Affirmed and Opinion filed September 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01300-CR

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LAWRENCE HERMAN AIKENS, JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 178th District Court
Harris County, Texas
Trial Court Cause No. 764,961

O P I N I O N

Lawrence Herman Aikens, Jr., appeals his conviction by a jury for murder. The jury assessed his punishment at 60 years imprisonment. In two points of error, appellant contends the evidence was legally and factually insufficient to sustain his conviction because the State never rebutted his self-defense claim. We affirm.

At about 10:30 a.m., October 2, 1997, Joseph Jones (Jones) was putting gas in his car at a Phillips 66 station when he observed the deceased, Edward Hardin (Hardin), drive by. A few seconds later, appellant drove in and asked Jones if he had seen which way Hardin was going. Jones said Hardin was going towards Fondren Street, and appellant told Jones that Hardin "took off with [his] cheese [crack

cocaine]." Appellant told Jones that he dropped the cocaine in Hardin's hand to "check out," and Hardin ran off with the dope without paying appellant for it. Appellant told Jones he was going to kill Hardin when he saw him. Jones talked with Hardin later that day, and Hardin admitted he had taken the cocaine from appellant but told Jones that the cocaine belonged to him [Hardin]. Jones told Hardin that appellant said he would kill Hardin when he saw him.

Hardin and a friend, Kavran Freeman (Freeman), drove to an apartment complex about 10:00 p.m. that night, and Hardin parked his car by the entrance gate. Freeman testified that appellant came up to Hardin's car and cursed him for running off with his dope without paying. Freeman stated that Hardin and appellant exchanged insults and obscenities concerning the earlier dope exchange. Appellant told Hardin he was going to get a gun, and ran off toward the bushes. Hardin told Freeman appellant was going for a gun, and then backed his car toward the street. Hardin turned his head around in order to guide his car while driving in reverse toward the street. Appellant retrieved a revolver, came back toward Hardin's car, and fired three shots in the direction of Hardin's retreating car. One bullet went through Hardin's windshield and struck him in the back of the head. Hardin fell over unconscious in Freeman's lap, and he never regained consciousness. He died the following morning at the hospital from the gunshot wound to the back of his head. Freeman stated that Hardin did not have a gun.

The police investigated the scene, and found no gun or cocaine in Hardin's car. No shell casings were found at the scene, and the officers surmised that a revolver was used in the killing.

Appellant testified that he had given Hardin some cocaine earlier, and told Jones that Hardin took the drugs without paying. He denied telling Jones that he was going to kill Hardin. Appellant admitted that he confronted Hardin at the apartment complex and argued with him about taking the drugs without paying. Appellant stated he and Hardin exchanged insults and obscenities about the drugs, but appellant did not threaten Hardin. Appellant was standing alongside Hardin's car door, and Hardin looked away keeping his hands down and out of appellant's sight. Thinking Hardin was going for a gun, appellant retrieved his revolver from the bushes. While Hardin was backing his car toward the street, appellant fired three shots at his car. Appellant stated he did not know if any of the shots hit Hardin's car. After shooting at Hardin's car, appellant ran from the scene and threw the revolver in a bayou.

In point one, appellant challenges the legal sufficiency of the evidence. Appellant contends the State never rebutted appellant's assertion of self-defense beyond a reasonable doubt. Appellant argues that he proved he was acting in self-defense because he assumed Hardin was reaching for a gun when he took his hands of the steering wheel. Therefore, appellant argues he was entitled to use deadly force against the appearance of deadly force, and the State failed to offer evidence to rebut his defense.

Under point two, appellant challenges the factual sufficiency of the same evidence. Appellant argues the jury's finding against him on his right to self-defense under the circumstances is not supported by the greater weight and preponderance of the evidence.

In reviewing the legal sufficiency of the evidence, we consider all the evidence, both State and defense, in the light most favorable to the verdict. *Houston v. State*, 663 S.W.2d 455, 456 (Tex.Crim.App.1984); *Garrett v. State*, 851 S.W.2d 853, 857 (Tex.Crim.App. 1993). In reviewing the sufficiency of the evidence in the light most favorable to the verdict or judgment, the appellate court is to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex.Crim.App. 1989), *cert. denied*, 110 S.Ct. 3255 (1990). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex.Crim.App. 1986). The jury is the exclusive judge of the facts, credibility of the witnesses, and the weight to be given to the evidence. *Chambers v. State*, 805 S.W.2d 459, 462 (Tex.Crim. App. 1991). In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence, but act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex.Crim.App.1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App1988). In making this determination, the jury can infer knowledge and intent from the acts, words, and conduct of the accused. *Dues v. State*, 634 S.W.2d 304, 305 (Tex.Crim.App.1982).

The sufficiency of the evidence to support a conviction should no longer be measured by the jury charge actually given but rather measured by the elements of the offense as defined by a hypothetically correct charge. *See Curry v. State*, 975 S.W.2d 629, 630 (Tex.Crim.App.1998). "Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not unnecessarily

increase the State's burden of proof or unnecessarily restrict the State's theories of liability and adequately describes the particular offense for which the defendant was tried." *Malik v. State*, 953 S.W.2d 234, 240 (Tex.Crim.App.1992).

Under *Clewis v. State*, 922 S.W.2d 126, 133 (Tex.Crim.App.1996), a court of appeals reviews the factual sufficiency of the evidence when properly raised after a determination that the evidence is legally sufficient. *Id*. In conducting a factual sufficiency review, 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. *Id*. In conducting a factual sufficiency review, the court of appeals reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. If the court of appeals reverses on factual sufficiency grounds, it must detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient. The appropriate remedy on reversal is a remand for a new trial. *Id*.

