Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00728-CR

ROBERT DEMOND LAVERN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 774,596

O P I N I O N

The appellant, Robert Demond Lavern, was charged by indictment with aggravated assault on a public servant. He was convicted by a jury and sentenced to life imprisonment in the Institutional Division of the Texas Department of Criminal Justice and fined $10,000.00. Appellant contends (1) the evidence is legally and factually insufficient to support the verdict; (2) the trial court erred in failing to charge the jury on the lesser included offenses of attempted murder and aggravated assault; and (3) that the State failed to disprove that appellant acted in self-defense. We affirm.

FACTUAL BACKGROUND

The record reflects that on February 4, 1998, Houston Police Officers Ralph Chaison and Vonda Higgins were engaged in an undercover narcotics investigation.[1] Their goal was to purchase contraband without making an immediate arrest in an effort to infiltrate the neighborhood and discover the identities of the local narcotics dealers. The officers drove a pickup truck to an apartment complex in southwest Houston. Leaving Higgins in the truck, Chaison approached two men who were standing inside the apartment's fence. Waiving money in his hand, Chaison quickly negotiated the purchase of crack cocaine. Separated by the wrought iron fence, appellant handed the cocaine to Chaison in exchange for twenty dollars. As Chaison attempted to turn and walk away, appellant ordered the officer to put the cocaine in his mouth. Appellant repeated the demand and added, "If you're not the law, put it in your mouth." Chaison replied, "Don't put that jacket on me," and explained that the cocaine was for the girl in the truck. Appellant then said, "You're the law and I'm not afraid of no law."

As the two men stared at each other, appellant lifted up his jacket which allowed Chaison to see a pistol in appellant's waistband. Officer Chaison drew his weapon while appellant was attempting to remove the pistol from his waistband. Appellant's weapon became entangled in his clothing and allowed Chaison to clear his weapon first. Appellant persisted and freed his weapon. After appellant cleared his waistband, but before he was able to point the muzzle of his weapon at Chaison, Chaison opened fire, striking appellant in the leg. Appellant limped behind a parked car and Chaison retreated behind a small tree.

From behind the tree, Chaison identified himself as a police officer. Chaison then

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[1] The facts recited here, are similar, if not identical, to the facts recorded in a companion case also styled *Lavern v. State*, which this Court heard on motion for rehearing and subsequently issued an en banc decision in favor of the State. 2001 WL 520975 (Tex. App.—Houston [14th Dist.] 2001) (en banc). We acknowledge that two separate cases were tried against the defendant. However, this panel has performed a thorough reading of the record before us and conclude that the facts, although similar to the prior case, correctly and accurately represent the facts as presented and recorded at trial.

instructed his partner, Officer Higgins, to call for additional police units. Shortly thereafter, when Higgins attempted to come to the aid of her partner, appellant shot her in the neck, paralyzing her for life. Chaison immediately turned his attention to Higgins and appellant seized the opportunity and fled the scene. Appellant was later apprehended in the apartment complex and identified as the shooter.

Sufficiency of the Evidence

Because Chaison was not in uniform, initially denied being a police officer, and since Higgins, also in plain clothes, remained in the pickup truck, appellant contends in his first and second points of error that the evidence is both legally and factually insufficient to show that he knew Officer Higgins was a public servant. We disagree.

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *Jackson v. Virginia,* 443 U.S. 307, 315-16 (1979). When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Curry v. State,* 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We consider all of the evidence whether properly or improperly admitted. *Chambers v. State,* 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). Moreover, in determining legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the verdict. *Clewis v. State,* 922 S.W.2d 126, 132 n. 10 (Tex. Crim. App. 1996).

Here, the jury heard evidence that Chaison repeatedly announced to appellant that he was a police officer. Pursuant to his order, a companion standing near appellant got on the ground. Moreover, a resident of the apartment complex heard appellant telling Chaison he was "the law." Accordingly, we find that a rational jury could have found from this evidence that appellant knew Chaison was a police officer and that Vonda Higgins, directly affiliated with Chaison, was also in fact a police officer.

When reviewing claims of factual insufficiency, it is our duty to examine the jury's weighing of the evidence. *Id.* at 133, 134. In other words, we must view the evidence "without the prism of 'in the light most favorable to the prosecution'" and set aside the verdict if it is "so contrary to the overwhelming wright of the evidence as to be clearly wrong and unjust." *Id.* at 129. Thus, when reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

Here, other than presenting this Court with case law supporting the standard of review for factual sufficiency, appellant's brief on his second point of error is a mere carbon copy of the argument set out in support his legal insufficiency claim. Therefore, reviewing the evidence with appropriate deference to the jury's verdict, we find there is nothing in the evidence to suggest that the jury verdict was clearly wrong and unjust. Accordingly, appellant's first and second points of error are overruled.

