

Affirmed and Opinion filed June 15, 2000.



In The

Fourteenth Court of Appeals

NO. 14-98-00801-CR and 14-98-00802-CR

STEPHEN BOWEN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 179th District Court
Harris County, Texas
Trial Court Cause No. 731,199 and 731,201**

OPINION

The State sought to revoke Stephen Bowen's probation after he threatened to shoot his girlfriend in the face. Appellant pleaded "not true" to the allegation. After a hearing, the trial court found he had violated the terms of his probation and sentenced him to four years in prison. In his sole point of error, appellant urges this court to apply a factual sufficiency standard of review to the revocation proceeding. We apply the usual standard of review and affirm the judgment of the trial court.

Traditionally, our review of the evidence in a probation revocation proceeding is limited to determining whether the trial court abused its discretion. *Barnett v. State*, 615 S.W.2d

220,222 (Tex. Crim. App. [Panel Op.] 1981), *overruled on other grounds*, *Moosavi v. State*, 711 S.W.2d 53, 55 (Tex. Crim. App. 1986); *Burke v. State*, 930 S.W.2d 230, 233 (Tex. App.—Houston [14th Dist.] 1996, no pet.). In conducting this review, we examine the evidence in the light most favorable to the trial court's order. *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App.1981) (citing *Fernandez v. State*, 564 S.W.2d 771 (Tex. Crim. App.1978)). The trial court is the exclusive judge of the credibility of the witnesses and determines if the allegations in the motion to revoke are sufficiently demonstrated. *Garrett*, 619 S.W.2d at 174; *Galvan v. State*, 846 S.W.2d 161, 162 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd).

Appellant urges us to apply the factual sufficiency standard contained in *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996) to determine whether the trial court erred in revoking his probation. Under the *Clewis* standard, we are required to view all the evidence, without the prism of “in the light most favorable to the prosecution,” and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis*, 922 S.W.2d 129. However, two of our sister courts of appeals have been presented similar claims and have declined to extend *Clewis*. See *Johnson v. State*, 943 S.W.2d 83, 85 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Brumbalow v. State*, 933 S.W.2d 298, 300 (Tex. App.—Waco 1996, pet. ref'd). We agree with the *Brumbalow* court's analysis that a review of the evidence is incorporated into a determination of whether the trial court abused its discretion. *Id.* (citing *Thomas v. Thomas*, 895 S.W.2d 895, 896 (Tex. App.—Waco 1995, writ denied). We also agree that extending *Clewis* beyond its current context is a judgment best made by the court of criminal appeals. See *Brumbalow*, 933 S.W.2d at 300. We will therefore examine the evidence presented under the abuse of discretion standard, in the light most favorable to the trial court's verdict.

Bowen had been on probation for about eighteen months at the time motions to revoke were filed. Susan Orendac, Bowen's probation officer, testified that Bowen had been employed at several jobs since he had been on probation.

Earl Page, Lozano's neighbor, testified he was watching television the night of the incident when she came bursting into his house, saying over and over that "he's going to kill me." Lozano staggered and fell into Page's arms; she managed to tell him that she had been threatened. Soon after that, Page said, Bowen backed out of Lozano's driveway and pulled into his. After warning his wife to call 911, and to be ready to flee with their children, Page went outside to confront Bowen. Page said he told Bowen to leave, and that Bowen replied, "You tell Michelle to come out. I have something to show her." When he said this, one of Bowen's hands was hidden. Page told him again to leave and Bowen left.

Harris County sheriff's deputy Donald Tipps responded to the call. He said Lozano was "very shook up, crying and shaking" when he talked to her at the Page house. He and his partner went to Lozano's house, where they arrested appellant as he was trying to leave. Police then entered the residence and found a letter and a gun. The letter, showed that appellant was upset because Lozano wanted to end their relationship. Tipps also said that, while handcuffed and in the back of his patrol car, appellant admitted that "I guess I shouldn't have threatened to shoot her in the face."

On cross-examination Tipps said the gun and letter were not in the original report, but included in a supplemental report two weeks after the incident occurred. He said he was going on vacation that day and that he left the report in the hands of a subordinate, who did not complete the report.

Rick Davis responded with Tipps to the disturbance call. He said that once appellant was arrested, he was calm. Davis did not hear appellant confess to making any threats against anyone.

Michelle Lozano said she and Bowen were talking about breaking up that night. She said she found out she was pregnant that day and decided she wanted to end the relationship. She said he asked if she was going to throw him out of her house, and that he began talking about killing himself. After more argument, Bowen told her that he was going to shoot her with the

gun she kept by her bed. When he went back into the bedroom, Lozano fled to Page's house. She said she later discovered that her gun had been fired.

Appellant testified that Lozano, a secretary at the district attorney's office, had previously threatened to get his probation revoked. He said that on the night of the incident, when he found out she was pregnant, she again threatened to get his probation revoked if he didn't leave. At that point, he said he talked about killing himself and went back to get the gun; when he returned, she had left. Appellant said he then wrote the letter which was introduced into evidence and went over to the Page residence to try and patch things up.

The court also heard numerous witnesses who testified to appellant's character.

We find the trial court did not abuse its discretion in finding that appellant violated his probation by threatening Lozano. The judgment of the trial court is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed June 15, 2000.

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

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

* Senior Justices Joe L. Draughn, Norman Lee and D. Camille Hutson-Dunn sitting by assignment.