Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00939-CR

ELVA EARL HODGE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court of Law No. 3
Harris County, Texas
Trial Court Cause No. 98-29453

O P I N I O N

Charged with the misdemeanor offense of assault with two enhancement paragraphs,[1] appellant, Elva Earl Hodge, pled not guilty. The jury found appellant guilty, disregarded the enhancement paragraphs, and assessed appellant's punishment at confinement for sixty days in the Harris County Jail. Appellant filed this appeal, claiming in two points of error that the evidence was both legally and factually insufficient to

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[1] The enhancement paragraphs pertained to the offenses of unlawfully carrying a weapon and unauthorized use of a motor vehicle.

support his conviction for assault where the state never rebutted his assertion of self-defense beyond a reasonable doubt. For the following reasons, we affirm appellant's conviction.

STATEMENT OF FACTS

Bonita Williams, the complainant, attended a pool party. Appellant, who was Williams' ex-boyfriend also attended the party, with his new girlfriend. At some point during the party, appellant introduced his new girlfriend to Williams. Williams did not appear to be upset after meeting the new girlfriend.

Later during the party, appellant approached Williams, who was sitting in a chair talking to appellant's new girlfriend. Appellant and Williams exchanged insults, and among other things, appellant called Williams a "roach," a "bitch," and a "nobody". Appellant then threw his wine in Williams' face. At that point, Williams stood up and ran towards him as if she wanted to fight. The two were near the gate surrounding the pool, and as Williams approached, appellant grabbed her and threw her violently to the ground just outside the gate. Appellant pinned her down and began hitting her repeatedly in the face with his open hand. Williams did not appear to kick or hit appellant at all. After appellant beat her for five to ten seconds, Willie Howard, a friend of Williams and an acquaintance of appellant, tackled appellant to get him off of Williams. Howard bear-hugged appellant and had to hold him down while Williams was helped to a nearby apartment. Appellant then sped off in his car.

After the incident, Williams was upset and crying. She had sustained a number of injuries. Appellant had no noticeable injuries.

LEGAL SUFFICIENCY

In his first point of error, appellant claims the evidence was legally insufficient to support his conviction for assault where the state never rebutted his assertion of self-defense beyond a reasonable doubt. In determining whether the evidence is legally sufficient, we view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim.

App. 1999) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We must evaluate all of the evidence in the record, whether admissible or inadmissible. *See Johnson v. State*, 967 S.W.2d 410, 412 (Tex. Crim. App. 1998) (citing *Gardner v. State*, 699 S.W.2d 831, 835 (Tex. Crim. App. 1985)).

When the accused has raised self-defense, we look to whether the evidence is legally sufficient to allow the jury (1) to find the essential elements of the offense beyond a reasonable doubt and (2) to find against the accused on the self-defense theory beyond a reasonable doubt, not to whether the state presented evidence to affirmatively refute self- defense. *See Benavides v. State*, 992 S.W.2d 511, 521 (Tex. App.–Houston [1st Dist.] 1999, pet. ref'd) (citing TEX. PENAL CODE ANN. § 2.03(d) (Vernon 1994); *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991)). Although the state has the burden to show beyond a reasonable doubt that the force used was not reasonable or justified, it does not have the burden of producing evidence to affirmatively refute self-defense. *See Tucker v. State*, 15 S.W.3d 229, 235 (Tex. App.–Houston [14th Dist.] 2000, pet filed.) (citing *Saxton*, 804 S.W.2d at 913). Therefore, we will first determine whether the evidence is legally sufficient to allow the jury to find the essential elements of assault and then determine whether the evidence is legally sufficient to allow the jury to find against appellant on the self-defense theory beyond a reasonable doubt.

To prove assault, the state must show that a person intentionally, knowingly, or recklessly caused bodily injury to another. *See* TEX. PENAL CODE ANN. § 22.01(a)(1) (Vernon Supp. 2000). In this case, appellant grabbed Williams and threw her violently to the ground, where he pinned her down and repeatedly struck her face. He continued beating her for five to ten seconds before Howard was able to separate the two. Howard, who had observed the entire scene, testified that Williams was struggling helplessly under appellant's weight. Williams received a bleeding gash on her nose, scrapes on her forearm, elbow, and knee, and abrasions on the tops of her hands. Appellant had no noticeable injuries. These events were uncontested at trial and clearly show appellant intended to subdue and strike Williams. We find the evidence is legally sufficient to prove that appellant intentionally, knowingly, or recklessly caused bodily injury to Williams and thus, establishes the essential elements of assault beyond a reasonable doubt.

Now we consider whether the evidence is legally sufficient to allow the jury to find against appellant on the self-defense theory beyond a reasonable doubt. Under the Penal Code, ". . . a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." TEX. PENAL CODE ANN. § 9.31(a) (Vernon Supp. 2000). The self-defense justification does not apply when the actor provoked the other's use or attempted use of unlawful force. *See id*. at § 9.31(b)(4). However, if the actor abandons the encounter or clearly communicates to the other his intent to do so, and the other nevertheless continues or attempts to use unlawful force against him, the actor can still claim self-defense. *See id*.

