Review of Recent Juvenile Cases (2007)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

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Shooting weapon into crowd made juvenile a party to offense of murder where someone is killed by second shooter, even where juvenile did not intend to injure.[Gamboa v. State](07-1-13B)

On January 3, 2007, the Houston (14th Dist.) Court of Appeals held that juvenile was acting in concert with the others in a vehicle and that the individuals in the vehicle were acting together to intentionally and knowingly caused the death of someone, or that they intended serious bodily injury and caused death by an act clearly dangerous to human life, namely shooting into a crowd of people

¶ 07-1-13B. **Gamboa v. State**, No. 14-05-00942-CR, 2007 Tex.App.Lexis 405 (Tex.App.— Houston [14th Dist.], 1/3/07).

Facts: On the night of December 26, 2003, Fausto Montes, Clint Drabeck, and Jason and Ashley Olivas went to a barbeque at Kenneth Wood's house in southwest Houston. Around 11:30 p.m., Wood saw a vehicle pass by his home for the second time that night. The occupants of the vehicle appeared to look very closely at Wood's guests. Shortly thereafter, Wood heard several gunshots coming from the direction of the vehicle and immediately got his gun and returned fire. The vehicle instantly drove away. Wood and his guests discovered that in the fray Montes had been shot.

The party guests went inside the house to call for help. In the meantime, Ashley Olivas unsuccessfully attempted to revive Montes through cardio-pulmonary resuscitation. By the time the ambulance arrived a short time later, Montes was dead.

Just after midnight, Alaine Edwards, at her home in the same area of far southwest Houston, heard her doorbell ring. The man at the door, later identified as appellant, asked if he could use her telephone. Edwards refused the request, but stated that she would call someone for him if necessary. Although appellant declined her offer, he lingered outside her home. After hearing voices outside the door, Edwards placed a 9-1-1 call. She then summoned her neighbor, John Nash, who was the head of her local "Neighborhood Watch" program, to come and investigate. Shortly thereafter, Edwards saw Nash approach appellant several houses down the street. After a brief exchange, Nash and appellant parted ways. Nash, however, remained suspicious and decided to look for appellant again.

Meanwhile, Officer James Welborn with the Houston Police Department, who was on patrol in the area, was dispatched to Wood's residence shortly after midnight. Officer Welborn secured the scene until homicide detective Sergeant James Ramsey and his partner, Sergeant Edward Gonzalez, arrived shortly before 2:00 a.m.

Sergeant Ramsey learned that the suspects' vehicle had been located by another police officer, Pamela Tyler, a few miles away. Officer Tyler had discovered a grayish-colored vehicle parked on the wrong side of the street, resting partially in an open field and partially on the sidewalk. The vehicle had significant damage, including several broken windows. When Officer Tyler searched the vehicle, she found a sawed-off shotgun in the backseat, containing a shell that had been fired recently. Tow truck drivers informed Officer Tyler that a man had walked away from the vehicle carrying a gun. Shortly thereafter, the same man began walking toward the abandoned vehicle. Officer Tyler commanded him to the ground but soon discovered that the man was Nash. He suggested that Officer Tyler look for two to three Hispanic males and provided detailed descriptions of them to the officer.

While Officer Tyler continued pursuit, Nash and another neighbor, Edward Williams, searched the neighborhood for the man (appellant) Alaine Edwards had sighted. Williams found him hiding in a large trash can in Edwards's yard. Holding him at gunpoint until the police arrived, Williams told appellant, "if you move, I will shoot you." Around 1:30 a.m., Officer Ciro Pena, who had been dispatched to the area to assist Officer Tyler, found Williams holding appellant at gunpoint and took appellant into custody. Williams informed Officer Pena that two other individuals had run further down the street. Officer Pena, who was on foot, briefly handcuffed appellant to a light pole while he searched the area for other possible suspects. About that time, Houston Police Officer Dubose arrived at the scene in a patrol car, and Officer Pena placed appellant in the back seat. After taking custody of appellant, Officer Dubose unsuccessfully attempted to pursue another vehicle sighted by Officer Pena, but returned shortly thereafter. Before long, two other suspects were apprehended and also placed in Office Dubose's patrol car.

