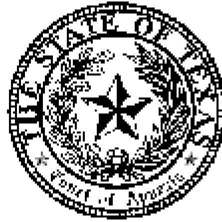
Affirmed and Opinion filed November 2, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-99-00704-CR

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JUAN MIGUEL SUAREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 30,207

O P I N I O N

Over his plea of not guilty, a jury found appellant, Juan Miguel Suarez, guilty of five counts of deadly conduct. *See* TEX. PEN. CODE ANN. § 22.05 (Vernon 1994). The jury assessed punishment at nine years imprisonment in the Texas Department of Criminal Justice, Institutional Division. Appellant appeals his conviction on two points of error. We affirm.

I.

Factual and Procedural Background

Appellant was indicted on five counts of deadly conduct because he knowingly discharged a firearm into the home of the Renauds. Count one was for the offense committed against Rachel Renaud, count two for Arnell Renaud, count three for the Renauds' daughter Naomi, and counts four and five for the Renauds' two minor sons. Their daughter Nicole, who was dating the appellant at the time of the offense, was not named in the indictment.

Officer Virata testified that six shots were fired at or into the home, and were fired from outside the home. The bullets entered through Nicole's bedroom window, which faces the street. Prior to the shooting, appellant stayed at the Renaud home on several occasions and knew the location of Nicole's room. The investigation revealed that bullets passed through Nicole's bedroom door leaving holes in the door and entering the bedroom of her two brothers. Other bullets entered into the boys' room and traveled through their bedroom closet and into the kitchen cabinet.

In October of 1997, appellant and Nicole Ranaud were involved in a volatile relationship. In the early morning hours of October 26, 1997, Nicole and her friend Lora Tovar were at the Crystal night club. While in the club, Nicole saw appellant with another female and an argument ensued. Management of the club eventually asked the parties to leave. After leaving the club, Nicole and Tovar drove to Tovar's apartment. They saw a vehicle following them and drove to a pay phone to call the police. The police escorted the women to Tovar's apartment where they found the glass patio door shattered.

While at Tovar's apartment, Nicole received a phone call from the appellant. He requested a ride from her because he had just totaled his vehicle in an automobile accident. Officer Correia responded to the accident at approximately 3:42 a.m., and appellant indicated that the accident occurred at 3:20 a.m., when he swerved to avoid hitting a dog. The officer did not conduct a detailed search of the vehicle and did not see any weapons. Nicole drove to the scene of the accident and took appellant to his home. She stayed with the appellant until the next day. Appellant admitted to Nicole that he was responsible for breaking Tovar's glass patio door.

Late Sunday evening, while Nicole visited appellant at his home, she received a phone call from her mother. Her mother told her that someone fired shots into their home. Nicole traveled to her parent's

home, where she met with police, and advised them of the argument that she had with appellant. Further, she revealed appellant's admission regarding her friend's patio door. Nicole told police that she suspected that appellant was the person who fired shots at her parents' home.

The testimony during trial established no firm time that the shooting occurred. A daylight savings change, however, occurred on the date of the incident. Appellant argued at trial that no witnesses saw the actual shots fired. No one saw a vehicle on the street where the shots were fired. Furthermore, investigating officers at the scene were unable to determine the caliber of the bullet fragments and no shell casings were found. Therefore, the State was unable to connect the appellant to the crime, based on physical evidence.

In addition, based on the testimony of several witnesses at trial, the shooting took place somewhere between 3:00 a.m. and 4:00 a.m. on October 26, 1997. Appellant argued that his automobile accident occurred during that time period. However, Officer Correia testified that a person driving fast could drive from the scene of the shooting to the scene of appellant's accident in three to four minutes. Conversely, Officer Virata testified that one driving the speed limit, could drive from the street where the shooting occurred to the Southwest Freeway, where appellant had his accident, in under five minutes.

More importantly, based on Nicole's suspicion that appellant was the shooter, the police gave her a telephone recording device to record conversations with the appellant. In one particular conversation between appellant and Nicole, appellant admitted shooting into her parent's home. State's Exhibit 25, a redacted tape recording of this conversation, was played for the jury during trial. In addition, appellant admitted during the recorded conversation that he threw the gun out the window of the car as he was fleeing the scene of the shooting.

