Affirmed; Majority and Dissenting Opinions filed November 10, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-00723-CR

CORNELIUS CHAPMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 713,623

M A J O R I T Y O P I N I O N

Cornelius Chapman appeals his conviction by the trial court for murder. The trial court assessed his punishment at ten years confinement in the Texas Department of Criminal Justice, Institutional Division. Appellant now pleads four points of error, the first three dealing with the legal sufficiency of the evidence and the fourth dealing with the factual sufficiency of the evidence. Because the evidence is legally and factually sufficient, we affirm.

I. BACKGROUND

On the evening of January 16, 1996, Monikque Francis (Monikque) was watching television in her apartment in Northwest Houston with her boyfriend, Leonel Flores (Flores), and her children. As Monikque was watching the evening news, appellant knocked on the door of her apartment. Before Monikque opened the door, Flores went to the bedroom. Flores was a drug dealer and did not want appellant to see what he looked like. According to Monikque, she, Flores, and appellant had been involved in several prior drug transactions. Monikque claimed that appellant still owed Flores money from one of these transactions. Appellant denies being involved in any drug transactions.

Appellant brought with him a wine set that he intended as a gift for Monikque's sister, Kimberly. Appellant remained in the apartment for a few minutes and then left. Roughly ten minutes later, appellant returned to Monikque's apartment and told her he had lost his keys. Monikque, who was on the phone, let appellant into the apartment and turned around to hang up the phone. As soon as she did so, a group of people rushed into her apartment and pulled her down to the floor. This occurred moments after she allowed appellant to enter her apartment. Gunshots were fired in the apartment. When the intruders left, Monikque found Flores leaning over the coffee table. He had a gunshot wound and died shortly thereafter.

II. APPELLANT'S FIRST THREE POINTS OF ERROR

Appellant was convicted for murder. In point one, appellant argues that the evidence is legally insufficient to support appellant's conviction for murder in his sole capacity. In point two, appellant argues that the evidence is legally insufficient to support appellant's conviction for murder under the law of parties. In point three, appellant argues that the evidence is legally insufficient to support appellant's conviction for murder under the theory

of conspiracy. Because the first three points of error deal with legal sufficiency, we shall address them together.

Appellant states that he arrived at Monikque's apartment only to deliver a present for Kimberly. He claims to have no knowledge of the identity of the individuals who rushed into the apartment shortly after he returned to search for his keys. Appellant contends that he, too, was forced to the floor by the intruders, but managed to escape after the gunshots were fired. Monikque did not witness any of these events because she was lying on the floor shielding her baby. While there were bystanders who witnessed some of the events in question, none could identify appellant as one of the people who had forced their way into the apartment. It is therefore appellant's assertion that the evidence does not link him to the murder of Flores.

The pertinent portion of the indictment charged that appellant, on or about January 16, 1996, did "then and there unlawfully, intentionally and knowingly cause the death of LEONEL ANGEL FLORES, hereinafter called the Complainant, by shooting the Complainant with a deadly weapon, namely, a firearm" and/or "did then and there unlawfully intend to cause serious bodily injury to LEONEL ANGEL FLORES, hereinafter called the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely, shooting the Complainant with a deadly weapon, namely, a firearm." *See* TEX. PEN. CODE ANN. § 19.02 (Vernon 1998). Although there was no allegation in the indictment charging appellant as a party, the law of parties may be applied to a case even though no such allegation is contained in the indictment. *See Malik v. State*, 953 S.W.2d 234, 239 (Tex. Crim. App. 1997); *see also Goff v. State*, 931 S.W.2d 537, 544 n. 5 (Tex. Crim. App. 1996); *Crank v. State*, 761 S.W.2d 328, 352 (Tex. Crim. App. 1988), *cert. denied*, 493 U.S. 874, 110 S.Ct.

209, 107 L.Ed.2d 162 (1989). The charge in this case included the law of parties. *See* TEX. PEN. CODE ANN. §§ 7.01, 7.02 (Vernon 1998).

A. Standard of Review. When reviewing the legal sufficiency of the evidence, the appellate court will look at all of the evidence in a light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993). In so doing, the appellate court is 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, 318-319, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 765 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986). The appellate court is not to reevaluate the weight and credibility of the evidence, but only ensure that the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993), *cert. denied*, 510 U.S. 837, 114 S.Ct. 116, 126 L.Ed.2d 82 (1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). The jury is free to believe or disbelieve any witness. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988). The sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997).

Appellant contends the evidence is insufficient to sustain his conviction as a party. In determining whether a defendant has acted as a party in the commission of a criminal offense, the jury may look to events occurring before, during and after the offense, and reliance may be placed upon actions which show an understanding and common design to engage in the illegal act. *Moore v. State*, 804 S.W.2d 165, 166 (Tex. App.–Houston [14th

Dist.] 1991, no pet.). Mere physical presence at the scene is insufficient in and of itself to show intentional participation in the offense. *Acy v. State*, 618 S.W.2d 362, 365 (Tex. Crim. App. 1981). Rather, the actions of the parties must show an understanding and common design to do the forbidden act. *Mayfield v. State*, 716 S.W.2d 509, 514 (Tex. Crim. App. 1986).

