Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-96-01470-CR

CARLOS JOHAN MEJIA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 724,326

O P I N I O N

A jury found appellant guilty of arson and found the fire was a deadly weapon. The jury assessed punishment at seventeen years confinement in the Institutional Division of the Texas Department of Criminal Justice. In six points of error appellant contends the trial court erred in entering judgment because the evidence was insufficient to support the jury's findings that (1) the commission of the offense caused injury to a firefighter; (2) the fire was a deadly weapon; and (3) he was aware of a risk of harm to the firefighter. We affirm.

Appellant lit a bottle, threw it through a picture window of the home owned and occupied by the Diaz family, and fired a gun into the house. A fire erupted, which destroyed

part of the Diaz home. The Diaz family escaped unharmed but firefighter Anthony Reynolds chipped a bone in his ankle when he stepped in a hole as he was unloading equipment from the firetruck at the scene. A grand jury indicted appellant for arson of a habitation and charged him with causing bodily injury to Reynolds by reason of appellant's commission of the offense.

When reviewing the legal sufficiency of the evidence, we review all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In conducting this review, we do not re-evaluate the weight and credibility of the evidence; instead, we act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993).

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). This review is appropriately deferential so as to avoid substituting this court's judgment for that of the jury. *Id*. at 133.

In his first two points of error, appellant contends the evidence is legally and factually insufficient to support the jury's finding that the commission of the arson caused bodily injury to Reynolds, as alleged in the indictment. Appellant does not dispute that Reynolds was injured but claims the record fails to show that Reynolds was on the Diaz property at the time he twisted his ankle or that the fire posed a threat or danger to Reynolds or caused his injury.

A person commits arson if he starts a fire or causes an explosion with the intent to destroy or damage any habitation with knowledge that the habitation is located on property belonging to another. TEX. PEN. CODE ANN. § 28.02(a)(2)(E) (Vernon 1994). Arson is a

second degree felony "unless bodily injury or death was suffered by any person by reason of the commission of the offense." *Id*. § 28.02(d). In such case, arson is a first degree felony. *See id*.

A person is criminally responsible for causing an injury if the injury would not have occurred "but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor was clearly insufficient." *Id*. § 6.04(a). Applying this concept of causation to section 28.02(d), it is clear that appellant is criminally responsible for causing Reynolds' injury only if the injury would not have occurred but for the commission of the arson, operating alone or concurrently with some other cause, unless the other cause was clearly sufficient to produce the injury and the commission of the arson clearly insufficient.

The record reflects that Reynolds injured his ankle when he stepped into a water meter hole while retrieving fire fighting equipment from the far side of the firetruck, where lighting conditions were poor. While stepping in a hole in a poorly lit yard is sufficient to produce an ankle injury, the commission of an arson requiring the presence of a firefighter at a location where the concurrent conditions exist is also sufficient to produce an injury. There is sufficient evidence in this case to prove that but for the commission of the arson, Reynolds would not have been fighting the fire at the Diaz home and would not have stepped in the hole or incurred the ankle injury.

Because the evidence is legally and factually sufficient to support the jury's finding that the commission of the arson caused Reynolds' injury, we overrule appellant's first two points of error.

In his third and fourth points of error, appellant contends the evidence is legally and factually insufficient to support the jury's finding that the fire, in this case, was a deadly weapon. A deadly weapon is "anything that in the manner of its use . . . is capable of causing death or serious bodily injury." TEX. PEN. CODE ANN. § 1.07(a)(17)(B) (Vernon 1994). Serious bodily injury is "bodily injury that creates a substantial risk of death or that causes

death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." *Id*. § 1.07(a)(46). Appellant contends the record fails to show that the fire set in this case was capable of causing serious bodily injury. In particular, appellant claims the State's expert failed to tie his expert opinion that fire is a deadly weapon to the fire in this case.

Expert testimony, however, is not required to prove that a weapon is deadly. *See Williams v. State*, 575 S.W.2d 30, 32 (Tex. Crim. App. 1979). In fact, no one needs to testify to the conclusion that a weapon is capable of producing serious bodily injury. *Id*. "The jury is free to consider all of the facts of the case, including actual wounds inflicted or words spoken by the appellant, in deciding if the weapon is deadly." *Id*.

The evidence, here, is legally and factually sufficient to support the deadly weapon finding. One of the Diaz daughters testified that appellant threatened to kill her family in a telephone conversation shortly before the fire. Another daughter observed appellant set fire to the house while the rest of her family was sleeping. The State's expert testified that the fire completely destroyed the den, part of the dining room, the front door, and the majority of the attic. Numerous photographs that reflect extensive damage to the Diaz home were admitted. Considering the extent of the damage and appellant's threats, a jury could reasonably conclude the fire, as used or as appellant intended it to be used, to be capable of causing serious bodily injury to one or all members of the Diaz family. Because the overwhelming weight of the evidence supports the jury's finding, we overrule appellant's third and fourth points of error.

In his fifth and sixth points of error, appellant contends the evidence is legally and factually insufficient to support his conviction because the State failed to establish that he was aware of a risk that Reynolds would be harmed in the fire. Although section 28.02(d) does not require a culpable mental state to elevate arson to a first-degree felony, appellant contends the State must prove the culpable mental state of recklessness because section 28.02(d) makes bodily injury an element of the offense of arson.

A culpable mental state to the aggravating circumstance of injury is not necessary to elevate the offense. *See Boyington v. State*, 738 S.W.2d 704, 705 (Tex. App.—Houston [1st Dist.] 1985, no pet.). Bodily injury or death is an aggravating circumstance of arson. *See Lozano v. State*, 860 S.W.2d 152, 155 (Tex. App.—Austin 1993, pet. ref'd) The arsonist need not intend to cause bodily injury to persons to elevate the offense to a first degree felony. *See Boyington*, 738 S.W.2d at 705. The offense is complete when the fire is started, not when bodily injury or death occurs as a result.[1] *See Lozano*, 860 S.W.2d at 155.

Because the State was not required to prove that appellant acted with a culpable mental state in causing injury to firefighter Reynolds, appellant's fifth and sixth points of error are without merit. Accordingly, we overrule appellant's fifth and sixth points of error.

Finding no error, we affirm the judgment of the court below.

PER CURIAM

Judgment rendered and Opinion filed October 28, 1999.
Panel consists of Justices Yates, Fowler, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] The actor's mental state regarding the welfare of others can be an element of the offense of arson. *See* TEX. PENAL CODE ANN. § 28.02(a)(2)(F) (Vernon 1994). The indictment returned against appellant and the jury charge, in this case, did not track the language of this subsection of the penal code.