Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00068-CR

Victor Manuel **PALOMO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 341st Judicial District Court, Webb County, Texas
Trial Court No. 2009CRN001115-D3
Honorable Beckie Palomo, Judge Presiding[1]

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Patricia O. Alvarez, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: May 13, 2020

AFFIRMED

Victor Manuel Palomo was convicted by a jury of one count of felony murder and one count of aggravated assault. On appeal, Palomo contends the trial court erred in denying his motion to quash the felony murder count of the indictment. Palomo also asserts the evidence is insufficient to support his convictions. We affirm the trial court's judgment.

[1] The Honorable Elma Teresa Salinas Ender presided over the jury trial in 2011 and entered an interim judgment of conviction which noted formal pronouncement and sentencing were pending Palomo's apprehension, who voluntarily absented himself and absconded during trial. After Palomo's apprehension in 2018, the Honorable Beckie Palomo formally pronounced sentence and entered a final judgment.

BACKGROUND

Roberto Dominguez was hosting an after-prom party at his house. Randy Quintanilla and a few of his friends arrived at the party despite not having been invited. A few of Dominguez's friends began arguing with Quintanilla and his friends about their uninvited presence at the party. Although Dominquez intervened and gave Quintanilla and his friends permission to stay at the party, Quintanilla and his friends decided to leave.

Quintanilla and another witness who was present in Quintanilla's group testified they left the party and met Quintanilla's two brothers at a gas station. Palomo was with Quintanilla's brothers. Quintanilla and his group, which now included his brothers and Palomo, returned to Dominguez's party, and a fight ensued after Dominguez punched one of Quintanilla's brothers in the face.[2] During the fight, Alberto Garcia was shot and killed, and Enrique Garza was shot and injured. Palomo was subsequently charged with felony murder for the shooting of Garcia and aggravated assault for the shooting of Garza.

On the final day evidence was presented during the guilt/innocence phase of trial, Palomo failed to return to court after the noon recess. The trial court instructed the jury that Palomo had voluntarily absented himself, and the trial proceeded. The jury returned a guilty verdict on both counts and assessed the maximum punishment possible for both offenses. Seven years after Palomo absconded during trial, he was apprehended and formally sentenced.

MOTION TO QUASH

In his first issue, Palomo contends the trial court erred in denying his motion to quash the felony murder count of the indictment because "the deadly conduct alleged cannot be both the underlying felony offense and the deadly conduct or the conduct clearly dangerous to human life."

[2] Although Dominguez stated he had prior incidents with the Quintanilla brothers during his interview at police headquarters following the shooting, he denied any such incidents when testifying at trial.

The State responds the issue is not preserved for our review because the argument made on appeal is different from the objection made at trial. We agree.

"Preservation of error is a systemic requirement on appeal." *Ford v. State*, 305 S.W.3d 530, 532 (Tex. Crim. App. 2009). "If an issue has not been preserved for appeal, neither the court of appeals nor [the Texas Court of Criminal Appeals] should address the merits of that issue." *Id*.

"To preserve error for appellate review, the complaining party must make a specific objection and obtain a ruling on the objection." *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002). In order to meet the specificity requirement, a party must "let the trial court know what he wants and why he feels himself entitled to it clearly enough for the judge to understand him." *Vasquez v. State*, 483 S.W.3d 550, 554 (Tex. Crim. App. 2016). In addition, the issue on appeal "must comport with the objection made at trial." *Wilson*, 71 S.W.3d at 349. When the issue on appeal does not comport with the trial objection, "nothing is presented for review." *Hallmark v. State*, 541 S.W.3d 167, 171 (Tex. Crim. App. 2017).

In the felony murder count of the indictment, the indictment alleged Palomo:

> did then and there intentionally or knowingly commit or attempt to commit an act clearly dangerous to human life, to-wit: shooting a firearm at or in the direction of an individual, that caused the death of ALBERTO GARCIA, and the defendant was then and there in the course of intentionally or knowingly committing a felony, to-wit: DEADLY CONDUCT, and said death of ALBERTO GARCIA was caused while the defendant was in the course of and in furtherance of the commission or attempt of said felony.

In the verbal motion to quash made before trial, Palomo's attorney noted the felony murder statute prohibits manslaughter from serving as the underlying felony. *See* TEX. PENAL CODE ANN. § 19.02(b)(3) ("A person commits [the] offense [of murder] if he commits or attempts to commit a felony, other than manslaughter, and in the course of 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."). Palomo's attorney then asserted:

> In this case, deadly conduct, I will argue is a lesser-included offense of manslaughter. What the State has done is, because they cannot show the specific intent to allege murder, they have combined the deadly conduct with the act clearly dangerous to human life to avoid the allegation that is necessary to either kill someone knowingly or intentionally. And so at best, they have alleged — in a round about way — manslaughter. So that's why I'm asking that you quash the indictment or that you proceed only on manslaughter.

