

Affirmed and Opinion filed March 1, 2001.

In The
Fourteenth Court of Appeals

NO. 14-98-00503-CR

MOHSEN HABIB AHMED, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 750,569**

OPINION

A jury found Appellant, Mohsen Habib Ahmed, guilty of injury to an elderly person, his eighty-two-year-old father-in-law. The trial court assessed punishment at four years' imprisonment, probated for four years. In a single point of error, Ahmed challenges the factual sufficiency of the evidence to support his conviction. Finding that the evidence is factually sufficient, we affirm.

When reviewing the factual sufficiency of the evidence, we view all the evidence without the prism of "in the light most favorable to the prosecution." *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We review the evidence that tends to prove an elemental fact in dispute and compare it with the evidence that tends to disprove that fact.

Johnson v. State, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Although an appellate court is authorized to disagree with the verdict, a factual sufficiency review must be appropriately deferential to avoid our substituting our judgment for that of the factfinder. *Clewis*, 922 S.W.2d at 133; *Roberts v. State*, 987 S.W.2d 160, 163 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd). We will reverse for factual insufficiency if our review 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*, 23 S.W.3d at 11.

Ahmed's complaint focuses on the credibility of the victim, his former father-in-law, Leo Kuboth. Ahmed contends that Mr. Kuboth gave so many different versions of his story that "his entire testimony is incredulous." He also contends that the evidence shows Mr. Kuboth suffered from dementia and had no clear memory of the cause of his injury. The State concedes that some contradictory testimonial evidence exists, but that credibility of the victim was the jury's determination. We agree. "A factual sufficiency analysis can consider only those few matters bearing upon credibility that can be fully determined from a cold appellate record." *Id.* at 8. In a case heavily dependent upon eyewitness testimony, as this case is, evaluation of eyewitness credibility and demeanor is a job best suited to the jury. *See id.*

The evidence showed that the victim in this case was Leo Kuboth, a German citizen who moved to the United States three years earlier after the death of his wife. He initially lived with his daughter, Heidi Ahmed Becker, her husband, Ahmed, and their two small children. However, by the time of the altercation, Ms. Becker and Ahmed had filed for divorce.

Ms. Becker testified that on the Saturday afternoon of the altercation, Ahmed came to her home to pick up the two children for a visit. Ms. Becker explained that because she and Ahmed had just switched residences, she knew that neither of them had food to feed the children. She gave the children a bag of potato chips, left Ahmed at her home with the children and her father, and ran to the store for sandwich ingredients. While she was there,

Ahmed appeared with the children, told her that an accident had happened, and told her she needed to return home. Ahmed appeared nervous and told her that her father had fallen down the stairs. As they drove home in Ahmed's car, leaving Ms. Becker's car at the grocery, Ahmed told her, "Tell Opa [the German word for grandfather] I'm sorry."

When they arrived home, Ms. Becker found her father bruised and bleeding. Further, Ms. Becker testified that the story her father told her differed from Ahmed's explanation. She took him to the Ben Taub Hospital emergency room, where he was treated for his facial lacerations and bruising. There, he told the physicians that his son-in-law had hit him with his fist and kicked him. On Monday following the altercation, Ms. Becker borrowed a Polaroid camera and photographed her father's extensive bruising on his leg, hip, and face. On Monday she also took her father to see his hematologist, who treats him for leukemia. After this visit, her father wanted to report his injuries to the police. However, Ms. Becker testified that she did not take him to make such a report until forty-five days after the altercation.

Much of Ms. Becker's testimony focused on her father's mental health. She testified that he had suffered greatly when her mother died. He erroneously believed that she had visited him in Germany, when she had not. When he came to live in the United States, his mental acuity seemed to improve. Three years before the altercation, however, he had once suffered hallucinations. He once wandered away and became disoriented. He also once put the children's shoes in the refrigerator. He had also fallen down. Further, on occasion, he had become aggressive with either her or the children. His medical records showed a history of some dementia and prescriptions for sleep medication. Ms. Becker said that her father was aware that he had suffered bouts of dementia. However, Ms. Becker testified that at the time of trial and the time of the attack, she considered her father clear-thinking. Further, she testified that her father's basic story about being attacked had been unchanged.

