

In retaliation prosecution, informant can simply be individual who provides information to police. [Lewis v. State](13-2-9)

On April 17, 2013, the Amarillo Court of Appeals individual who provides information to police, on the possible whereabouts of Appellant falls within the definition of an informant for purposes of the retaliation statute.

¶ 13-2-9. **Lewis v. State**, No. 07-11-0444-CR, --- S.W.3d ----, 2013 WL 1665835 (Tex.App.-Amarillo, 4/17/13).

Facts: Lewis, a juvenile at the time of the offense, was certified to be tried as an adult.

On Friday, August 22, 2008, Constable Thomas Prado was at the Emerald Green Apartments searching for Appellant. The apartment manager, Jamie Lujan, and a maintenance worker, Mark Jimenez, informed Prado that Appellant could be located at apartment 214 of the Beverly Arms Apartments, an adjoining complex. Although Appellant was not at that apartment, Jimenez later pointed out a vehicle driven by Andre Hamilton, in which Appellant might be a passenger, and Prado waved down that vehicle. Although Appellant was not in the vehicle, a passenger, Montreal Wright, was arrested on an outstanding warrant and for carrying a pistol. According to witnesses, Appellant was extremely upset over Wright's arrest.

When Jimenez left work that day, he was at a stop sign when four males made threatening gestures towards him. He called Lujan and told him he would not be coming back to work. Lujan assured him it would be "okay" to return and he did so the following Monday. After returning to work Jimenez noticed an individual, later identified as Appellant, following him around for a few days while he was picking up the grounds. Because Appellant, Hamilton and others were angry with Jimenez for pointing out Hamilton's vehicle, which had led to Wright's arrest, they conspired to "get" Jimenez. There was conflicting testimony on whether "getting" him meant shooting him or beating him.

On August 28, 2008, Jimenez arrived at work at 7:50 a.m. and Lujan was already in the office. They noticed a male, later identified as Anthony Thomas, walk by the office. Thomas had been previously banned from the complex. Jimenez left the office to do some work at a nearby apartment complex. Approximately twenty minutes later, he heard an ambulance.FN4When he returned to the apartment complex, he observed the ambulance as well as police cars. He was told the manager had been shot and saw Lujan being carried out on a stretcher. Lujan suffered five gunshot wounds and on September 1, 2008, he died as a result of those wounds.

Yolanda Evans, a tenant at the Beverly Arms Apartments, testified that she was looking out her window on the morning of the shooting when she observed Appellant, Hamilton and Thomas cover their faces with bandanas while standing outside the manager's office at the Emerald Green complex.FN5Soon thereafter, she heard gunshots, followed by three individuals running from the area. Lakeisha Davis, a tenant at the Beverly Arms Apartments, testified she heard a noise and looked out her window and saw Appellant, Hamilton and Thomas running up the stairs of the Beverly Arms complex. Thomas was carrying a black bag.FN6Another witness testified that she was working on her car when she heard shots and later saw the suspects run into

apartment number 112 where Thomas's cousin lived. Thomas's cousin testified that shortly after hearing gunshots, Appellant and Hamilton entered his apartment and Thomas showed up not long thereafter.

Numerous officers arrived at the scene. After interviewing witnesses, they determined the suspects were holed-up in an apartment at the Beverly Arms. After SWAT arrived, an officer trained as a negotiator was able to convince the three suspects to come out of the apartment and they were arrested. They were identified as Appellant, Hamilton and Thomas and they were each subsequently charged with capital murder for causing the death of Lujan while in the course of retaliating against Jimenez.

On the morning of the shooting, Inga McCook, Thomas's girlfriend, was cleaning when she heard a boom similar to a dumpster lid closing. She went to look out her window and saw Thomas carrying a black bag. Suddenly, she realized that Thomas was in her apartment and he told her, “[t]hey shot him. They shot ... the [racial slur].” She ordered him out of her apartment. When he left her apartment, Thomas did not have the black bag on his person.