Appellant was separated from the other suspects and placed in the back seat of Officer Pena's patrol car. Appellant admitted that the shotgun found in the vehicle belonged to him. A test of appellant's hands revealed fresh gunshot residue. Officer Gordon Oran, assigned to canine duty with the Houston Police Department, was also dispatched to the area to search for suspects and weapons. Officer Oran's dog located a handgun in the bushes near where appellant was found.

While all of this activity was taking place, Sergeant Ramsey, still at Wood's residence, asked the party guests if they could identify the vehicle involved in the drive-by shooting. Ashley Olivas was taken to the vehicle's location and positively identified the vehicle as the one involved in the drive-by shooting. By the time Sergeant Ramsey arrived with Olivas, three suspects had been apprehended -- appellant, Raymond Duran, and Jose Aguilera. Sergeant Ramsey spoke to Duran and learned that he had been the driver of the vehicle. Duran consented to a search of the vehicle and offered a statement.

Immediately after speaking to Duran, around 3:00 a.m., Sergeant Ramsey began interrogating appellant. Appellant was very cooperative and openly offered information about what had transpired, such as the placement of the individuals in the vehicle at the time of the shooting. During this brief talk, Sergeant Ramsey learned that appellant was only sixteen years old, and immediately terminated the discussion. Sergeant Ramsey next questioned Jose Aguilera, who was uncooperative and refused to offer a statement. However, a test of Aguilera's hands revealed the presence of gunshot residue.

After securing the scene, Sergeant Ramsey immediately drove appellant to Magistrate Judge Villagomez's chambers, which functioned as a juvenile processing office. At 4:40 a.m., Judge Villagomez read appellant his rights in both English and Spanish. After the warnings, Sergeant Ramsey transported appellant to the main police station at 1200 Travis, in downtown Houston. Appellant was placed in interview room number 6 on floor 6, which also was designated as a juvenile office. Sergeant Ramsey interviewed appellant from 5:14 a.m. until 5:36 a.m.. During this brief interview, appellant admitted that he fired one round from a double-barrel shotgun and that Aguilera had fired at least two or three rounds from a handgun. Immediately after the interview, Sergeant Ramsey transported appellant to the juvenile detention center in southeast Houston.

Appellant was charged with the felony offense of murder. He pleaded "not guilty" and sought to suppress the audio-taped statements. The trial court refused to suppress the statements. A jury found appellant guilty as charged, and assessed punishment at twenty-three years' confinement in the Institutional Division of the Texas Department of Criminal Justice.

Held: Affirmed

Opinion: Appellant contends that the evidence is legally and factually insufficient to support his conviction for murder as a principal actor or as a party to the offense. n4

> n4 Because appellant's issues two through seven are similar and require the same analysis, we address them together.

When evaluating the legal sufficiency of the evidence, we 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 offense beyond a reasonable doubt. *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)*; *Drichas v. State, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005)*. The standard is the same for both direct and circumstantial evidence cases. *King v. State, 895 S.W.2d 701, 703 (Tex. Crim. App .1995)*. We do not resolve any conflict of fact, weigh any evidence, or evaluate the credibility of any witnesses. *See Adelman v. State, 828 S.W.2d 418, 421 (Tex. Crim. App. 1992)*. We review all of the evidence admitted at trial, and resolve any inconsistencies in the evidence in favor of the verdict. *Id.*

When evaluating a challenge to the factual sufficiency of the evidence, we view all the evidence in a neutral light and inquire whether we are able to say, with some objective basis in the record, that a conviction is "clearly wrong" or "manifestly unjust" because the great weight and preponderance of the evidence contradicts the jury's verdict. *Watson v. State, 204 S.W.3d 404, 414-17 (Tex. Crim. App. 2006)*. It is not enough that this court harbor a subjective level of reasonable doubt to overturn a conviction that is founded on legally sufficient evidence, and this court cannot declare that a conflict in the evidence justifies a new trial simply because it disagrees with the jury's resolution of that conflict. *See id. at 417.* If this court determines that the evidence is factually insufficient, it must explain in exactly what way it perceives the conflicting evidence greatly to preponderate against conviction. *Id. at 414-17.* Our evaluation should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony. *See id*; *Fuentes v. State, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999)*. In conducting a factual-sufficiency review, we must discuss the evidence appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003)*.

