CASE NO. 09-97-00021-CR

IN THE

TEXAS COURT OF APPEALS

NINTH SUPREME JUDICIAL DISTRICT

BEAUMONT, TEXAS

On Appeal from Cause No. 19,058

159th Judicial District Court

Angelina County, Texas

DESIREE SHAW,
Appellant

VS.

THE STATE OF TEXAS,
Appellee

BRIEF FOR APPELLEE

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ORAL ARGUMENT REQUESTED ONLY IF REQUESTED BY APPELLANT

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1. Desiree Shaw, Appellant.

2. John Heath, Counsel for Appellant at trial and on appeal.

3. David V. Wilson II, Cousel for State at trial and on appeal.

TO THE HONORABLE COURT OF APPEALS:

PRELIMINARY STATEMENT

The appellant was charged with the felony offense of murder. (TR-004). The appellant entered a plea of not guilty to the offense. (R. II- 7)[1]. However, the jury found the appellant guilty of murder. (TR-103). They then heard evidence on the issue of punishment. (R. V.- 1-63). After arguments of counsel, the jury sentenced the appellant to 32 years imprisonment. (TR. 123). Timely notice of appeal was given.

STATEMENT OF FACTS

The State challenges all factual assertions in the appellant's brief pursuant to Tex. R. App. P. 38.1(f) and submits the following account of facts.

On August 11, 1996, the victim was at home with his family in the City of Diboll, Texas. (R. III- 257-267). In the house with him were his wife, the appellant, his two children, and two of his step-children. (R. III- 257-267). The victim had been to a party and came home late. (R. III- 381-387). He entered the house and went to bed sometime in the early morning hours of August 11. (R. III- 257).

Shortly after 7:00 a.m. that morning, the Diboll Police received a "911" call from the appellant indicating that the victim had been shot and needed medical assistance. (R. II- 18-19). When police arrived, they found the appellant standing over the victim

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[1] All citations to the Statement of Facts (Reporter's Record) refer to the page numbers at the bottom center of each page.

with a towel in her left hand held up to appellant's throat. (R. II- 19). The first officer on the scene checked the victim for a pulse and found none. (R. II- 20). The appellant was taken out of the bedroom. (R. II- 20). In the bed with the victim, the officers observed a pistol wrapped in a pair of underwear. There was a pool of blood under the victim's right arm which was already clotting. (R. II- 20).

Officer Gary White, the first officer on the scene, overheard the appellant in the living room telling his partner that she had been taking a shower. (R. II- 25). Officer White checked the shower in the house and found the shower stall and tub to be dry. (R. II- 25). Even hair accumulated in the drain was dry. (R. II- 25). The officers bagged the victim's hands to perform an atomic absorbtion test for gunpowder residue. (R. II- 28). The underwear wrapped around the pistol was unwrapped by Officer White. (R. II- 28). The officers discovered that although the muzzle was completely covered by the underwear, there was no bullethole in the fabric. (R. II- 28-29). Officer White decocked the weapon and discovered that the empty cartridge was still in the weapon. (R. II- 29).

Laboratory testing of the victim's hands and the underwear wrapped around the gun by D.P.S. Chemist Ivan Wilson revealed the presence of no gunpowder residue. (R. II- 146-149). Test firing of the gun with the exact brand of underwear as that found next to the victim revealed that elements found in gunpowder would be deposited in the fabric. (R. II- 149-150). Further test firing by

D.P.S. firearms expert Russell Johnson of the pistol found next to the victim revealed that the extractor mechanism which ejected spent cartridge casings was working properly. (R. II- 165). The only way the phenomenon of the casing not being ejected when the pistol fired could be reproduced by Johnson was to apply pressure on the slide mechanism while the gun is fired. (R. II- 165). This pressure on the pistol is consistent with someone attempting to muzzle the gun with a foreign object to impede its sound, as well as placing an object over the gun to hide it from view. (R. II- 166).

An autopsy of the victim by pathologist Dr. James Bruce revealed that the gunshot wound was a contact-type wound. (R. II- 135). This type of wound is caused by the gun touching the skin when fired and is not consistent with an accidental shooting. (R. II- 136). The bullet severed the victim's spinal cord, instantly causing complete paralysis. (R. II- 137). This would have prevented the victim from wrapping the gun in the underwear after the shot was fired. (R. II- 137).