The trial court did not charge the jury on provocation; however, we measure the sufficiency of the evidence against the elements of the offense as defined by a hypothetically correct jury charge. *See Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). A charge on provocation is properly given if: (1) self-defense is an issue; (2) there are facts in evidence which show that the victim made the first attack on the defendant; and (3) the defendant did some act or used some words intended to and calculated to bring on the difficulty in order to have a pretext for inflicting injury on the victim. *See Willis v. State*, 936 S.W.2d 302, 307 (Tex. App.–Tyler 1996, pet. ref'd) (citing *Matthews v. State*, 708 S.W.2d 835, 837-38 (Tex. Crim. App. 1986); *Williamson v. State*, 672 S.W.2d 484, 486 (Tex. Crim. App. 1984)). For example, provocation charges are proper when there is evidence that the defendant cursed the victim before the victim attacked the defendant. *See Matthews*, 708 S.W.2d at 838 (citing *Tardy v. State*, 47 Tex. Crim. 444, 83 S.W. 1128 (App. 1904)). In this case, appellant approached Williams to introduce her to his new girlfriend. He then approached her again and began to insult her, calling her names and making derogatory personal remarks. Finally, when he threw wine in her face, Williams ran towards appellant as if she were ready to fight. The first element is satisfied because self-defense is an issue. The second element is satisfied because there are facts in evidence which show that Williams made the first attack on appellant. The third element is also satisfied because it is not unreasonable to conclude from the facts that appellant provoked Williams to cause her to act like she was going to hit him and thus provide a pretext to fight her. A rational trier of fact could have found the essential elements of provocation beyond

a reasonable doubt. Additionally there is no evidence that appellant abandoned the encounter or clearly communicated his intent to do so to Williams. We find the evidence is legally sufficient to allow the jury to find against appellant on the self-defense theory beyond a reasonable doubt because the evidence shows appellant provoked Williams, thereby eliminating the self-defense theory as a justification.

Even if appellant did not provoke Williams and there was justification for his use of force, he was not justified in using the amount of force he did. First, the vast difference in the physical size of appellant and Williams makes it unlikely that appellant reasonably believed he was justified in using the amount of force he exerted. Williams, at 5'3" tall and weighing about 145 pounds, was considerably smaller in stature and size than appellant, who stood 6'0" tall and weighed about 210 pounds. Appellant could have easily subdued her without injury. There is no evidence in the record to suggest any justification for throwing her onto the ground. Second, when appellant saw Williams running towards him, he grabbed her, threw her to the ground, and pinned her down. At that point, any threat Williams posed to appellant had been neutralized. There was no indication that she was kicking appellant or hitting him, and so, there could not be any justification for him to repeatedly slap her. Finally, Howard tackled appellant and pulled him off of Williams after only a few seconds. Appellant was highly excited and had to be held down while Williams got up and was taken away. There is no indication that Williams was threatening appellant with unlawful force at this point in time either. It is inconceivable that appellant could have reasonably believed force was immediately necessary to protect himself from Williams as she was being assisted in getting off of the ground. Any rational fact finder could have found beyond a reasonable doubt that appellant surpassed the amount of force that would have been justified in self-defense. Therefore, we find the evidence is also legally sufficient to allow the jury to find against appellant on the self-defense theory beyond a reasonable doubt because appellant provoked Williams and used too much force.

Having found that the evidence is legally sufficient to allow the jury (1) to find the essential elements of assault beyond a reasonable doubt and (2) to find against appellant on the self-defense theory beyond a reasonable doubt, we overrule appellant's first point of error.

FACTUAL SUFFICIENCY

In his second point of error, appellant claims that the evidence was factually insufficient to support his conviction for assault where the state never rebutted his assertion of self-defense beyond a reasonable doubt. When reviewing the factual sufficiency of the evidence, we consider all of the evidence "without the prism of 'in the light most favorable to the prosecution'" and "set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). Three major principles guide appellate courts when conducting a factual sufficiency review. *See Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997) (construing *Clewis*, 922 S.W.2d at 129). The first principle requires deference to the jury's findings, especially those concerning the weight and credibility of the evidence. *See Johnson v. State*, 2000 WL 140257, at *6 (Tex. Crim. App. Feb. 9, 2000) (en banc) (construing *Cain*, 958 S.W.2d at 404). Appellate courts "'are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable.'" *Clewis*, 922 S.W.2d at 135 (quoting *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)). Disagreeing "with the fact finder's determinations is appropriate only when the record clearly indicates such a step is necessary to arrest the occurrence of a manifest injustice." *Johnson*, 2000 WL 140257, at *6. The second principle requires a detailed explanation of a finding of factual insufficiency. *See Cain*, 958 S.W.2d at 407. The final principle requires the reviewing court to evaluate all the evidence. *See id*. If there is sufficient competent evidence of probative force to support the finding, a factual sufficiency challenge cannot succeed. *See Taylor v. State*, 921 S.W.2d 740, 746 (Tex. App.—El Paso 1996, no pet.).

"Self-defense is subject to a factual sufficiency review." *Tucker*, 15 S.W.3d at 235 (citing *Shaw v. State*, 995 S.W.2d 867, 868 (Tex. App.–Waco 1999, no pet.)). We review all the evidence in the record which is probative of self-defense to decide if the finding of guilt and finding against self-defense are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Vasquez v. State*, 2 S.W.3d 355, 359 (Tex. App.–San Antonio 1999, pet. filed) (citing *Reaves v. State*, 970 S.W.2d 111, 116 (Tex. App.–Dallas 1998, no pet.) (combining standards set out in *Clewis* and *Saxton* to review the factual sufficiency of a self-defense issue). Appellant did not put on a defense at trial. There is no evidence that even suggests that appellant did not strike Williams. Thus, the finding that appellant

committed assault is not so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Additionally, nothing in the record suggests that appellant could even argue self-defense because he provoked the encounter. Even if he did not provoke the encounter, nothing in the record suggests that the degree of force appellant used was appropriate. After reviewing all the evidence in the record that is probative of self-defense, we cannot conclude the jury's finding against self-defense is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Accordingly, we overrule appellant's second point of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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