Ms. Becker's father, Leo Kuboth, also testified over a two-day period. The record reflects that on the first day of his testimony, the interpreter had difficulty following the court's instructions and interpreting Mr. Kuboth's answers. According to an observer from

the District Attorney's office, the interpretations were inaccurate. Additionally, the defense often objected that the victim's responses were not being interpreted in full. In short, the trial court described the day as a "virtual nightmare."

Nonetheless, in his first day of testimony, Mr. Kuboth explained that he lived with his daughter and helped her care for her two children, ages four and six. He testified that he was beaten by Ahmed. He could not remember on what day the attack occurred, but believed it was during the school week. He said that he saw Ahmed eating potato chips that had been purchased for the children. He told Ahmed that the chips were for the children and tried to take them away. According to Mr. Kuboth, Ahmed threw the chips down furiously. Then, Ahmed "strangled me like a tiger, and he hurled a punch and threw me down on the floor and also kicked me." Mr. Kuboth did not know how many times Ahmed hit him. He testified that he did not fall by accident. He also testified that the children did not see the fight, but when they saw him bleeding, Ahmed explained to them that he had fallen down the stairs.

Finally, on his first day of testimony, Mr. Kuboth claimed to have no problems with his memory and thinking. However, he testified that he first went to the doctor ten days after the altercation. This testimony is contradicted by his medical records. He also testified that he explained the attack to the police and gave them the photographs taken by his daughter shortly after the altercation. Lastly, when asked if he saw the man who hit him in the courtroom, Mr. Kuboth first said no, then said "I don't know." When asked again who hit him, he pointed at Ahmed and said, "That gentleman sitting there."

In his second day of testimony, with a different interpreter, Mr. Kuboth testified that he only understood half of what the previous interpreter said to him because the interpreter spoke German poorly. He understood the second interpreter better. In his testimony, he again detailed the attack. He said that Ahmed and his daughter had been separated for eight or nine months. One weekend, although he was not sure of the day, Ahmed came to pick the children up for a visit around noon. Mr. Kuboth saw Ahmed eating the children's potato chips. Angry because Ahmed did not contribute much money for upkeep and because the

chips were for his grandchildren, Mr. Kuboth asked for the bag of chips back. He testified that Ahmed continued to eat, grinning while doing so. Mr. Kuboth tried to take the chips away, but Ahmed got angry, put the chips away, and hit him. Mr. Kuboth described Ahmed as “wild.” Additionally, Mr. Kuboth stated that the children saw the attack. After the attack, Ahmed went to the supermarket, where Ms. Becker had gone. When he returned, he tried to say he was sorry, but Mr. Kuboth cut him off. He said that Ahmed never apologized.

In describing the attack, Mr. Kuboth testified that Ahmed tried to strangle him. He first testified that Ahmed knocked his teeth out. Later, he said that the teeth were already bad and after the attack, a dentist had to remove them. He did not know the number of blows he received, but was hit in the face many times. He said that he also received blows to the chest, legs, stomach, arms, mouth, and cheeks. He bled and developed bruises on his face, neck, arms, and legs. He stated that the day after the attack, his daughter photographed some of his injuries. Further, he explained that he went to the doctor on the day of the attack for some bandages. He returned to the doctor on Monday to be checked for a concussion. Further, on Monday after the attack, Mr. Kuboth decided to go to the police, and his daughter took him there. Because the first police station was too crowded, she took him to another.