Special Agent Michael Prodan of the California Department of Justice, supervisor of his department's violent crime profiling unit and an expert in crime scene analysis, examined the photographs of the crime scene in the instant case and listened to the trial testimony. (R. II- 179). In the opinion of Agent Prodan, the crime scene was staged by an individual who wished to make the shooting look like something other than a homicide. (R. II- 179). The position in which the pistol was found and the

position of the body make it highly unlikely that he used the gun on himself. (R. II- 181). The pistol had to have been wrapped in the underwear and placed next to the victim after the shooting, which would have been an impossibility for the victim. (R. II-181). Prodan testified that crime scene staging is done by perpetrators with a relationship to the victim, as perpetrators who are strangers generally have no need to stage crime scenes. (R. II-183).

The appellant was questioned by law enforcement on three occassions, on August 11th, August 15th, and August 26th. (R. III-390-393; Exhibits Volume). Appellant told Texas Ranger Don Morris that she had not touched the pistol at any point on the night of the shooting and stated that she could not explain how the underwear was wrapped around the gun. (R. III- 397-398). She told law enforcement consistently that she found the appellant in their bed after hearing a noise while she was in the shower. However, she told Elizabeth Hodges, a co-worker, that she found him on the floor on his right side. (R. III- 371-372). She told the Texas Ranger that her relationship with the appellant was "the most trusting relationship" and that they had had no marital problems in the summer of 1996 (R. III 397-398).

However, appellant told her neighbor on July 5, 1996 that the victim had asked her to leave and that he wanted a divorce. (R. III- 377). She further told her neighbor that the victim stated his intention that he would seek custody of their son and one of her daughters. (R. III- 377). She went on to tell her neighbor

that she had nowhere to go. (R. III- 377).

During the weekend that he was shot, the victim told three different people that he planned to divorce the appellant and seek custody of their children. (R. III- 366; 273; 386-387). He told one person this on the night he was shot. (R. III- 386-387). He told another that he had an appointment with a lawyer on Monday, August 12, to discuss these issues. (R. III- 366-367). The day before that appointment is the day he was killed.

REPLY TO APPELLANT'S FIRST POINT OF ERROR

Appellant's first point of error alleges that she is entitled to a new trial because an exhibit has been ommitted from the Statement of Facts. In support of this claim, appellant asserts that there is a photograph marked as "defendant's exhibit four" that is missing from the Exhibits Volume of the Statement of Facts. Appellant also claims that the index to the Exhibits Volume of the Statement of Facts is in disarray to the extent that she is entitled to a new trial. Appellant cites no authority for the proposition that a disorganized index to a record that is otherwise a complete record of the trial entitles her to a new trial.[2]

With respect to defendant's exhibit 4, an even casual glance at the record reveals that no such exhibit was admitted at trial. During appellant's cross-examination of Officer Charlie Harris the

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[2] In fact, the index corresponds exactly to the page numbers at the bottom center of the pages of the Statement of Facts. Appellant apparently ignored those page numbers, focusing on the admittedly distracting page numbers at the top right corner of each page.

following took place:

Q Okay. I want to show you Defendant's Exhibit 4, this hasn't been offered, can you identify that?

A Yes Sir

Q Okay. Is that a photograph that you took?

A Yes Sir

Q Okay

(Prosecutor) No Objection, Judge.

THE COURT: Are you offering it at this time?

Q I am, your honor. Defendant's four.

THE COURT: All right, Defendant's four admitted.

Q Your honor, I want to make sure, there is two numbers on here.

COURT REPORTER: One up at the top in red.

Q Judge, I'm sorry, it's defendant's three. What is that and when was it taken?

A Photograph of the victim in the bed. It was taken when I arrived and began taking --

Q Early on?

A Yes sir.

Q Okay. We offer this photograph, your honor, if I haven't already done so.

THE COURT: It's already admitted, Defendant's Exhibit 3.

(R. II- 121-122)(emphasis added).

