No. 01-24-00429-CR

In the
Court of Appeals
for the
First District of Texas
at Houston

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No. 1671000
In the 182nd District Court
Harris County, Texas

———♦———

JESSE JAMES CLAY
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

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APPELLANT REQUESTS ORAL ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument. Appellant requests this Court to distinguish between what is a tragic accident from criminal conduct. Jurisprudence is full of cases where the evidence was sufficient to support a conviction for manslaughter involving a vehicle accident when the State alleged that the defendant was intoxicated, had driven at a high rate of speed, was intoxicated, was fatigued, or had left the roadway. Since the State charged appellant with murder and not manslaughter, the precise allegation of recklessness is unknown. But none of those circumstances are present in this case. Appellant believes that oral argument will assist this Court in reaching a decision on the sufficiency of the evidence to support appellant's conviction.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Hon. Danilo Lacayo

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STATEMENT OF THE CASE

Appellant was charged by indictment with murder. (CR 25). A jury convicted him of the lesser-included offense of manslaughter. (CR 571; RR VII 150; RR IX 68). After a punishment proceeding, the court found one enhancement paragraph true and sentenced appellant to six years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 571; RR IX 68).

STATEMENT OF FACTS

Appellant and Joe Warren have never met. (RR VII 43, 44). In the thick of the COVID-19 pandemic, Mr. Warren was home, drinking[1], and doing yard work. (RR VI 243, 244). Mr. Warren placed some yard debris on the curb to be picked up by the neighborhood waste management company. (RR VI 243). Appellant was a driver for Texas Pride working a route that included Mr. Warren's neighborhood. (RR VII 41, 43; State's exhibit 65). By late afternoon, appellant, along with two "helpers," had completed the route, and were driving back to the Texas Pride yard. (RR VII 45). At the same time, Mr. Warren noticed that the yard debris had not been collected. (State's exhibit 10).

[1] A blood test on Mr. Waren's remains indicated that his blood alcohol level was .11. (State's exhibit 84). Additionally, appellant's wife reportedly told law enforcement that Warren was "drunk" prior to the incident.

Enraged, Mr. Warren yelled at appellant's truck as it was passing him on the street and threw the uncollected trash toward the truck[2]. (State's exhibit 10). As appellant continued down the street, Mr. Warren made lewd gestures and screamed "fuck you" repeatedly. (State's exhibit 10). Appellant only noticed Mr. Warren when he was standing on the sidewalk to the truck's right, holding the debris. (RR VII 46, 69, 70; State's exhibits 10, 19, 20). Not wanting any complaints about his customer service, appellant brought the full garbage truck to a stop and began reversing in order to meet up with Mr. Warren on the side of the road. (RR VII 47; State's exhibit 10). Despite the flashing lights on the back of the truck and a persistent beeping to indicate the truck was in reverse[3], Mr. Warren took a dozen steps toward the truck as it was simultaneously backing up. (State's exhibit 10). The rear of the truck struck Mr. Warren, knocking him to the ground. (State's exhibit 10). Appellant, intending to return to where he first saw Mr. Warren, ran over Mr. Warren, tragically killing him. (RR VII 48; State's exhibit 10).

Appellant testified that, although the truck had a backup camera, he did not see Mr. Warren directly behind the truck because, believing Mr. Warren to be on the sidewalk, he used the side mirrors to guide him. (RR VII 47; State's exhibit 10). When appellant did not see Mr. Warren in the place where he was originally standing when appellant first saw him, appellant proceeded back to the Texas Pride yard. (RR VII 48).

[2] The interaction was captured on several home surveillance cameras.

[3] Although the witnesses did not agree on precisely how fast appellant was reversing, the record reveals it was slowly – anywhere from 1½ to 8 miles per hour. (RR V 47, 115, 116, 138; RR VI 26, 120).