A factual sufficiency review must be appropriately deferential so as to avoid the appellate court's substituting its own judgment for that of the fact finder. *Santellan v. State*, 939 S.W.2d 155, 164 (Tex.Crim.App.1997). This court's evaluation should not substantially intrude upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *Id*. The appellate court maintains this deference to the fact findings, by finding fault only when "the verdict is against the great weight of the evidence presented at trial so as to be clearly wrong and unjust." *Id*.

The court of criminal appeals has recently clarified *Clewis* addressing the factual sufficiency standard of review. *See Johnson v. State*, No.1915-98, 2000 WL 140257, at *8 (Tex.Crim.App. Feb. 9, 2000)(mandate issued May 3, 2000). The court of criminal appeals held, in pertinent part:

> We hold, therefore, that our opinion in *Clewis* is to be read as adopting the complete civil factual sufficiency formulation. Borrowing in part from Justice Vance's concurring opinion in *Mata v. State*, 939 S.W.2d 719, 729 (Tex.App.--Waco 1997, no pet.), the complete and correct standard a reviewing court must follow to conduct a *Clewis* factual sufficiency review of the elements of a criminal offense asks whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so

> obviously weak as to undermine confidence in the jury's determination, or the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof.

Johnson, 2000 WL 140257, at *8

In his first point, appellant contends the State did not meet its burden of proof to rebut his evidence of self-defense beyond a reasonable doubt. Appellant incorrectly argues that the burden of proof is on the State to prove he did not act in self-defense beyond a reasonable doubt. In resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we 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. *Saxton v. State,* 804 S.W.2d 910, 914 (Tex.Crim.App. 1991).

Defensive evidence that is merely consistent with the physical evidence at the scene of an offense will not 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 defensive evidence. *Id*. A jury verdict of guilty is an implicit finding rejecting the defendant's self-defense theory. *Id*.

In this case, the jury was properly instructed on the law of self-defense. A person is justified in using deadly force when: (1) self-defense is justified under section 9.31[1]; (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. TEX. PEN. CODE ANN.§ 9.32(a) (Vernon 1994 & Supp. 2000).

There were fact issues for the jury to determine concerning whether appellant: (1) reasonably believed that deadly force was immediately necessary to protect himself from the victim's use or attempted use of deadly force; and (2) reasonably believed he was in apparent danger of death or serious bodily injury. There was also a fact issue concerning whether a reasonable person in appellant's situation would have retreated before using deadly force against Hardin. Appellant testified that Hardin was backing away

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[1] Section 9.31(a) provides: "Except as provided in Subsection (b), 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."

towards the street when appellant started shooting. Freeman stated that Hardin was backing his car toward the street and looking to the rear when the shooting started. There was no evidence that Hardin had a gun. Even if appellant had a right to be apprehensive, the jury could find that appellant could not reasonably believe he was going to be attacked when Hardin was trying to get away from appellant. The jury could find that appellant could have easily retreated rather than start shooting at a retreating car. In our opinion, the evidence supports the jury's verdict, which by finding appellant guilty, implicitly rejected appellant's claim of self-defense. *See Saxton*, 804 S.W.2d at 914. We find that rational jurors could find the essential elements of murder beyond a reasonable doubt, and could also find against appellant's self-defense claim beyond a reasonable doubt. We overrule appellant's point of error one.

In point two, appellant further contends the same evidence is factually insufficient to support his conviction because the State never rebutted appellant's assertion of self-defense beyond a reasonable doubt. As stated in this opinion under point one, the State is not required to affirmatively produce evidence to refute appellant's self-defense claim, but must prove its case beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d at 914. Appellant bases his self-defense claim upon his testimony that he thought Hardin was going for a gun when Hardin took his hands off the steering wheel and started looking around. However, appellant admits that Hardin was backing away when appellant came out of the bushes firing at Hardin's car. Appellant stated he never told Jones that he would kill Hardin when he saw him. Appellant's argument goes to the weight and credibility of the evidence. What weight to give contradictory testimonial evidence is within the sole province of the trier of the fact, because it turns on an evaluation of credibility and demeanor. *Cain v. State,* 958 S.W.2d 404, 408-09 (Tex.Crim.App.1997). Accordingly, we must show deference to the jury's findings. *Id*. at 409. A decision is not manifestly unjust merely because the jury resolved conflicting views of the evidence in favor of the State. *Id*. at 410. In performing a factual sufficiency review, the courts of appeals are required to give deference to the jury verdict, examine *all* of the evidence impartially, and set aside the jury verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *Cain*, 958 S.W.2d at 410; *Clewis*, 922 S.W.2d at 129. We have examined all of the evidence impartially, a neutral review, and do not find that proof of murder is so "obviously weak as to undermine confidence in the jury's determination." *Johnson*, 2000 WL 140257, at *8 . Under the new *Clewis-Johnson* test, we further find that the proof of guilt

is not greatly outweighed by appellant's contrary proof of self-defense. *Id*. Considering all of the evidence, measuring it against the charge (here, correctly given), and giving due deference to the role of the jury as fact finder, we cannot say that the finding of guilt, beyond a reasonable doubt, and the implied finding against the self-defense issues, beyond a reasonable doubt, are so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Reaves v. State*, 970 S.W.2d 111, 118 (Tex.App.-Dallas 1998, no pet.). We overrule appellant's point of error two.

We affirm the judgment of the trial court.

/s/ Bill Cannon
Justice

Judgment rendered and Opinion filed September 7, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.[**]

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

[**] Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.