The indictment in this case alleged the following:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, FRANCO GAMBOA, hereinafter styled the Defendant, heretofore on or about DECEMBER 27, 2003, did then and there unlawfully, intentionally and knowingly cause the death of FAUSTO MONTES, hereinafter called the Complainant, by SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY A FIREARM.
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> It is further presented that in Harris County, Texas, FRANCO GAMBOA, hereinafter styled the Defendant, heretofore on or about DECEMBER 27, 2003, did then and there unlawfully intend to cause serious bodily injury to FAUSTO MONTES, 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 BY SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY A FIREARM.

To sustain a guilty verdict, the State must prove the elements of the offense as set forth in the jury charge. *Rabbani v. State, 847 S.W.2d 555, 558 (Tex. Crim. App. 1992)*. The charge in this case authorized conviction on two theories C law of the parties or direct liability:

> The defendant, Franco Gamboa, stands charged by indictment with the offense of murder, alleged to have been committed on or about the 27th day of December, 2003, in Harris County, Texas. The defendant has pleaded not guilty.
>
> Our law provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual; or if he intends to cause serious bodily injury and intentionally or knowingly commits an act clearly dangerous to human life that causes the death of an individual.
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> . . .
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> All persons are parties to an offense who are guilty of acting together in the commission of the offense. 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.
>
> 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. Mere presence alone will not constitute one party to an offense.
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> 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.

When, as in this case, the jury returns a general verdict of "guilty" and the evidence is sufficient to support the finding under any of the allegations submitted, the verdict will be upheld. *Fuller v. State, 827 S.W.2d 919, 931 (Tex. Crim. App. 1992)*. Appellant contends that the evidence is insufficient to support his conviction either as a principal actor or as a party to the offense.

There is no dispute that the gun used by appellant was not the gun that actually killed Montes. Thus, the inquiry in this case is whether the evidence is legally and factually sufficient to establish that appellant was a party to the offense. If we conclude that it is, appellant's conviction will stand. *See Davis v. State, 195 S.W.3d 311, 319, n.4 (Tex. App.-Houston [14th Dist.] 2006, no pet.)* (concluding that if the court finds the evidence to be sufficient under one particular theory, it need not address appellant's remaining points to determine whether the evidence is also sufficient under the other theories).

A person commits an offense if he: (1) intentionally or knowingly causes the death of an individual; (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or (3) commits or attempts to commit a felony, other than manslaughter, and in the course or and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he

commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. *TEX. PEN. CODE ANN. § 19.02(b)* (Vernon 2003). The specific intent to kill may be inferred from the use of a deadly weapon. *Flanagan v. State, 675 S.W.2d 734, 744 (Tex. Crim. App. 1984)* (op. on reh'g). A firearm is a deadly weapon. *See TEX. PEN. CODE ANN. § 1.07(a)(17)(A)* (Vernon 1994). A person acts intentionally with respect to the result of his conduct when it is his conscious objective or desire to cause the result. *Id. § 6.03(a)*. A person acts knowingly with respect to the result of his conduct when he is aware his conduct is reasonably certain to cause the result. *Id. § 6.03(b)*. A jury may infer intent from the acts and words of the defendant, the manner in which the offense was committed, the nature of the wounds inflicted, and the relative size and strength of the parties. *Patrick v. State, 906 S.W.2d 481, 487 (Tex. Crim. App. 1995)*.

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 by both." *TEX. PEN. CODE ANN. § 7.01(a)* (Vernon 2003). "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." *Id. § 7.02(a)(2)*.