Appellant was subsequently charged by indictment with murder. (CR 25). The jury rejected the State's theory that appellant intentionally or knowingly killed Mr. Warren, but instead found him guilty of manslaughter. (CR 571; RR VII 150; RR IX 68). After a punishment proceeding, the court found one enhancement paragraph true and sentenced appellant to six years confinement in the Institutional Division of the Texas Department of Criminal Justice. (CR 571; RR IX 68).

SUMMARY OF THE ARGUMENT

The evidence is insufficient to support appellant's conviction for manslaughter. Appellant and the complainant had never met. Appellant, having the right of way in the roadway, was driving a garbage truck in reverse when the complainant, intoxicated, and angry at not having his trash collected, walked up to the rear of the truck as it was reversing. It was unreasonable for the jury to infer that appellant was aware of the risk that the complainant would walk into the path of the reversing garbage truck, with its flashing light and back-up alarm sounding, and then consciously disregard it, subsequently hitting and killing the complainant.

APPELLANT'S POINT OF ERROR

The evidence is insufficient to support appellant's conviction for manslaughter.

Standard of Review

The due process guarantee of the Fourteenth Amendment requires that a conviction be supported by legally sufficient evidence. *Jackson v. Virginia*, 443 U.S. 307, 315-16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Brooks v. State*, 323 S.W.3d 893, 917 (Tex. Crim. App. 2010). In a legal-sufficiency review, an appellate court considers all the admitted evidence and views it in the light most favorable to the verdict. *Harrell v. State*, 620 S.W.3d 910, 913-14 (Tex. Crim. App. 2021). This standard recognizes it is the jury's prerogative to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* at 914. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013). The jury may draw reasonable inferences from the evidence as long as each inference is supported by the evidence. *Carter v. State*, 620 S.W.3d 147, 150 (Tex. Crim. App. 2021). But a jury's verdict cannot rest on speculation - mere theorizing or guessing about the possible meaning of the evidence presented, as opposed to reasonable inferences that can be drawn from the evidence. *Anderson*, 416 S.W.3d at 888.

Argument and law

Appellant was charged by indictment with murder for intentionally and knowingly causing the death of Mr. Warren by striking him with a vehicle. (CR 25). In

the alternative, the indictment alleged that appellant unlawfully intended to cause serious bodily injury to Mr. Warren and caused his death by intentionally and knowingly committing an act clearly dangerous to human life, specifically striking the Mr. Warren with a motor vehicle. (CR 25). Over the defense's objection, the court instructed the jury on both murder and manslaughter. (RR VII 89). The jury found appellant guilty of manslaughter.

The sufficiency of the evidence supporting a conviction is measured by the elements of the offense as defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 239-40 (Tex. Crim. App. 1997). A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Gollihar v. State*, 46 S.W.3d 243, 256 (Tex. Crim. App. 2001).

In this case, a hypothetically correct jury charge for manslaughter would have required the State to allege in the jury instruction the precise acts that the State was alleging as reckless. *See State v. Rodriguez*, 339 S.W.3d 680, 684-85 (Tex. Crim. App. 2011) (holding that the State "must allege those particular acts or circumstances surrounding the act that, at least, suggest an unjustifiable risk"); *Ramos v. State*, 407 S.W.3d 265, 273 (Tex. Crim. App. 2013) (Alcala, J. dissenting). Therefore, under a hypothetically correct instruction, appellant could be convicted of manslaughter if the

evidence showed that he acted recklessly by striking the complainant with a motor vehicle.

A person commits manslaughter if he recklessly causes the death of an individual. TEX. PENAL CODE ANN. § 19.04(a). Manslaughter is a "result of conduct crime," one in which recklessness must go to the conduct causing the death. *Schroeder v. State*, 123 S.W.3d 398, 400-01 (Tex. Crim. App. 2003); *Gilbert v. State*, 196 S.W.3d 163, 166 (Tex. App.--Houston [1st Dist.] 2005, pet. ref'd). A person is reckless with respect to the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the result will occur. TEX. PENAL CODE ANN. § 6.03(c). The risk created "must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*

