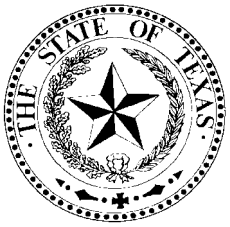
Affirmed and Opinion filed April 13, 2000.



In The

Fourteenth Court of Appeals

NO. 14-97-00378-CR

MICHAEL WAYNE HARRIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 185th District Court
Harris County, Texas
Trial Court Cause No. 746,702

O P I N I O N

Michael Wayne Harris appeals his conviction by a jury for the offense of burglary of a habitation. The jury assessed punishment at life. In four points of error, appellant contends (1) he was denied a hearing by a fair and impartial judge where the trial judge decided prior to appellant's punishment hearing that the court would cumulate punishment, (2) the trial court erred in ordering his sentences cumulated where the intent of the court was to punish him for going to trial, (3) the evidence was legally insufficient to support his

conviction, and (4) the evidence was factually insufficient to support his conviction. We affirm the judgment of the trial court.

BACKGROUND

On the afternoon of August 2, 1996, Sheri Herwig's house was burglarized. The burglar broke open the front door, pried open a window, and stole about $10,000 of property. The Herwigs were not home at the time. Quinten Parmer, a fourteen-year-old boy who lived across the street, witnessed the burglary. Quinten testified that he saw appellant pull up in front of Herwig's house in an older model blue and white Suburban. Quinten saw appellant walk to the front of the Herwig home and "fidget" with the front door. Appellant then returned to his Suburban and drove away. He returned a few minutes later with a crowbar. Using the crowbar, appellant gained entry into the Herwig residence. Quinten saw him exit several minutes later carrying a rifle. Mr. Herwig testified that one of the items stolen from the house was rifle.

The police received information that led them to believe appellant was a suspect. The police then prepared a photospread, from which Quinten identified appellant. When appellant was arrested, he was working on a two-tone blue older model suburban which matched the description of the vehicle used in the burglary. The police located Mr. Herwig's rifle by checking pawn records. They traced the rifle back to Douglas Keller, who testified that appellant sold him the rifle in August of 1996.

FIRST AND SECOND POINTS OF ERROR

Appellant complains in his first point of error that he was denied a hearing by a fair and impartial judge where the judge decided prior to appellant's punishment hearing that he would cumulate any punishment assessed against appellant in this case with the sentence he had received in a prior case. In a related point of error, appellant contends that the trial court

erred in ordering the appellant's sentence to be cumulated where the intent of the court was to punish the appellant for going to trial. We shall address these points together.

The State filed a motion in this case to cumulate sentences. Prior to selecting the jury, the judge informed appellant of the effect of this motion. The conversation proceeded as follows:

> The Court: Mr. Harris, we're getting ready to have a jury panel over here to try you on this burglary of a habitation case. And you were tried yesterday on a possession case and given 20 years in the penitentiary.
>
> The Defendant: Yes, sir.
>
> The Court: You understand if we try this case today and the jury should find you guilty and assess punishment in the Texas Department of Criminal Justice, Institutional Division, that sentence will be stacked on top of the previous sentence?
>
> In other words, you will not begin serving this second sentence, if it is given to you, until you have completed the time for your first sentence. Do you understand all that?
>
> The Defendant: Yes, sir.
>
> The Court: Your attorney has explained that to you?
>
> The Defendant: Yes, sir.

There is no indication that the trial court's decision to cumulate depended on whether appellant plead guilty or went to trial. We can find no evidence in any of the judge's statements that he did not act fairly and impartially, nor is there any evidence that appellant's due process rights were violated.

As authority for his argument, appellant cites the cases of *McClenan v. State* and *Jefferson v. State*. *McClenana v. State*, 661 S.W.2d 108 (Tex. Crim. App. 1983); *Jefferson v. State*, 803 S.W.2d 470 (Tex. App.–Dallas 1991, pet. ref'd). We note that in both these cases the trial judges assessed punishment. Further, the trial judges limited the range of punishment which they were willing to give even before the respective defendants presented their evidence. Thus, these two cases stand for the principle that it is a denial of due process for the court to arbitrarily refuse to consider the entire range of punishment for an offense

or refuse to consider the evidence and impose a predetermined punishment. *Jefferson*, 803 S.W.2d at 471; *McClenan*, 661 S.W.2d at 110; *Cole v. State*, 757 S.W.2d 864, 865 (Tex. App.–Texarkana 1988, pet. ref'd).

