

**Affirmed and Opinion filed July 5, 2001.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-00-00413-CR**

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**ROBERT JAMANE GLENN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 174<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 814986**

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**OPINION**

This is a murder case involving transferred intent. Appellant fired a pistol in the direction of a person with whom he had a dispute. The bullet missed but went through the window of a residence and killed complainant. A jury found appellant guilty and sentenced him to life imprisonment. In this appeal, we determine whether: (1) the evidence was legally and factually sufficient to support the intent element of appellant's conviction; (2) the trial court erred in overruling appellant's objection to the State's closing argument; and (3) the punishment phase jury charge pertaining to parole and good conduct time violated appellant's federal and state Constitutional rights. We affirm.

## **Background**

Appellant was an acquaintance of Ron James. The day before complainant's death, James had allegedly assaulted and robbed Gustina Paige. Paige then armed herself with a pistol to protect herself from James. The following day, James advanced on Paige as if to assault her. Paige pulled her pistol and fired several times, hitting James once in the leg. After exchanging threats with James, Paige put away her weapon and began walking away. Paige stated that after she shot James and was walking away, she heard another shot. Paige testified, "When I looked around, they was shooting up in the air. They're not shooting at me. I walked on home."

Jeanette Macum also witnessed part of the incident. After she saw Paige shoot James, she heard James call for appellant to bring him a gun. Macum later saw appellant fire the weapon several times in the air.

Meanwhile, Elvanelia Hernandez, complainant's wife, saw the altercation between Paige and James. A few minutes after Paige shot James, Hernandez saw appellant, who was about fifteen to sixteen feet from her house, shoot at Paige as Paige was walking by her residence. Hernandez maintained several times that she saw appellant shoot in the direction of Paige and did not see him shoot in the air. Hernandez heard a bullet enter her home. That bullet penetrated a screen and blinds and hit complainant squarely in the chest, killing him.

HPD Officers found five spent casings on the ground from the location appellant fired the gun. Officer J.C. Wood testified that the trajectory of the bullet that struck complainant appeared to be horizontal and direct, was at an angle consistent with the location of the spent casings, and there was no indication of a bullet going up in the air and coming back down.

Appellant admitted he shot his pistol two or three times but asserted he did it in defense of himself and others. The jury convicted appellant of murder and sentenced him to life imprisonment.

## Legal and Factual Sufficiency

Appellant first argues that the evidence is legally and factually insufficient to support his conviction. In determining whether the evidence is legally sufficient to support a verdict, we view the evidence “in the light most favorable to the verdict” and ask whether “any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Weightman v. State*, 975 S.W.2d 621, 624 (Tex. Crim. App. 1998); *Lane v. State*, 933 S.W.2d 504, 507 (Tex. Crim. App. 1996) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979)). In contrast to a legal sufficiency review, a review of factual sufficiency requires that the evidence be viewed in a neutral light, favoring neither party. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). The verdict will be set aside only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Id.*

Appellant argues the evidence is legally insufficient to show he had the specific intent to cause death or serious injury to Gustina Paige, which was attributed to complainant under the transferred intent rule.<sup>1</sup> In support, appellant cites *King v. State*, 312 S.W.2d 677 (Tex. Crim. App. 1958). There, according to witnesses, the appellant “didn’t have the right sense” and was “cracking up.” As he ran from officers, he fired his gun at them from about seventy yards away, but missed. The appellant tried to reload his weapon but was apprehended. The court of criminal appeals held that after “careful consideration of [the] facts,” it was unable to reach the conclusion the appellant had the intent to commit “murder with malice.” *Id.* Unfortunately, the court did not provide any

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<sup>1</sup> The Penal Code states:

(a) A person is criminally responsible if the result 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 clearly insufficient.

(b) 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.

analysis of its consideration of the facts. Clearly, though, the mental state of the appellant in that case and in ours differs significantly. There is no indication that our appellant was mentally unstable, as was the appellant in *King*. Further, unlike the appellant in *King*, who was retreating and fired his gun in what appeared to be haphazard fashion, there is clear evidence here that our appellant pointed his gun at Paige and fired from a much closer range; thus the manner of use of the weapon is readily distinguishable.

Appellant also cites *Davis v. State*, 516 S.W.2d 157 (Tex. Crim. App. 1974) as “instructive on the issue of intent when the complainant does not realize a weapon is fired in her direction.”<sup>2</sup> There, the complainant, who was not hit, testified he could not tell whether he had been shot at. The court held that “on the basis of the complaining witnesses’ own testimony,” there was insufficient evidence to show a specific intent to kill. *Id.* at 160. Here, however, we have Hernandez’s testimony that she did see appellant shoot directly at Paige; thus there is ample evidence that appellant fired at Paige under circumstances reasonably calculated to produce death or serious injury to her. *See Ross v. State*, 861 S.W.2d 870, 873 (Tex. Crim. App. 1992) (holding that the jury may infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of that weapon). *Davis* and *King* are not in point. We overrule appellant’s legal sufficiency issue.