McCook also testified that Thomas called her from jail to tell her he had hidden the black bag in a Christmas tree box in her bedroom closet. She found the bag, discovered it had two guns inside and drove down a country road to dispose of them. When she returned to her apartment, investigators were waiting to question her and she eventually led them to the area where she had tossed the guns.

Appellant, Hamilton and Thomas were each tested for gunshot primer residue. An expert testified that a classic primer mixture consists of three compounds and a particle of primer residue can contain one, two or all three of those compounds. He further testified that a particle that contains all three compounds usually results from the discharge of a firearm. The policy of the Texas Department of Public Safety is that any gunshot primer residue collected more than four hours after a shooting is usually not analyzed because too much time has passed. An exception is made when a district attorney requests testing. However, under those circumstances, interpretations are not drawn from the results.

In the underlying case, Appellant's gunshot primer residue test was conducted within the four hour window. Test results were consistent with him having recently fired a weapon, being nearby when a weapon was fired or contacting some surface with gunshot primer residue on it. Results from the gunshot residue collected from Thomas, which was also timely obtained, did not show any gunshot primer residue particles on his hands, but some was detected on the pocket of his shorts. Hamilton's test was not conducted within the four hour window; however, his results were consistent with him having fired a weapon or having been in the proximity to or touching a weapon that had been fired. Due to the time frame issue, the expert did not draw any conclusions from those results.

Thomas originally agreed to testify against Appellant and Hamilton at their trials in exchange for an offer to plead guilty to a lesser included offense. Following this development, the State moved to jointly try Appellant and Hamilton. The trial court granted that motion and they were subsequently tried together in the same proceeding. Eventually however, at Thomas's

plea hearing, he withdrew from his plea bargain and instead entered a plea of guilty to the offense of capital murder. He testified that he initiated the shooting and “it just wouldn't seem right blaming two individuals that absolutely had, you know, nothing to do with the whole situation, sir.” At trial, an excerpt from Thomas's plea hearing was offered into evidence; however, the State's objection was sustained. It was subsequently introduced by the defense for purposes of appeal.

Appellant maintains the evidence is legally insufficient to support his conviction for capital murder when the indictment alleges retaliation against a person other than the victim of the murder as the aggravating circumstance elevating the offense of murder to capital murder.

Held: Affirmed

Opinion: The only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense the State is required to prove beyond a reasonable doubt is the standard set forth in *Jackson v. Virginia*, 443 U.S. 307, 33 S.Ct. 2781, 61 L.Ed.2d 560 (1979). See *Brooks v. State*, 323 S.W.3d 893, 912 (Tex.Crim.App.2010). Under that standard, in assessing the sufficiency of the evidence to support a criminal conviction, this Court considers all the evidence in the light most favorable to the verdict and determines whether, based on that evidence and reasonable inferences to be drawn therefrom, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 912. We measure the legal sufficiency of the evidence by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1997). In our review, we must evaluate all of the evidence in the record, both direct and circumstantial, whether admissible or inadmissible. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex.Crim.App.1999), cert. denied, 529 U.S. 1131, 120 S.Ct. 2008, 146 L.Ed.2d 958 (2000). We must give deference to the responsibility of the trier of fact to fairly resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App.2007).

A person commits capital murder if he commits murder as defined in section 19.02(b)(1) and intentionally commits the murder in the course of committing or attempting to commit, among other offenses, the offense of retaliation. TEX. PENAL CODE ANN. § 19.03(a)(2) (WEST SUPP. 2012). A person commits murder if he “intentionally or knowingly causes the death of an individual.” Id. at § 19.02(b)(1). See *Adames v. State*, 353 S.W.3d 854, 861–62 (Tex.Crim.App.2011), cert. denied, 2012 U.S. LEXIS 2268, 132 S.Ct. 1763, 182 L.Ed.2d 533 (2012). A person commits retaliation if he intentionally or knowingly harms or threatens to harm another by an unlawful act in retaliation for or on account of the service or status of another as an informant. TEX. PENAL CODE ANN. § 36.06(a)(1)(A) (WEST 2011). An informant is a person who has communicated information to the government in connection with any governmental function. Id. at 36.06(b)(2).

