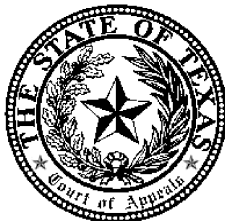


**Affirmed and Opinion filed November 8, 2001.**



**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-00-01294-CR**

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**AUSTIN LEE STEVENS, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 228<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 841,905**

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**OPINION**

Appellant entered a plea of not guilty to the offense of aggravated assault with a firearm. He was convicted and the trial court assessed punishment at five years in prison. In two points of error, appellant claims the evidence is legally and factually insufficient to show that he used a firearm. We affirm.

On April 15, 2000, Houston police officers were dispatched to investigate a disturbance with a firearm. When the first officer arrived, Glen Williams reported that appellant had pointed a firearm in his face over an argument concerning appellant's missing \$100. Williams described appellant, who had not left the establishment, and the officer

found him and arrested him. Appellant initially denied having a firearm, then later stated that although he did not have a firearm, he had seen another man leave the establishment with a firearm. As a result of this incident, appellant was convicted of aggravated assault with a deadly weapon, namely a firearm.

In two points of error, appellant challenges the legal and factual sufficiency of the evidence to support the finding that he used a firearm in the commission of the offense. Appellant admits that he argued with Williams over the missing \$100, but claims the evidence is insufficient to show he did so with a firearm.

Consistent with the Fourteenth Amendment guarantee of due process of law, no person may be convicted of a criminal offense and denied his liberty unless his criminal responsibility for the offense is proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). Because the fact finder is the sole judge of the weight and credibility of the evidence at a criminal trial, our task as an appellate court is to consider all the record evidence in the light most favorable to the verdict, and to determine whether, based on that evidence and all reasonable inferences therefrom, any rational fact finder could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). If, given all the evidence, a rational fact finder would necessarily entertain a reasonable doubt as to the defendant's guilt, the due process guarantee requires that we reverse and order a judgment of acquittal. *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992), *cert. denied*, 507 U.S. 975 (1993). Appellate courts are not fact finders, but act only as a final due process safeguard ensuring the rationality of the fact finder. *See Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

Williams testified that at the time appellant became angry, Williams was talking on the telephone with Lois Norman. Because appellant pointed a gun at Williams, Williams asked Norman to call 911 for him while maintaining the telephone connection. Williams requested the police to come in regard to a disturbance with a firearm. The police officers

who responded to the dispatch testified that they were called to an aggravated robbery in progress with a gun. When the police officers arrived, they did not find a firearm.

The morning before trial began, appellant attempted to apologize to Williams. Williams responded stating, “You know you was wrong for pulling a gun.” Appellant made no attempt to deny use of a firearm, but stated, “Yeah, man. I apologize for that man, but I was just – I was out of it, my head. I was just mad.” Reviewing the evidence in the light most favorable to the verdict, we find sufficient evidence to support the finding that appellant used a deadly weapon in the commission of the offense. Appellant’s first point of error is overruled.

Appellant also challenges the factual sufficiency of the evidence to support his conviction. The courts of appeals are constitutionally empowered to review the judgment of the trial court to determine the factual sufficiency of the evidence used to establish the elements of the offense. *Johnson v. State*, 23 S.W.3d 1 (Tex. Crim. App. 2000). A factual sufficiency review dictates that the evidence be viewed in a neutral light, favoring neither party. *Clewis v. State*, 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). In this neutral light, the appellate court reviews the fact finder’s weighing of the evidence and is authorized to disagree with the fact finder’s determination. *Id.* at 133. This review, however, must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *See Johnson*, 23 S.W.3d at 7. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Such an approach occasionally permits some credibility assessment, but usually requires deference to the fact finder’s conclusion based on matters beyond the scope of the appellate court’s legitimate concern. *Id.*

Appellant presented four witnesses in his defense, including himself. Each witness testified that, although appellant was angry over his missing \$100, he did not use a firearm when threatening Williams. Appellant claims the evidence is insufficient because Williams’ testimony that appellant used a firearm is not corroborated. Corroboration is a legislative

creation not required by the common law or federal constitutional law. *Thompson v. State*, 691 S.W.2d 627, 613 (Tex. Crim. App. 1984). Corroboration is necessary in instances where certain testimony is inherently unreliable, such as accomplice testimony. *See Bingham v. State*, 915 S.W.2d 9, 12 (Tex. Crim. App. 1994). In this case, corroboration of whether a firearm was used was not necessary. This case presents a classic swearing match where the trial court, as fact finder, chose to believe the witnesses who testified that appellant used a firearm. As an appellate court, we cannot second guess that credibility determination. Therefore, after reviewing the evidence in a neutral light, we find the evidence is not so weak as to render the trial court's verdict manifestly unjust. Appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed November 8, 2001.

Panel consists of Chief Justice Brister and Justices Fowler and Seymore.

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