When a party is not the "primary actor," the State must prove conduct constituting an offense plus an act by the defendant done with the intent to promote or assist such conduct. *Beier v. State, 687 S.W.2d 2, 3 (Tex. Crim. App. 1985)*. Evidence is sufficient to sustain a conviction under the law of parties if it shows that the defendant was physically present at the commission of the offense and encouraged the commission of the offense either by words or other agreement. *Cordova v. State, 698 S.W.2d 107, 111 (Tex. Crim. App. 1985)*.

An agreement among parties to act together in common design can seldom be proven by words. Consequently, the State often must rely on the actions of the parties, shown by direct or circumstantial evidence, to establish an understanding or a common design to commit the offense. *Miller v. State, 83 S.W.3d 308, 314 (Tex. App.-Austin 2002, pet. ref'd)*. The agreement, if any, must be made before or contemporaneous with the criminal event, but in determining whether one has participated in an offense, the court may examine the events occurring before, during and after the commission of the offense. *Id*. Circumstantial evidence may suffice to show that one is a party to an offense. *Wygal v. State, 555 S.W.2d 465, 469 (Tex. Crim. App. 1977).* Though mere presence at the scene is not enough to sustain a conviction, such facts may be considered in determining whether an appellant was a party to the offense. *Valdez v. State, 623 S.W.2d 317, 321 (Tex. Crim. App. 1979)* (op. on reh'g); *Scott v. State, 946 S.W.2d 166, 168 (Tex. App.-Austin 1997, pet. ref'd)*.

The evidence in the record shows that appellant's role in the offense went far beyond mere presence at the scene. Lysette Alecio, appellant's girlfriend and the mother of his children, testified that on the evening of the murder, they went to Raymond Duran's home. While she stayed in the vehicle, appellant went inside for about five minutes. Appellant then returned to the vehicle and drove toward her home. Aguilera and Duran followed them. Around 11:30 p.m., Duran, Aguilera, and appellant left Lysette's home. Although Lysette did not know where they went, the evidence shows that appellant and Duran fired their guns at a group of people at a barbeque, killing Montes.

An autopsy of Montes's body revealed that he suffered a gunshot wound to the right side of his chest. The bullet penetrated through his right lung, heart, liver, and his left lung. A bullet was found in Montes's clothing near his left armpit. In addition, a .45 caliber shell casing was found near a vehicle parked in Wood's driveway. A bullet fragment and some shotgun wadding was recovered from Wood's truck.

Appellant admitted to owning the shotgun found inside the vehicle involved in the drive-by shooting. Appellant also admitted to being in the vehicle at the time of the shooting. Appellant was found hiding in a trash can near the location where the vehicle was abandoned. Though flight alone is not enough to sustain a conviction, the fact may be considered. *Valdez, 623 S.W.2d at 321*.

The evidence supports the reasonable inference that appellant knew that his firing of his weapon in the general direction of a group of people, including Montes, was reasonably certain to result in a death. *See Flanagan, 675 S.W.2d at 736* (concluding intent to kill was established by evidence that defendant picked up a gun in the backseat, leaned out the vehicle's window and shot the weapon at the pickup truck behind him); *Rojas v. State, 171 S.W.3d 442, 447 (Tex. App.-Houston [14th Dist.] 2005, pet. ref'd)* (holding evidence sufficient to prove appellant intended for someone to die when he shot his weapon in the general direction of a group of people including a four-year-old). Even if appellant's own weapon did not directly cause the death of the complainant, the evidence supports the finding that appellant was guilty as a party to the offense. *See Cain v. State, 976 S.W.2d 228, 234 (Tex. App.-San Antonio 1998, no pet.)* (finding defendant guilty under law of the parties and stating that "the fortuity that only a bullet from the defendant's partner struck the victim, and the fact that the defendant was a poor marksman does not absolve the defendant of criminal responsibility").