Recklessness requires the defendant to foresee the risk involved and consciously decide to ignore it. *Williams v. State*, 235 S.W.3d 742, 751 (Tex. Crim. App. 2007). "The issue is not one of theoretical possibility, but one of whether, given all the circumstances, it is reasonable to infer that the particular individual on trial was in fact aware of the risk." *Dillon v. State*, 574 S.W.2d 92, 95 (Tex. Crim. App. 1978). The jury's determination of a culpable mental state is usually grounded upon inferences drawn from the attendant circumstances and may be inferred from the acts, words, and conduct of the accused. *Robledo v. State*, 126 S.W.3d 150, 155 (Tex. App.--Houston [1st Dist.] 2003, no pet.) (citing *Lane v. State*, 763 S.W.2d 785, 787 (Tex. Crim. App. 1989)).

At the time of the accident, appellant was an experienced commercial driver and had a valid license authorizing him to drive the garbage truck he was operating that day. (RR V 89, 90, 122, 123; State's exhibit 64). Appellant first saw Mr. Warren when he was standing near a corner, on the passenger side of the garbage truck, holding a banana leaf. (State's exhibit 19, 20; RR VIII 46). Unbeknownst to appellant, Mr. Warren moved behind the truck as it passed him. (State's exhibit 10). The windows of the truck were rolled up and witnesses with experience in driving garbage trucks testified that you would not likely hear someone yelling from behind the truck inside of the cab. (RR VI 265; State's exhibit 10)

The truck had side mirrors and a back up camera. However, rain, humidity, and dirt can obscure the view from the camera. (RR V 119, 120; RR VI 270; RR VIII 45). It was rainy and misty on the day of the accident. (RR IV 167). The truck was equipped with a working back up alarm and had a flashing light on the back of the truck to warn those behind it that it was reversing. (RR IV 49, 148; V 45; VI 54). Despite this, Mr. Warren continued to walk toward the reversing truck when he could have stepped out of the way. (RR VI 55, 181; State's exhibit 10). The State's expert testified that the Mr. Warren's alcohol consumption that day could have played a role in the accident. (RR VI 56). Additionally, the lead investigator testified that he could not say that appellant was intending to do anything other than to stop and help Mr. Warren. (RR VI 182).

Although appellant left the scene of the accident, there is ample evidence that appellant was not aware that he struck the complainant and would not have felt the

impact. (RR V 111, 112, 127, 128, 148, 149; RR VI 262). Appellant returned the truck to his employer's yard as he usually would, completed an inspection of the truck, and proceeded to his home. (RR IV 134, 135; State's exhibit 64). When contacted by law enforcement, appellant cooperated and passed a drug and alcohol screening. (RR V 123; RR VI 94, 95; RR VIII 50).

"At the heart of reckless conduct is conscious disregard of the risk created by the actor's conduct." *Williams v. State*, 235 S.W.3d 742, 751 (Tex. Crim. App. 2007) (quoting *Lewis v. State*, 529 S.W.2d 550, 553 (Tex. Crim. App. 1975)). Lack of foresight, stupidity, irresponsibility, thoughtlessness, ordinary carelessness, however serious the consequences may happen to be, do not suffice to constitute criminal recklessness. *Id.* Recklessness requires the defendant to actually foresee the risk involved and to consciously decide to ignore it. *Id.* "Those who are subjectively aware of a significant danger to life and choose, without justification, to engage in actions (or in some cases inactions) that threaten to bring about that danger have made a calculated decision to gamble with other people's lives." *Id.*, at 752 (citing James Gobert, SEARCHING FOR COHERENCE IN THE LAW OF INVOLUNTARY MANSLAUGHTER: THE ENGLISH EXPERIENCE, 6 Crim. L.F. 435, 454 (1995)) . This combination of an awareness of the magnitude of the risk and the conscious disregard for consequences is crucial. *Id.*, at 752. Determining whether an act or omission involves a substantial and unjustifiable risk "requires an examination of the events and circumstances from the viewpoint of

the defendant at the time the events occurred, without viewing the matter in hindsight." *Id.*, at 753 [Internal citations omitted].