Lesser-Included Offense

In his third point of error, appellant contends he was entitled to an instruction on the lesser-included offense of attempted murder and aggravated assault. A defendant is entitled to an instruction on a lesser included offense, (1) where the proof for the offense charged includes the proof necessary to establish the lesser included offense; and (2) there is some evidence in the record that would permit a rational jury to find that if the defendant is guilty, he is guilty only of the lesser included offense. *Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999); *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994); *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

While both attempted murder and aggravated assault are lesser included offenses

of attempted murder and aggravated assault of a public servant,[2] the record is wholly devoid of any evidence showing aggravated assault or attempted murder to be "a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997). To warrant an instruction on a lesser-included offense there must be *some evidence* in the record that the defendant is guilty only of the lesser-included offense. *Rousseau*, 855 S.W.2d at 673. In other words, the legal test in such cases is not whether an appellate justice can by clever imagination conceive of an alternative offense; rather the standard by which we must be guided is whether the record contains some conflicting *evidence* which, if believed, would permit a rational jury to find the defendant guilty only of the lesser-included offense. *Id.*

Here, there is no conflict in the evidence. The record shows that Officers Chaison initially attempted to pass himself off as a felonious narcotics buyer. Appellant suspected Chaison was a police officer, accused him of being a police officer, and attempted to shoot him *because he was a police officer*. In addition, after Chaison yelled to his partner, Officer Higgins, instructing her to call for backup and Higgins attempted to come to the aid of her partner, appellant shot her, *since she too was a police officer*. There is simply no other logical explanation for appellant's conduct.

We find no evidence from any source in the record that he did not know Higgins was a police officer and did not hear Officer Chaison identify himself as a police officer in which case appellant would unquestionably have been entitled to a charge on aggravated assault or attempted murder because *some evidence* would then be found in the record to support the instruction. Appellant, however, offered no evidence. Moreover, the evidence offered by the State did not conflict on this issue. Thus, no valid, rational alternative to the charged offense was raised by the evidence. Appellant's third point of

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[2] *Forest*, 989 S.W.2d at 367 (aggravated assault); *Shuter v. State*, 858 S.W.2d 606, 607 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (attempted murder).

error is overruled.

Self-Defense

In his fourth point of error, appellant asserts that the State failed to prove beyond a reasonable doubt that appellant was not entitled to an acquittal on the grounds of self-defense. Specifically, appellant argues that when Chaison drew his gun, appellant was unaware of Chaison's and Higgins' true identities, therefore the jury could not find, beyond a reasonable doubt, that appellant's return gun fire was not in self defense. We disagree.

In resolving the legal sufficiency of the evidence, we look not to whether the State presented evidence that refuted appellant's defensive testimony, but instead determine whether there was legally sufficient evidence to allow the jury to find the essential elements of the charged offense beyond a reasonable doubt and thus, refute appellant's defensive theories. *Saxton v. State,* 804 S.W.2d 910, 914 (Tex. Crim. App.1991); *see also* TEX. PEN. CODE ANN. § 2.03(d) (Vernon 1994) (stating that if defense is submitted to jury, defendant must be acquitted if jury has reasonable doubt on defense). The standard of review for legal sufficiency in a self-defense case was stated in *Green v. State*:

> It is not relevant whether the reviewing court believes the evidence or that it is "outweighed" by the opposing side's evidence, if there is any evidence that could establish guilt beyond a reasonable doubt, the conviction will not be reversed.... An appellate court is not to sit as the thirteenth juror, reweighing the evidence or deciding whether it believes the evidence established the element in contention beyond a reasonable doubt; rather it is to ask itself whether the trier of fact, acting rationally, could have found the evidence sufficient to establish the element beyond a reasonable doubt.

891 S.W.2d 289, 297 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

In 1978, the United States Supreme Court ruled that the sole remedy for insufficient evidence was acquittal, not a new trial as Texas law then provided. *Burks v. United States*,

437 U.S. 1, 18 (1978), and *Greene v. Massey*, 437 U.S. 19, 23 (1978). Since then, Texas courts have been unwilling to hold that self-defense was established as a matter of law, requiring acquittal. In *Saxton*, the Texas Court of Criminal Appeals emphatically held that the State did not have to produce evidence disproving or refuting a claim of self-defense, even if all evidence supporting the defense was uncontradicted and consistent. *Id.* at 912 nn. 3-4. The court held that Penal Code Section 2.03(d) "addresses the mechanics of the jury charge vis-a-vis the State's burden of proof when a defensive issue has been raised by the evidence, rather than the sufficiency of the evidence." *Id.* at 913.

Therefore, the State's burden under Section 2.03(d) "is not a burden of production, i.e., one which requires the State to affirmatively produce evidence refuting the self-defense claim, but rather a burden requiring the State to prove its case beyond a reasonable doubt." *Id.* (emphasis original). The *Saxton* court concluded that "more importantly, case law instructs us that the issue of self-defense is an issue of fact to be determined by the jury." *Id.* Thus, the issue is whether after reviewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the State's case beyond a reasonable doubt and also could have found against appellant on the self-defense issue beyond a reasonable doubt. *Id.* at 914.

Section 9.31 of the Texas Penal Code provides that 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. PEN. CODE ANN. § 9.31 (Vernon Supp. 2001) (emphasis added). In most self-defense cases, evidence of self-defense comes from defense witnesses. In the instant case, appellant did not testify and offered only one defense witness. While a rational jury certainly could have believed the defense witness' testimony that Officer Chaison opened fire on appellant after appellant began to walk away, appellant's jury did not. The record before this Court indicates that the jury was well within its discretion to find the essential elements of aggravated assault of a public servant beyond a reasonable

doubt, thus, negating appellant's defensive theory. Therefore, we overrule point of error four.

Accordingly, we affirm the judgment of the trial court.

/s/ Norman R. Lee
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Yates, Fowler, and Lee[3].

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice Norman R. Lee sitting by assignment.