A rational jury could find that appellant was acting in concert with the others in the vehicle and that the individuals in the vehicle were acting together to intentionally and knowingly caused the death of someone, or that they intended serious bodily injury and caused death by an act clearly dangerous to human life, namely shooting into a crowd of people. *See Hoang v. State, S.W.3d. , 2006 Tex. App. LEXIS 3843, No. 01-04-01139-CR, 2006 WL 1228655, at *4-6 (Tex. App.-Houston [1st Dist.] May 4, 2006, pet. ref'd)* (concluding that evidence was sufficient to support conviction for murder as party to offense when defendant assisted shooter by giving him a firearm, drove the shooter parallel to the victim's car, and hid all evidence of the crime); *Hernandez v. State, 198 S.W.3d 257, 266-67 (Tex. App.-San Antonio 2006, pet. ref'd)* (finding evidence sufficient to establish that defendant was a party when defendant knew that physical force would be used, ignored the victim's screams while assuming the role of a lookout, helping dispose of the body, and discard other evidence of the crime). Because a rational trier of fact could find the essential elements of murder beyond a reasonable doubt, there is legally sufficient evidence to support the verdict.

In support of his factual-sufficiency challenge, appellant asserts that evidence does not show that he acted with the intent to cause death, or for any other party with him to cause the death of the complainant. We view all of the evidence in a neutral light. *Watson, 204 S.W.3d at 414.* Appellant directs us to his statement given to Sergeant Ramsey in which he expressed anger and his desire to frighten the guests at the barbeque, but never intended to kill anyone. Appellant contends that he fired either in the air or away from where the people were standing. Thus, he contends that he did not anticipate that the complainant, or any other individual, would be shot and killed. The jury, as fact-finder, was free to disbelieve this evidence, and believe the overwhelming amount of evidence supporting the conviction. *Cain, 958 S.W.2d 404 at 407.* This evidence includes the following: (1) appellant went to Duran's home earlier in the evening to have some "discussion"; (2) he left his girlfriend's home with Duran and Aguilera around 11:30 p.m.; (3) he was in the vehicle at the time of the shooting; (4) he owned the shotgun found in the vehicle; (5) he was found hiding in a trash can in a location near the abandoned vehicle; and (6) he had fresh gun residue on his hands. A participant in the drive-by shooting, appellant fired a weapon into a crowd of people while he was a passenger in the vehicle. The victims were standing in plain sight in the yard and appellant fired his weapon directly at them. At the very least, appellant is guilty as a party to the shooting of the complainant. *See Patterson v. State, 950 S.W.2d 196, 202 (Tex. App.-Dallas 1997, pet. ref'd)* (concluding that evidence was factually sufficient to support murder conviction of defendant, who, along with another person, shot at an automobile in which the victim was riding); *Garcia v. State, 827 S.W.2d 25, 26-27 (Tex. App.-Corpus Christi 1992, no pet.)* (finding murder conviction sufficiently supported by the evidence that the defendant had personally stabbed the victim even though the evidence was conflicting as to which of three suspects involved was the actual stabber); *Polk v. State, 710 S.W.2d 610, 611 (Tex. App.-Dallas 1986, pet. ref'd)* (concluding that the evidence at a minimum shows that the defendant was a party to the offense without proof of whether he actually pulled the trigger). n5 Because the verdict is not against the great weight and preponderance of the evidence and is not clearly wrong or unjust, the evidence is factually sufficient to support the murder conviction.

n5 Murder is a "result of conduct" offense. *Cook v. State, 884 S.W.2d 485, 490 (Tex. Crim. App. 1994)*. A person commits the offense of murder if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *TEX. PEN. CODE ANN. § 19.02(b)(2)* (Vernon 2003). 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. *TEX. PEN. CODE ANN. § 6.04(b)(2)* (Vernon 2003). Under the statute, a defendant can be held "criminally responsible," that is, guilty for the death of another even if he did not intend to harm the victim, so long as he caused the actual victim's death while acting with the intent to kill a different person. *Chimney v. State, 6 S.W.3d 681, 700 (Tex. App.-Waco 1999, pet. ref'd)*. Thus, even if appellant did not intend to kill anyone or intended to kill another person, he would not be absolved of criminal responsibility. *Id.*

Conclusion: Having found no merit in appellant's challenges to the legal and factual sufficiency of the evidence, we overrule appellant's remaining issues two through seven.

We affirm the trial court's judgment.