After the State presented cases holding deadly conduct is not a lesser-included offense of manslaughter and can be the underlying felony for felony murder, Palomo's attorney asserted:

> Your Honor, if I may just clarify further? My objection is not just that deadly conduct cannot be the underlying offense. The thrust of my objection is that the deadly conduct alleged here cannot be both the underlying felony offense and the — the deadly conduct or the conduct clearly dangerous to human life.

On appeal, Palomo asserts the indictment violates the protection against multiple punishments for the same offense. Asserting the offense of deadly conduct could be established by the same or less proof than that needed to establish felony murder, Palomo contends deadly conduct is the only offense for which he could be convicted. Palomo also notes murder is a result-oriented offense while deadly conduct is conduct-oriented offense.

First, although Palomo's attorney stated the thrust of his objection was not based on deadly conduct being alleged as the underlying felony offense, the attorney's specific objection at trial was that deadly conduct "is a lesser-included offense of manslaughter" and that the indictment alleged manslaughter as the underlying felony "in a round about way." In addition, Palomo's trial attorney argued the trial court could only proceed on the offense of manslaughter while Palomo's brief asserts deadly conduct is the only offense for which Palomo could be convicted. Finally, Palomo's trial attorney never made any reference to murder being a result-oriented offense while deadly conduct is a conduct-oriented offense. Therefore, because Palomo's objection at trial does

not comport with the first issue he raises on appeal, the issue has not been preserved for this court's review.

Even if this issue had been preserved for our review, we believe the Texas Court of Criminal Appeals would overrule the issue based on its analysis in *Johnson v. State*, 4 S.W.3d 254 (Tex. Crim. App. 1999). In his brief, Palomo argues the indictment violates the constitutional protection against multiple punishments for the same offense. Specifically, Palomo argues a multiple punishments claim arises in the "lesser-included offense context" because "the same conduct is punished twice; once for the basic conduct, and a second time for the same conduct plus more." Palomo then contends, "As a result of the wording in the indictment, the conduct of discharging a firearm at or in the direction of an individual is the conduct alleged as the felony conduct underlying the felony murder. However, the same conduct is used to support murder since it was allegedly caused by discharging a firearm at or in the direction of an individual."

This argument is similar to the argument made in *Johnson* that "the act constituting the underlying felony and the act clearly dangerous to human life merged, and thus could not support a conviction for felony murder." 4 S.W.3d at 254. Disavowing an overly broad statement made in an earlier opinion, the court held its prior opinion "did not create a general 'merger doctrine' in Texas." *Id*. at 258. The court then clarified the merger "doctrine exists only to the extent consistent with section 19.02(b)(3)" and "stands only for the proposition that a conviction for felony murder under section 19.02(b(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter." *Id*. Because deadly conduct is not a lesser included offense of manslaughter, *Washington v. State*, 417 S.W.3d 713, 721 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *Price v. State*, No. 04-04-00886-CR, 2006 WL 927282, at *2 (Tex. App.—San Antonio Apr. 12, 2006, pet. ref'd) (not designated for publication), Palomo's argument, even if it was preserved, would fail in this case.

SUFFICIENCY

In his second and third issues, Palomo challenges the sufficiency of the evidence to support his convictions. Specifically, Palomo contends the evidence is insufficient to establish that he was the person at the scene who discharged the firearm which killed Garza and injured Garcia.

In reviewing a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see also Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). "[T]he jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony." *Zuniga*, 551 S.W.3d at 733. Accordingly, we defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

Numerous witnesses at the scene of the shooting identified the shooter as wearing a red shirt with some describing the shirt as a red "Ed Hardy" shirt. Several witness identified Palomo as the shooter from photographic lineups shown to them at the time their statements were taken at police headquarters immediately after the shooting. One witness, who was with Quintanilla and his group, identified Palomo as the shooter, stated she saw him with the gun at a second party where the group went after the shooting, saw him remove the shirt he was wearing at the time of the shooting, and was told by the group of people not to say anything about the shooting. Quintanilla and one of his brothers also identified Palomo as the shooter during their interviews at police headquarters. Another witness testified Palomo handed him a gun wrapped in a red and orange "Ed Hardy" shirt and asked him to hide it. The shirt and gun were recovered from the console of the truck where the witness testified he hid the shirt and gun. Ballistics tests linked the

gun recovered from the truck to all of the spent casings and live rounds recovered from the crime scene. Although some witnesses' trial testimony was inconsistent with the statements they made during their initial interviews at police headquarters and some witnesses' trial testimony identifying only one shooter was inconsistent with their statements regarding the existence of a second shooter, we defer to the jury's weighing of the evidence, including the credibility of witnesses, and to the jury's resolution of conflicts in the evidence. Finally, we note the jury could have drawn an inference of guilt from Palomo's flight. *See Clayton v. State*, 235 S.W.3d 772, 780 (Tex. Crim. App. 2007) (recognizing "factfinder may draw an inference of guilt from the circumstance of flight"). Having reviewed the record as a whole, we hold the evidence is sufficient to support the jury's finding that Palomo was the individual who shot Garcia and Garza. Palomo's second and third issues are overruled.

CONCLUSION

The judgment of the trial court is affirmed.

Sandee Bryan Marion, Chief Justice

DO NOT PUBLISH