B. Application. The jury was charged that it could find appellant guilty of murder if he either committed murder as a principal or solicited, encouraged, or aided others in the death of Flores. In the present case, Mr. Anthony Williams testified that at about the same time as the shooting occurred, he went outside to smoke a cigarette on his balcony. While on his balcony, he saw four gentlemen walking down the sidewalk. Mr. Williams saw one of the individuals knock on Monikque's door while the other three waited. When the door opened Mr. Williams saw the first individual walk inside, followed quickly by the other three. The witness then heard two or three "pop" sounds from the apartment and a female scream. Mr. Williams did not see anyone else knock on the apartment door. Other witnesses called by the state testified to seeing a group of individuals wandering around the apartment complex and described hearing gunshot noises at about the same time Mr. Williams saw the events. However, none of the witnesses could identify the four individuals' faces.

Monikque testified that appellant was the only person who knocked on her door prior to the shooting. The jury could infer from her testimony and the testimony of Mr. Williams that appellant was associated with the group of individuals that later ran into the apartment and shot Flores. The trier of fact could have found beyond a reasonable doubt that appellant intended to promote or assist others in commission of the murder and appellant encouraged, aided, or attempted to aid others to commit the murder. Thus, although appellant may not have fired the bullet, he was still guilty as a party. Viewing the evidence

in the light most favorable to the verdict, the evidence is legally sufficient to support the jury's verdict. Points one through three are overruled.

III. APPELLANT'S FOURTH POINT OF ERROR

In point four, appellant argues that the evidence is factually insufficient to support appellant's conviction for murder.

A. Standard of Review. In reviewing the factual sufficiency of the evidence to support a conviction, we must look to all of the evidence "without the prism of 'in the light most favorable to the verdict.'" *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996) (citing *Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.–Austin 1992, pet. ref'd, untimely filed)). However, our review is not unfettered, for we must give "appropriate deference" to the fact finder. *Id.* at 136. We may not impinge upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Dimas v. State*, 987 S.W.2d 152, 155 (Tex. App.–Fort Worth 1999, no pet.). The jury, as fact finder, was the judge of the facts proved and of reasonable inferences to be drawn therefrom. *See Kirby v. Chapman*, 917 S.W.2d 902, 914 (Tex. App.–Fort Worth 1996, no pet.). The weight given to contradictory testimonial evidence is within the sole province of the jury, because it turns on an evaluation of credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). Thus, we must defer to the fact finder's weight-of-the-evidence determinations. *See id.* at 408. Consequently, we may set aside a verdict for factual insufficiency only when that verdict is so against the great weight and preponderance of the evidence so as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d. at 134-35.

B. Application. Appellant restates the arguments made in his first three points of error and also notes that there are discrepancies in the testimony of the various witnesses.

He argues that the overwhelming weight of the evidence was contrary to the verdict. We do not agree. Resolution of the inconsistencies in the witnesses' testimony is merely weight-of-the-evidence determinations for the fact finder. *See Cain*, 958 S.W.2d at 408. Contradictions between witnesses' statements are resolved by the fact finder's determination of credibility. Accordingly, the verdict was not contrary to the great weight of the credible evidence. We find that the evidence supporting the judgment was not so weak as to be manifestly unjust and clearly wrong. Therefore, we hold that the evidence is factually sufficient to support the judgment. Point four is overruled.

IV. CONCLUSION

Because the evidence is legally and factually sufficient, the judgment of the trial court is *affirmed*.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed November 10, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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

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D I S S E N T I N G O P I N I O N

I dissent. No one knows who killed the deceased. Neither direct nor circumstantial evidence can tell which of the several suspects was the shooter. Therefore the government's proof of murder as a principal against appellant fails.

Appellant may, as the majority implies, only be guilty as a party. Neither the witness Williams nor any other bystander identified appellant as one of four persons who intruded into the scene of the crime. Williams swore the four men he saw wore dark colored caps.

Monikque testified appellant wore neither cap nor mask. She saw someone other than appellant with a mask on and holding a pistol. In fact the government witness Monikque as well as appellant's testimony already place the appellant inside the crime scene when the "group of people" rushed in and murdered the "big time" drug dealer, Flores. She witnessed there were five (not four) people in the place. Like Monikque, appellant maintains when the murder occurred he had his head on the floor, in fear of his life. There is no evidence, not even a scintilla, that appellant solicited, encouraged, aided or abetted others in this cold blooded, execution style murder. The only possible connection to the others is Williams' testimony about four intruders. We do not know who these four are except by circumstantial inference but appellant was as likely not amongst them as he was likely amongst them.[1] Based on the government's own case, appellant was already inside the apartment. That he was already inside initially is corroborated by the also undisputed testimony appellant had already been inside some minutes before to deliver a gift to Kimberly as well as discuss his drug business with Monikque. Appellant, unlike the intruders, had a verifiable and discernable reason for his presence at the scene. The government presents no evidence to directly connect appellant with the four intruders. The ephemeral evidence the majority strains to say is sufficient, would by the same standard convict Monikque, whose testimony remarkably parallels that of appellant.[2] The majority doesn't even address the government's conspiracy count; this is understandable because there is patently no evidence of conspiracy.

As the majority notes, mere physical presence at the scene is insufficient to show intentional participation. *See Acy, supra*. The proof must show an understanding and

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[1] A fifty-fifty possibility at best, seems, if only to me, to be a little light to convict for murder in Texas. If Monikque was correct that there were five people at the apartment, then it follows appellant would not be one of the four witnessed by Williams.

[2] To illustrate, if a murder occurred inside a restaurant or restroom, by the government's argument, all who walked in at or even near the time of the crime, would themselves be guilty of murder as a party.

common design to commit this murder. *See Mayfield, supra.* For the lack of legally or factually sufficient proof of murder, I would reverse and render the judgment of the trial court.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed November 10, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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