II
Comment on the Failure to Testify

In his first point of error, appellant contends that during jury selection, the prosecutor commented on his decision not to testify, in violation of his Fifth Amendment right to remain silent. He argues that this comment informed the jurors that they could judge his guilt if he chose not to testify. Specifically, the

appellant complains of the following statements presented to a prospective juror by the State as hypothetical reasons why a defendant might not want to testify:

> He can be shy . . . He could stutter . . . He could be guilty. There's many other reasons why a person may not get on the witness stand.[1]

The appellant objected to the comment and the court sustained the objection. Subsequently, the prosecution further explained that if the defendant does testify, that it doesn't mean he's a truth teller just because he's getting on the witness stand. In addition, the prosecutor questioned the venire panel asking if anyone would automatically consider that defendant to be truthful just because he took the witness stand.

It is well settled that the prosecution may not comment on the accused's failure to testify. *See Hogan v. State,* 943 S.W.2d 80, 81 (Tex. App.—San Antonio 1997, no pet.). Such a comment offends both State and Federal Constitutions. *See Nickens v. State,* 604 S.W.2d 101, 104 (Tex. Crim. App. 1980); *Pollard v. State,* 552 S.W.2d 475, 477 (Tex. Crim. App. 1977). Whether a comment is improper is determined from reviewing the statements from the jury's perspective. *See Hogan,* 943 S.W.2d at 82. The language of such a comment must be either manifestly intended, or of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify. *See Nickens,* 604 S.W.2d at 102. A statement is a direct comment on a defendant's failure to testify if it references evidence that only the defendant can supply. *See Hogan,* 943 S.W.2d at 82. On the other hand, the fact the language might be construed as an implied or indirect allusion to a defendant's failure to testify is not sufficient. *See Staley v. State*, 887 S.W.2d 885, 895 (Tex. Crim. App. 1994). Language that can reasonably be construed to refer to a failure to present evidence other than from the defendant's

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[1] In *Sanders v. State,* the prosecutor stated to the venire panel the following hypothetical reasons why a defendant might not want to testify:

> I want to take the stand . . . but I can't . . . because my brother did it and my brother cannot go to prision, it will kill him. I'll just have to do the time. [Or] I'm running these drugs for these guys . . . I ain't going to testify, they will shoot me and kill me. [Or] I'm guilty as sin, I can't get on the stand and say that.

963 S.W.2d 184, 190 (Tex. App.–Corpus Christi 1998, pet. ref'd.) (holding that statements made during voir dire as to a defendant's right to testify are not error because the defendant has not yet invoked his right).

own testimony does not amount to a comment on his failure to testify. *See id.* Even a direct comment during voir dire on a defendant's failure to testify is not error where the prosecutor has no way of knowing whether the defendant will testify, because the statement, at the time it was made, could not be construed by the jury as a comment on the subsequent failure of the defendant to testify. *See Campos v. State*, 589 S.W.2d 424, 426 (Tex. Crim. App. 1979).

In the instant case, however, the prosecutor's comment was an attempt to instruct the jury on how to treat appellant's decision to testify or not to testify. Notably, in instructing the jury, the prosecutor did not misstate the law. He indicated only that the jury should not look unfavorably upon appellant if he were to choose not to testify, nor favorably if he did choose to testify. *See Godfrey v. State,* 859 S.W.2d 583, 585 (Tex. App.—Houston [14th Dist.] 1993, no writ) (holding where a prosecutor had misstated the law the appellate court must conduct a harmless error analysis). Additionally, the objectionable comments here occurred during voir dire. A comment "which occurs prior to the time testimony in the case had closed cannot be held to refer to a failure to testify which had not yet occurred." *McCarron v. State,* 605 S.W.2d 589, 595 (Tex. Crim. App. 1980); *Reynolds v. State,* 744 S.W.2d 156, 59-60 (Tex. App.—Amarillo 1987, writ ref'd.); *Hogan,* 943 S.W.2d at 82. In *Sanders,* the prosecutor, during voir dire, presented the panel with hypothetical reasons why a defendant might not want to testify (such as family loyalty, fear of drug dealers, or that he was guilty). Although the error was not preserved in *Sanders*, the court held that because the statements were made during voir dire, there was no error since the defendant had not yet invoked his Fifth Amendment right. *See Sanders,* 963 S.W.2d at 190; *see also Campos,* 589 S.W.2d at 424 (holding that because the prosecutor had no way of knowing whether the defendant would in fact testify, no error was committed by the prosecution for commenting during voir dire on the defendant's failure to testify).