From the above colloquy, it is clear that appellant's counsel simply misstated the exhibit number of the photograph, caught his mistake, and corrected it. The trial court acknowledged as much by stating, "It's already admitted, Defendant's Exhibit 3." The photograph that appellant claims is missing is in fact contained in

the Exhibits Volume as Defendant's Exhibit 3, which is a photo of the victim in the bed just as Officer Harris described. This point of error is meritless as it is based upon a fact that is not reflected in the record: the existence of defendant's exhibit 4.[3] Texas Rule of Appellate Procedure 34.6(f) only entitles appellant to a new trial if a significant exhibit has been lost or destroyed. Appellant, as discussed above, has made no such showing.

REPLY TO APPELLANT'S SECOND POINT OF ERROR

Appellant's second point of error alleges that the evidence adduced in the instant case is "factually insufficient" to support the verdict and his conviction should be reversed and remanded for new trial. Appellant cites the new standard of review of the facts of criminal cases by the Texas courts of appeal announced in Clewis v. State, 922 S.W.2d 126 (Tex.Crim.App. 1996). This standard provides that an intermediate appellate court can set aside a verdict that is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Id. at 129-130.

In her brief, appellant makes the argument that one "could rationally conclude" that the circumstantial evidence against her required speculation and guess-work. However, under Clewis, an appellate court is not free to reweigh the evidence and set aside a jury verdict merely because its justices feel that a different result is more reasonable. Id. at 135; See also Orona v. State,

[3] Appellant's brief refers to being "advised" that the exhibit is missing. However, such a statement is not contained in the Statement of Facts (Reporter's Record) or the Transcript (Clerk's Record). Thus, the fact of such a statement is not porperly before this Court. Tex. R. App. P. 34.1.

836 S.W.2d 319, 322 n. 2 (Tex.App.-Austin 1992, no pet.)

Indeed, nothing in Clewis suggests that a "factual sufficiency" review overrides the trier of fact's perogative to weigh the evidence and judge the credibility of the witnesses. Turro v. State, 867 S.W.2d 43, 48 (Tex.Crim.App. 1993). In fact, Clewis holds that the appropriate balance between the jury's role as the judge of facts and the reviewing court's duty to review criminal convictions is struck by not allowing the appellate courts to "find" facts or substitute its judgement for that of the jury. Clewis, 922 S.W.2d at 135. Furthermore, the standard of review in a homicide proven by circumstantial evidence is no different than the standard of review in direct evidence cases. See Alexander v. State, 919 S.W.2d 756 (Tex.App.- Texarkana 1996).

Under the proper application of the factual sufficiency standard, this jury's verdict should be affirmed. In that respect, this case is similar to Mora v. State, 797 S.W.2d 209 (Tex.App.-Corpus Christi 1990, pet. ref'd.) There, the defendant challenged the factual sufficiency of the evidence supporting the verdict finding him guilty of murder. Id. at 211. There, as here, the defendant's spouse was found with a bullet wound to the head, the murder weapon was found in suspicious circumstances, the defendant had a motive to kill his spouse, and a history of violence. Id. at 211-214. The court of appeals held that these facts were sufficient to support the jury's verdict of guilty and overruled the defendant's factual sufficiency challenge. Id. at 214. Likewise, this jury's verdict should withstand such a challenge.

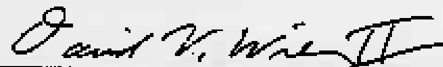
The judgement of conviction should be affirmed.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellee, The State of Texas, respectfully prays that this Honorable Court of Appeals deny all relief sought by Appellant, affirm his conviction and the imposition of punishment, and grant the State such other relief to which it may be entitled.

Respectfully submitted,

DAVID V. WILSON II
Assistant District Attorney
Angelina County, Texas



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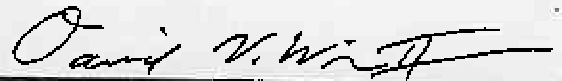
CERTIFICATE OF SERVICE

The undersigned attorney certifies that a true and correct copy of the foregoing Brief for Appellee was served upon Appellant's attorney, Mr. John Heath, 1308 Raguet, Houston, Texas 75961 on the 22d day of December, 1997.



David V. Wilson II