Much of Mr. Kuboth’s testimony also focused on his mental health. He denied ever having memory problems or suffering from dementia. He explained that his wife of forty-seven years had died of cancer, and he was very depressed after her death. He stated that he never took medicine for depression, but only for his heart. He denied ever experiencing dizziness or falling. He claimed to never have gotten lost when walking. He denied ever physically fighting with his daughter. Finally, he stated that although he did not like Ahmed, and wanted to teach him a lesson, he did not fabricate his story.

Finally, Officer Leonard Dawson testified. He worked with the police department investigating assaults against elderly people. He spoke with Mr. Kuboth and his daughter after they were referred to him by a police sub-station. He interviewed Mr. Kuboth, using Ms. Becker as a translator. Officer Dawson re-questioned Mr. Kuboth, and his story

remained consistent. Officer Dawson testified that he had dealt with delusional or demented people before, and Mr. Kuboth appeared rational to him. He did not think that Mr. Kuboth was delusional. Further, Officer Dawson testified that the photographs of Mr. Kuboth's injuries were consistent with his story. However, if Mr. Kuboth said that he had been hit many times in the face so hard that his teeth were knocked out, the photograph would not be consistent with that story. If given a story inconsistent with photographic evidence, he would probably not find probable cause.

Ms. Becker's neighbor testified on rebuttal that on a Saturday in February 1997, she had to drive Ms. Becker back to a supermarket to retrieve her car. The neighbor saw Mr. Kuboth at that time and he appeared injured and bleeding. She also saw Ahmed in the yard with the children.

For the defense, a friend of Ahmed's testified that the night before the attack, he went to Ms. Becker's home with Ahmed to move some furniture. He waited outside as Ahmed gathered his children, but no furniture. They then drove to the grocery store and Ahmed went inside. The friend testified that Ahmed purchased nothing and left the store alone. The friend testified that they then drove to Ahmed's new home with the children. Apparently, this testimony was offered to impeach Ms. Becker because she previously testified that Ahmed and his friend came inside her home that night and that Ahmed did not leave with the children.

Also for the defense, an assistant librarian for the Houston Public Library testified that she checked out books for Ahmed and his children on Saturday, February 8. Although she was not working that day, she had specially obtained the books for him as a favor. She testified that she called him before noon from her home to tell him that the books were ready. When she called, one of his daughters answered.

Lastly, Ahmed testified that he and Ms. Becker experienced an acrimonious divorce. February 7, 1997, the Friday evening before the alleged altercation, was the first night of visitation he was permitted since his separation from Ms. Becker. He arrived that night with a friend to pick up the children and some furniture. Before he could leave with the children,

Ms. Becker first wanted to buy some food for them at the supermarket. She left, and he remained to play with the children. While there, he noticed that Mr. Kuboth had a scratch on his left cheek. Ahmed testified that he offered to help bandage the scratch, but when he moved toward Mr. Kuboth, the elderly man stepped away and fell on his back. At that point, Ahmed took the children into the van with his friend, drove to the supermarket, and told Ms. Becker that her father had fallen. He did not give her a ride back to her home. He was not accused of hurting her father until April. He testified that between February and April, his divorce and child custody issues became heated. He also denied ever hitting Mr. Kuboth.

Ahmed also testified about his past observations of Mr. Kuboth's mental health. He stated that the elderly man had twice gotten lost. He also observed him confused, disoriented, and physically out-of-control.

Having reviewed all the evidence, both in support of and in opposition to the verdict, we find that the proof of guilt is not so obviously weak as to undermine confidence in the jury's determination. Nor is the proof of guilt greatly outweighed by contrary proof. *See Johnson v. State*, 23 S.W.3d at 11. Accordingly, we overrule Ahmed's sole point of error and affirm his conviction.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed March 1, 2001.

Panel consists of Justices Lee, Hutson-Dunn, and Amidei.*

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

* Senior Justice Norman Lee, Senior Justice D. Camille Hutson-Dunn, and Former Justice Maurice Amidei sitting by assignment.