We do not find these cases controlling. In the case before us, the jury, not the trial judge, assessed punishment. There is no evidence that the trial court's admonishment to appellant that his sentence would be cumulated was made at an inappropriate time, nor is there evidence that the trial court was punishing appellant for asserting his right to trial. We notice generally that a defendant has no right to concurrent sentencing. Whether punishment will run cumulatively or not is within the discretion of the trial judge. *Carney v. State*, 573 S.W.2d 24 (Tex. Crim. App. 1978); *Christopher v. State*, 489 S.W.2d 573 (Tex. Crim. App. 1973); TEX. CODE CRIM. PROC. ANN. art. 42.08(a) (Vernon Supp. 1999). We find that the trial judge's statement concerning cumulation of sentences to be proper and overrule appellant's first and second points of error.

THIRD POINT OF ERROR

In point of error three, appellant argues that the evidence is legally insufficient to support his conviction for burglary of a habitation. To substantiate this claim, appellant only points to two inconsistencies in the testimony of Quinten Parmer. First, Quentin testified that appellant's Suburban was blue and white while the actual colors were blue and a faded light blue. Second, Quinten testified that appellant only entered complainant's residence once, taking a rifle. However, the Herwigs claimed that several items were taken and estimated the value of the stolen property at over $10,000.

When reviewing the legal sufficiency of the evidence, the appellate court will look at all of the evidence in a light most favorable to the verdict. *Garrett v. State*, 851 S.W.2d 853, 857 (Tex. Crim. App. 1993); *Houston v. State*, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984). In so doing, an 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, 318-319 (1979); *Ransom v. State*, 789 S.W.2d 572, 577 (Tex. Crim. App. 1989). This standard is applied to both direct and circumstantial evidence cases. *Chambers v. State*, 711 S.W.2d 240, 245 (Tex. Crim. App. 1986). An appellate court is not to

reevaluate the weight and credibility of the evidence, but only ensure that 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. App. 1988). The jury is free to believe or disbelieve any witness. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986).

While appellant points to two slight discrepancies in the State's evidence, the evidence leads us to believe that the trier of fact could have found beyond a reasonable doubt that appellant committed burglary. Quinten identified the appellant as the person he saw breaking into the Herwig house. He identified the vehicle driven by appellant. He testified that he saw appellant exit the Herwig house carrying a rifle. Pawn records trace that same rifle back to Douglas Keller, who testified that appellant sold him the rifle. Viewing the evidence in the light most favorable to the verdict, the evidence is legally sufficient to support the jury's verdict. Point of error three is overruled.

FOURTH POINT OF ERROR

In point of error four, appellant asserts that the evidence is factually insufficient to support his conviction. He argues that the jury's verdict is against the greater weight and preponderance of the evidence. In sole support of this contention, appellant restates his view that the testimony of Quinten Parmer cannot be trusted because of the two inconsistencies mentioned in point of error three. We disagree.

In reviewing the factual sufficiency of the evidence to support a conviction, we must look to all of the evidence "without the prism of 'in the light most favorable to the verdict.'" *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). However, our review is not unfettered, for we must give "appropriate deference" to the fact finder. *Id.* at 136. We may not impinge upon the fact finder's role as the sole judge of the weight and credibility of witness testimony. *See Santellan v. State*, 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Dimas v. State,* 987 S.W.2d 152, 155 (Tex.App.–Fort Worth 1999, no pet.). The jury, as fact finder, was the judge of the facts proved and of reasonable inferences to be drawn therefrom.

See Kirby v. Chapman, 917 S.W.2d 902, 914 (Tex. App.–Fort Worth 1996, no pet.). The weight given to contradictory testimonial evidence is within the sole province of the jury, because it turns on an evaluation of credibility and demeanor. *See Cain v. State*, 958 S.W.2d 404, 408-09 (Tex. Crim. App. 1997). Thus, we must defer to the fact finder's weight-of-the-evidence determinations. *See id.* at 408. Consequently, we may set aside a verdict for factual insufficiency only when that verdict is so against the great weight and preponderance of the evidence so as to be clearly wrong and unjust. *See Clewis*, 922 S.W.2d. at 134-35.

Resolution of the inconsistencies in the testimony of Quinten Parmer is merely weight-of-the-evidence determinations for the fact finder. *See Cain*, 958 S.W.2d at 408. Unless the record clearly reveals a different result is appropriate, an appellate court must defer to the jury's determination concerning what weight to give contradictory testimonial evidence. *See Johnson v. State*, No. 1915-98, 2000 WL 140257, at *6 (Tex. Crim. App. February 9, 2000) (not yet released for publication); *Jones v. State*, 944 S.W.2d 642, 648-49 (Tex. Crim. App. 1996). The record reveals no reason for this court to question the veracity or honesty of Quentin Parmer. The inconsistencies in Quentin Parmer's testimony were minor, and the great weight of the credible evidence supports the verdict. For the reasons stated above, we find that the evidence supporting the judgment was not so weak as to be manifestly unjust and clearly wrong. Therefore, we hold that the evidence is factually sufficient to support the judgment. We overrule appellant's point of error four and affirm the judgment of the trial court.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed April 13, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig.

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