By amended indictment, Appellant was charged with intentionally causing the death of Jamie Lujan ... in the course of committing or attempting to commit the offense of retaliation

against Mark Jimenez. The charge instructed the jury on transferred intent, the law of parties and criminal responsibility for conduct of another as follows:

[a] person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated or risked is that:

- (1) a different offense was committed; or
- (2) a different person or property was injured, harmed or otherwise affected.

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both.

Each party to an offense may be charged with commission of the offense.

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, aids, or attempts to aid the other person to commit the offense.

If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy. See TEX. PENAL CODE ANN. §§ 6.04(b), 7.01(a) & (b), 7.02(a)(2) & (b) (WEST 2011).

Conspiracy requires an agreement with one or more persons that they or one or more of them engage in conduct that would constitute the offense; and the person or one or more of them performs an overt act in pursuance of the agreement. See TEX. PENAL CODE ANN. § 15.02(a) (WEST 2011). The essential element of conspiracy is the agreement to commit the crime. *Williams v. State*, 646 S.W.2d 221, 222 (Tex.Crim.App.1983). A person may be guilty of conspiracy by doing nothing more than agreeing to participate in the conspiracy so long as another co-conspirator does some overt act in furtherance of the conspiracy. *Walker v. State*, 828 S.W.2d 485, 487 (Tex.App.-Dallas 1992, pet. ref'd). However, if the evidence shows there was no actual, positive agreement to commit a crime, the evidence is insufficient to support a conviction for conspiracy. *Brown v. State*, 576 S.W.2d 36, 43 (Tex.Crim.App. [Panel Op.] 1978). Commission of the underlying substantive offense is not an essential element of conspiracy. *McCann v. State*, 606 S.W.2d 897,898 (Tex.Crim.App. [Panel Op.] 1980). Since direct evidence of intent is rarely available, the existence of a conspiracy can be proven through circumstantial evidence. *Rhoten v. State*, 299 S.W.3d 349, 351 (Tex.App.-Texarkana 2009, no pet.).

Nothing in section 19.03(a)(2) of the Penal Code requires that the intended victim of the aggravating offense must also be the murder victim. See *Chirinos v. State*, 2011 Tex.App. LEXIS 147, at *14 n. 3 (Tex.App.-Houston [14th Dist.] 2011, pet. ref'd). Appellant does not cite

this Court to any authority holding otherwise and we see no reason to read such a requirement into the statute.

Jimenez provided information to Constable Prado, a government official, on the possible whereabouts of Appellant. Thus, he falls within the definition of an informant for purposes of the retaliation statute. Jimenez testified that he felt threatened when four individuals made gestures to him when he left work the same day he gave that information to Prado. McCook, who lived in an upstairs apartment at the Beverly Arms, testified that Thomas told her Appellant and Hamilton blamed Jimenez for Wright's arrest and were plotting against him. Lakeisha Davis testified she had told the police that Appellant, Hamilton, Thomas and others were going to "get" the maintenance man [Jimenez]. Although she wavered in her testimony before the jury on whether Hamilton was present during the conversation, she did testify that the group talked about shooting the maintenance man.

Byronishia Moore, Appellant's girlfriend and a tenant at the Beverly Arms, testified she and Appellant went to a motel room with a group a few days after Wright was arrested. While there, they engaged in a conversation about getting the maintenance man. She denied any conversation about killing Jimenez and just thought the group was conspiring to beat him up. We conclude the evidence shows that Appellant conspired with others to harm or threaten to harm Jimenez in retaliation for providing information to Constable Prado that lead to Wright's arrest.

Conclusion: Appellant is guilty of Lujan's murder regardless of which conspirator actually fired the fatal shots. Thus, the evidence is legally sufficient to support the jury's verdict that Appellant, as a principal or party, murdered Jamie Lujan while in the course of attempting to commit the offense of retaliation against Mark Jimenez as alleged in the indictment. Issue two is overruled.