The complainant's death was a tragic, albeit gruesome accident. Appellant was not under the influence of drugs or alcohol at the time of the offense and did not have a history of unsafe driving. Driving a garbage truck fitted with a flashing, visible light and audible back up alarm, in reverse, using the mirrors as a guide, only a few miles an hour, in a straight line, on a wide street does not create a substantial and unjustifiable risk. Mr. Warren was standing on the passenger side of the truck when he attempted to flag appellant down. Appellant, using his mirrors to guide his way back to where Mr. Warren was standing, did not see Mr. Warren directly behind the truck and had no reason to assume the man would walk toward the rear of a large garbage truck as it was in reverse.

Appellant's driving was not inherently reckless. In fact, Mr. Warren walking in the middle of the roadway toward a large, commercial vehicle driving in reverse was reckless[4]. *See*, *e.g.*, *Smith v. State Farm Ins. Co.*, 431 S.W.2d 775, 776 (Tex. App.--Beaumont 1968, writ ref'd n.r.e.) (Driver not liable for plaintiff's death when motorist, and not pedestrian, had right-of-way in middle of block in paved portion of road and

[4] Walking in a street where a sidewalk is provided is a violation of the Texas Transportation Code and an arrestable offense. TEX. TRANSP. CODE ANN. § 552.006; *see Magic v. State*, 878 S.W.2d 309 (Tex. App.--Houston [1st Dist.] 1994, pet. ref'd) (Police officers had probable cause to arrest defendant for violating statute prohibiting walking in street when sidewalk is provided; officers testified that defendant and his brother were walking in middle of street beyond point at which sidewalk began when officers saw them).

it could reasonably be inferred that pedestrian failed to keep a proper lookout when it was undisputed that motorist was driving on blacktop at 15 miles per hour.).

Considering all of the circumstances, it was unreasonable for the jury to infer that appellant was aware of the risk that Mr. Warren would walk directly behind the reversing garbage truck and then consciously disregard it. The evidence is insufficient to support appellant's conviction for manslaughter. *Compare*, *Williams v. State*, 531 S.W.3d 902, 907 (Tex. App.--Houston [14th Dist.] 2017), *aff'd*, 585 S.W.3d 478 (Tex. Crim. App. 2019) (Evidence was sufficient to support defendant's conviction for manslaughter following a vehicle accident in which victim was killed when struck by defendant's car, where at the time of the accident weather was clear, traffic was light, visibility was excellent, defendant left the roadway, drove onto the shoulder toward a group of joggers, defendant's car was accelerating, defendant never applied the brakes, and within hours of the crash, defendant's blood contained methamphetamine, amphetamine, hydrocodone, marijuana, and cocaine.); *compare also*, *Cooks v. State*, 5 S.W.3d 292, 296 (Tex. App.--Houston [14th Dist.] 1999, no pet.) (Guilty verdict for three counts of manslaughter arising out of automobile accident that occurred when defendant was estimated to be travelling at nearly 100 miles per hour was not so contrary to weight of evidence as to be clearly wrong and unjust, despite other driver's testimony that, in hindsight, she probably would not have pulled out in front of defendant's car, despite officer's testimony that he originally attributed cause of

accident to other driver, and despite testimony of defendant's brother that other driver said that her father told her that she did not have time to make turn.

CONCLUSION

The evidence is insufficient to sustain appellant's conviction for manslaughter. His conviction should be reversed and a judgement of acquittal rendered.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on December 16, 2024, has 4,468 words based upon a word count under MS Word.

Mandy Miller

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument to counsel for the State of Texas via eservice on December 16, 2024, at:

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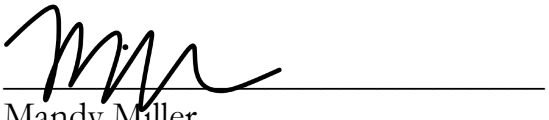

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