Affirmed and Opinion filed November 22, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01304-CR & 14-98-01305-CR

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XAVIER VAN POTTS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 768,009 and 768,010

O P I N I O N

Over his plea of not guilty, a Harris County jury found appellant, Xavier Van Potts, guilty of two counts of aggravated assault. Both charges were enhanced with one prior felony offense. The jury assessed punishment at fifteen years' confinement in cause number 768,009 and ten years' confinement in cause number 768,010. Appellant argues in three points of error that (1) the trial judge was not constitutionally qualified to preside over the trial; and (2) and (3) the evidence is factually insufficient to support the jury's verdicts.

We affirm.

In his first point of error, appellant argues the visiting judge presiding over the trial was

not constitutionally qualified to preside over the trial because he failed to take the oath of office before being assigned as a visiting judge. We disagree.

To raise an objection by regular appeal to a procedural irregularity in a former judge's assignment as a visiting judge, a party is required to object to the judge's authority pretrial. *See Wilson v. State*, 977 S.W.2d 379, 380 (Tex. Crim. App. 1998); *see also Preito Bail Bonds v. State*, 994 S.W.2d 316, 318 (Tex. App.—El Paso 1999, pet. filed). The Court of Criminal Appeals discussed this situation in *Wilson*:

> How, then, may a defendant challenge the authority of a trial judge, who is otherwise qualified, to preside pursuant to an expired assignment? We hold that such a defendant, if he chooses, may object pretrial; if he does not, he may not object later or for the first time on appeal.
>
> This holding is consistent with our prior holding that, in general, all but the most fundamental evidentiary and procedural rules (or "rights") are forfeited if not asserted at or before trial. *See Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993). A timely objection in the trial court will afford both the trial judge and the State notice of the procedural irregularity and an adequate opportunity to take appropriate corrective action. *See Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1997).

Wilson, 977 S.W.2d at 380. Thus, a party may only challenge the authority of a trial judge by regular appeal if he objects to the judge's assignment pretrial. *See id*.

Here, appellant did not object to the authority of the trial judge at any time. Accordingly, he has not preserved any error for our review and we overrule his first point of error.

In his second and third points of error, appellant argues the evidence at trial is factually insufficient to support his two aggravated assault convictions. To review each of appellant's factual sufficiency points, we must ask the following question: 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. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000); *see also Childs v. State*, 21 S.W.3d 631, 634 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). If we determine a manifest injustice has

occurred, we may not defer to the jury's findings, but rather provide a "clearly detailed explanation of that determination that takes all of the relevant evidence into consideration." *Johnson*, 23 S.W.3d at 12; *see Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). Additionally, we must be careful not to intrude on the jury's role as the sole judge of the credibility of the witnesses or the weight to be given their testimony. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Childs*, 21 S.W.3d at 635.

Here, Sinettra Barnett testified that appellant continued to call her after their breakup and wanted to reunite with her. Barnett and her new boyfriend, Timothy Sampson, testified they heard appellant stomping up the stairs to Barnett's apartment. While appellant was banging on the door, Barnett called 911. Appellant kicked the door down and pointed a gun at both Sampson and Barnett and asked Barnett repeatedly, "is this the n----- you left me for?" Sampson ran outside and appellant ran after him, shooting in his direction. Sampson testified that a bullet grazed his cheek. As Sampson ran out of sight, appellant turned on Barnett, shooting at her and chasing her down the street.

After conducting a neutral review of the evidence, we find the proof of guilt is not so obviously weak as to undermine confidence in the jury's determination. Accordingly, we overrule appellant's second and third points of error.

Having overruled each of appellant's points of error, we affirm the trial court's judgment.

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Sam Robertson
Justice

Judgment rendered and Opinion filed November 22, 2000.

Panel consists of Justices Robertson, Sears, and Lee.*

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*Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.