Affirmed and Opinion filed August 3, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00021-CR

ROBERT ANTHONY PATTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 208th District Court
Harris County, Texas
Trial Court Cause No. 762,426

O P I N I O N

Appellant, Robert Patton, was convicted by a jury of murder and sentenced to thirty-four years incarceration in the Texas Department of Criminal Justice, Institutional Division. In three points of error, he challenges his conviction arguing that: (1) the trial court erred by refusing to allow him to impeach a witness for the State; (2) the evidence is legally insufficient to sustain his conviction, and (3) the evidence is factually insufficient to sustain his conviction. We affirm.

I.
Factual Background

The record demonstrates that late one night, appellant shot and killed the complainant, Bryan Seals, as the car Seals was riding in pulled alongside appellant's truck. Apparently, there had been a disagreement between the complainant and the appellant, and the complainant asked an acquaintance to follow appellant's truck with his own car, and the acquaintance complied. The acquaintance, James Welch, testified at trial that the complainant told him the appellant owed him money, so the two followed appellant's truck on to a freeway. They easily caught up to appellant's truck, and as they pulled alongside, appellant began shooting at them. The complainant was shot six times and died at the scene. Welch was shot twice and lived, although he remained unconscious for seventeen days following the shooting.

Police received their first clue as to the shooter's identity when Welch regained consciousness. Welch described appellant's truck to the police, but could give no other description. Later, appellant told an acquaintance, James Kennedy, about shooting both men. Kennedy called the police to inquire whether there had been an incident like the one appellant described, and the police confirmed there had been and referred Kennedy to the officers in charge of the investigation. Kennedy cooperated with the police and got further specifics of the shooting and recovered the gun appellant used. At trial, Kennedy testified as to the conversations he had with appellant. Appellant's first point of error concerns the propriety of the trial court's refusal to allow him to impeach Kennedy.

II.
Impeachment Evidence

Appellant claims the trial court erred by refusing to allow him to impeach Kennedy with evidence demonstrating Kennedy's character for untruthfulness. Appellant intended to question Kennedy about his alleged theft from an employer in order to challenge the credibility of his testimony. Before appellant cross-examined Kennedy, however, the State orally requested in a motion in limine that appellant be prohibited from questioning Kennedy

as to any specific instances of conduct in order to attack Kennedy's credibility. *See* TEX. R. EVID. 608(b). The trial court granted the motion, and appellant never attempted to question Kennedy about the alleged theft.

However, when appellant took the stand in his own defense, he attempted to attack Kennedy's credibility by testifying about Kennedy's alleged theft of supplies and jobs from a former employer. At trial, appellant's stated purpose for the testimony was to "attack his credibility as a witness." In addition, appellant argued the evidence was admissible because "[i]t also goes to his character, the fact that the man was stealing jobs and stealing merchandise from the company he worked for." By contrast, on appeal, appellant argues that he wants to use this evidence to show that Kennedy had a motive or bias against Appellant. Appellant's argument on appeal is that Kennedy "had some blame he would want to divert away from himself." Citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), appellant theorizes the jury is entitled to infer Kennedy's bias or prejudice against appellant because he "might want to shade the truth against appellant in order to shift any possible attention away from his own improper workplace conduct." Because this argument was not presented to the trial court, thereby allowing the trial judge an opportunity to rule on it, appellant's "bias" argument has not been preserved for appeal. *See Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990). Accordingly, we overrule appellant's first point of error.

III.
Sufficiency of the Evidence

In his second and third points of error, appellant contends that the evidence was legally and factually insufficient to support the jury's finding of murder and rejection of self-defense. Appellant argues that it was the State's burden to disprove his self-defense theory by a reasonable doubt. Therefore, because the State failed to disprove his defense, the evidence was legally and factually insufficient to convict him. We disagree.

A person is justified in using deadly force when: (1) self-defense is justified under Texas Penal Code section 9.31; (2) a reasonable person in the defendant's situation would not

have retreated; and (3) the use of deadly force was reasonably believed to be immediately necessary to protect the defendant against another's use or attempted use of unlawful deadly force. *See* TEX. PEN. CODE ANN. § 9.32(a) (Vernon Supp. 2000). The State has the burden of persuasion to disprove self-defense but not a burden of production which means that the State must prove its case beyond a reasonable doubt. *See Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App.1991).