Appellant also challenges the factual sufficiency of the evidence. In so doing, however, he incorrectly asserts there is “no evidence” that appellant shot at Paige. As already discussed, this is simply untrue. Appellant also points to the testimony of other witnesses who said they only saw appellant shoot in the air. It appears, though, that these witnesses did not see appellant shoot all five rounds. Further, their testimony is belied both by Hernandez’s firm testimony and by the officer’s testimony as to the direct

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<sup>2</sup> Appellant seems to contend that if a victim is unable to ascertain he or she is being attacked with deadly force, the defendant does not have a culpable mental state. Obviously, there is nothing of the sort in the murder statute. Otherwise, a person could escape responsibility for murder by killing his victim by stealth. It is the mental state of the defendant, not the complainant, that is relevant in a murder prosecution.

trajectory of the deadly bullet. Thus, viewing all the evidence in the record in neutral fashion, we see no basis upon which to reverse the jury's verdict. We overrule appellant's factual sufficiency issue.

### **Improper Argument**

Next, appellant points to the State's closing argument during the guilt phase of trial:

Let me get something out of the way. You heard from the witness stand that the officers involved in this case stated that Ronald James was completely uncooperative. The State cannot pursue or prosecute a case when the witness is uncooperative.

Appellant objected that the argument was a misstatement of the law, which the court overruled. The State then went on to argue that appellant was trying to divert attention from his own actions, adding, "And he was not someone that was willing to deal with the police in this incident at all."

Appellant correctly points out that a misstatement of the law is improper jury argument. Appellant argues that the State's comments incorporated an unspoken, circuitous logic which ultimately meant that, because the force James used against Paige was not unlawful, appellant was not justified in using force against Paige to defend James. This, in turn, he argues, "wholly undermined" appellant's defense of a third person (James) argument. Of course, this is not what the State actually said. While a juror might have inferred that logic from the brief assertion made by the State, it does not necessarily follow from it. We also observe that it is not clear whether the State's argument was made as a statement of the law or as a statement that, as a practical matter, it is difficult to pursue a case with an uncooperative complainant.<sup>3</sup>

In any event, even assuming the argument were improper, appellant's substantial

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<sup>3</sup> Just as appellant points out the heavily publicized case of Warren Moon's alleged assault on his wife, in which his wife was an unwilling complainant, and the jury found Moon not guilty, members of the jury may well have been aware that it is not necessary to have a cooperative complainant, yet as a practical matter, it is difficult to pursue a case when the complainant is uncooperative.

rights were not affected. A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict. *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). Erroneous rulings related to jury argument are generally treated as non-constitutional error within Rule 44.2(b). *Martinez v. State*, 17 S.W.3d 677, 692 (Tex. Crim. App. 2000); *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998). Rule 44.2(b) requires any error that does not affect substantial rights to be disregarded. See TEX. R. APP. P. 44.2(b). The following three factors are used to analyze the harm associated with improper jury argument: (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks); (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the judge); and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). *Martinez*, 17 S.W.3d at 692-93; *Mosley*, 983 S.W.2d at 259.

In this case, the severity of any misconduct was minimal. The reasons the State chose not to pursue prosecution of Paige was a minor aspect of the case and was not of great consequence to any material issue. Further, there is no indication the State's comment was intended to introduce improper or inflammatory argument. Rather, it appears the argument was simply a good faith attempt to counter appellant's attack on Paige. Assuming the comment was improper, the court overruled the objection to it, thus took no measures to cure any damage associated with it. With regard to the third factor, the evidence that appellant intentionally shot at Paige while she was walking away from the scene, with her gun put away, was very strong. Also strong was the evidence that appellant's bullet, shot at Paige, killed complainant. Thus, absent the comment, the conviction was just as likely to have occurred.

In view of these elements, we find that even assuming that the argument was improper and the court was remiss in overruling the objection, the record provides fair assurance that the argument did not influence the jury or had only a slight effect. We overrule this issue.

## Jury Charge

Finally, appellant argues that the punishment phase jury charge violated his state and federal Constitutional rights because it carried an instruction on parole and good time, but was an incorrect statement of the law because he was convicted of an offense for which he may not be released to mandatory supervision. Appellant recognizes this court has already rejected this contention in *Edwards v. State*, 10 S.W.3d 699 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1999, pet. granted). But since the court of criminal appeals has granted review in *Edwards*, appellant requests we revisit our holding. We decline. Unless and until *Edwards* is disapproved, we see no reason to overturn our own recent precedent. We overrule appellant's final issues.

The judgment of the trial court is affirmed.

/s/ Don Wittig  
Justice

Judgment rendered and Opinion filed July 5, 2001.

Panel consists of Justices Yates, Fowler, and Wittig.

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