient for a rational jury to find all of the

elements of a murder committed *for remuneration*. We overrule appellant's fifth point of error.

B. **Factual Sufficiency**

Appellant's sixth point of error contends the evidence was factually insufficient to support his conviction for capital murder because the State failed to prove appellant caused the complainant's death for remuneration. 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 stage of trial, we will apply the second prong of the standard of review.

As noted above, appellant does not challenge the evidence supporting his conviction for committing the murder, rather he is challenging the evidence to support the aggravating element of murder for remuneration. However, at trial, appellant testified in his own behalf at the guilt stage and essentially denied any participation in the murder and contended his confession was false. He also asserted that Diamantina had not given him any money, and she did not discuss any life insurance policies on Darryl's life. Applying the applicable standard from *Johnson*, we conclude the proof supporting the charging paragraph that appellant

committed the murder for remuneration is not greatly outweighed by the contrary evidence provided by appellant. We overrule appellant's sixth point of error.

V.
General Verdicts

In appellant's seventh and eighth points of error he contends the evidence is legally and factually insufficient to support his conviction for an intentional murder during the course of committing a burglary.

The indictment in this case charged appellant with capital murder, setting out two 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 for remuneration or the promise of remuneration, or while in the course of committing burglary. The jury charge authorized conviction of capital murder as charged in the indictment if the jury found that appellant intentionally caused the death of Darryl for remuneration or in the course of committing burglary. The jury returned a general verdict finding appellant "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). Thus, the State need only have sufficiently proven one of the paragraph allegations to support the guilty verdict. *Id*.

We have held that the evidence in this case is sufficient to support the capital murder verdict based on an intentional murder committed for remuneration. Because the jury's verdict of guilty was general, and the evidence is sufficient under the murder for remuneration paragraph, we will uphold the verdict. *Id*. Accordingly, we need not address appellant's seventh and eighth points of error challenging the evidence supporting appellant's conviction based on the murder during the course of a burglary paragraph.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 19, 2001.

Panel consists of Justices Anderson, Fowler, and Edelman.

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