A. Legal Sufficiency

In a legal sufficiency review of the evidence, we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we must determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt, and if so, would thereby have implicitly found against appellant on the self-defense issue beyond a reasonable doubt. *See* TEX. PEN. CODE ANN. § 2.03(d) (Vernon 1994); *see also Saxton*, 804 S.W.2d at 914.

It is the role of defense counsel to bring forth enough credible evidence such that the jury must find that the State has not carried its burden. Self-defense is a fact issue to be determined by the jury. *See Saxton* at 913. The jury, as the trier of fact, is the sole judge of the credibility of the witnesses. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App.1986). The jury may believe or disbelieve all or part of any witness' testimony. *See Saxton*, 804 S.W.2d at 913. Appellant's testimony alone will not conclusively prove self-defense as a matter of law. *See Letson v. State*, 805 S.W.2d 801, 805-06 (Tex. App.—Houston [14th Dist.] 1990, no pet.). Nor will the presentation of defensive evidence necessarily render the State's evidence insufficient since the credibility determination of such evidence is solely within the jury's province, and the jury is free to accept or reject the evidence. *See Adelman v. State*, 828 S.W.2d 418, 423 (Tex. Crim. App.1992). It cannot be overemphasized that a jury finding of guilty of all the elements of the offense beyond a reasonable doubt is an implicit finding rejecting the defendant's self-defense theory. *See*

Saxton, 804 S.W.2d at 914; *see also Hull v. State*, 871 S.W.2d 786, 790 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

A person commits the offense of murder as defined by the Texas Penal Code if he: (1) intentionally or knowingly causes the death of an individual; or (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *See* TEX. PEN. CODE ANN. § 19.02(b) (1) & (2) (Vernon 1994). The evidence establishing the elements of the offense consist of several pieces of testimony both from the State's witnesses and the appellant.

First, testifying for the State, Welch related that when he regained consciousness, he told the police that the person who shot him was driving a small, blue truck with a rack attached over the bed. The State established appellant drove a truck matching this description. Second, Kennedy testified how appellant told him about shooting the complainant and Welch, and how later, appellant gave him the murder weapon. Third, Michael Lyons, a forensic scientist with the Houston Police Department, testified that the gun appellant gave Kennedy was the one used to kill the complainant. Finally, appellant testified that in self-defense he shot the complainant and Welch from his own car while driving down the freeway. On the basis of these facts, a rational jury could have: (1) found the elements of the offense of murder beyond a reasonable doubt, and (2) implicitly found beyond a reasonable doubt against appellant on the self-defense issue. Therefore, we find that the evidence is legally sufficient to support appellant's conviction. *See Saxton*, 804 S.W.2d 910, 914; *see also Hull*, 871 S.W.2d at 790. Accordingly, we overrule appellant's second point of error.

B. Factual Sufficiency

When reviewing a factual sufficiency challenge, the court of appeals "views all the evidence without the prism of 'in the light most favorable to the prosecution' and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Clewis v. State*, 922 S.W.2d 126, 129 (Tex.Crim.App. 1996). Here, the only evidence in the record supporting appellant's self-defense theory was

appellant's testimony. Although appellant testified he killed the complainant in self-defense, Kennedy, testifying for the State, related a different version. According to Kennedy, appellant told him that he started a fight with the complainant, so the complainant would follow. Once on the freeway, Kennedy said the appellant slowed down to allow the complainant's car to catch up to his truck. Once the vehicles were even, appellant began shooting, intending to kill the complainant and the driver of the car so there would be no witnesses to the crime. This testimony was consistent with that of Welch. Welch testified to appellant's slow speed on the freeway which allowed him to easily catch up to appellant's truck. Welch told the jury that once his car caught up to appellant's truck, appellant began shooting both him and the complainant, killing the complainant and injuring Welch.

As noted above, the jury, as the trier of fact, is the sole judge of the credibility of the witnesses. *See Sharp*, 707 S.W.2d at 614. Further, the jury may believe or disbelieve all or part of any witness' testimony. *See Saxton*, 804 S.W.2d at 913. Based on the evidence presented, the jury clearly found appellant's self-defense theory untenable in light of the evidence put on by the State. We can not say the jury's verdict was so "contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See Clewis*, 922 S.W.2d at 129. Therefore, the evidence was factually sufficient to convict the appellant of murder despite his assertion of self-defense. Accordingly, we overrule appellant's third point of error.

We affirm the judgment of the trial court.

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John S. Anderson
Justice

Judgment rendered and Opinion filed August 3, 2000.

Panel consists of Justices Amidei, Anderson, and Frost.

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