The same analysis holds true in the present case. The prosecutor here had no way of knowing whether appellant would testify, he did not indicate appellant's possible reasons for choosing not to testify, and he did not misstate the law. Thus, no error was committed. Appellant's first point of error is overruled.

III
Factual Sufficiency

Appellant also contends, under point of error two, that the evidence is factually insufficient to support his conviction. The factual sufficiency review begins with the assumption the evidence is legally sufficient under the *Jackson* test. *See Clewis v. State,* 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). In reviewing the factual sufficiency of the evidence, the appellate court views all the evidence without the prism of "in the light most favorable to the verdict" 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.* at 129; *Franklin v. State,* 928 S.W.2d 707, 708 (Tex. App.—Houston [14th Dist.] 1996, no writ). Furthermore, the appellate court considers all of the evidence in the record relating to the sufficiency challenge, not just the evidence supporting the verdict. *See Santellan v. State,* 939 S.W.2d 155, 164 (Tex. Crim. App. 1997). The court is authorized to disagree with the jury's determination but must be appropriately deferential so as to avoid substituting its judgment for that of the jury. *See Clewis,* 922 S.W.2d at 33; *Franklin,* 928 S.W.2d at 708. The court's review should not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony. *See Santellan,* 939 S.W.2d at 164.

In the instant case, the jury heard and weighed a taped confession by appellant in which he confesses to shooting into the Renauds' home. Appellant, however, argues that the testimony of the State's witnesses who heard the shots fired at 3:30 a.m. and Officer Correia's testimony that he got a call for help to the automobile accident site at 3:31 a.m. establishes that he could not have been in a wreck and at a shooting at the same time. However, any conflicts regarding the time of the shooting, the automobile accident, or the credibility of the witnesses testimony is resolved by the jury. *See Dunn v. State,* 13 S.W.3d 95, 97 (Tex. App.—Texarkana 2000, no pet.). In doing so, the jury may accept one version of facts and reject another or reject any of a witness's testimony. *See Penagraph v. State,* 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). It is the jury's job to judge the credibility of the witnesses and the weight to be given their testimony, and it may resolve or reconcile conflicts in the testimony, accepting or rejecting such portions thereof as it sees fit. *See Banks v. State,* 510 S.W.2d 592, 595 (Tex. Crim. App. 1974). When evidence both supports and conflicts with the verdict, we must assume that the fact finder resolved the conflict in favor of the verdict. *See Turro v. State,* 867 S.W.2d 43, 47 (Tex. Crim. App. 1993).

Having reviewed all of the evidence, we do not find the verdict to be so against the great weight of the evidence as to be clearly wrong and unjust. Appellant has not directed this court to any contrary evidence which greatly outweighs the evidence in support of the verdict, which is the taped confession. Indeed, appellant primarily argues that no physical evidence connected him to the crime, and it was impossible for him to have committed the crime at the same time that he was involved in an automobile accident. This evidence, or lack of evidence in one instance, and direct evidence suggesting his inability to be in two places at the same time, was weighed by the jury against the evidence contained in appellant's taped confession, and resulted in a verdict of guilty.

This court must review the evidence weighed by the jury to prove appellant committed the offense and compare it with the evidence that tends to disprove that fact. *See Johnson v. State*, No. 1915-98, 2000 WL 140257, at *4 (Tex. Crim. App. Feb. 9, 2000). We must not intrude on the jury's role as the sole judge of the weight and credibility given to witness testimony. Here, we cannot say, viewing the evidence in a neutral light, that the evidence supporting the verdict is greatly outweighed by contrary evidence. Therefore, we hold that the evidence is factually sufficient to support Suarez's five count conviction of deadly conduct. Accordingly, we overrule appellant's point of error two.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed November 2, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

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