Affirmed and Opinion filed September 20, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00931-CR

WILFREDO KAWAS MARQUINA, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 833,288

O P I N I O N

Appellant was charged by indictment with the felony offense of assault. TEX. PEN. CODE ANN. § 22.01(b)(2). A jury convicted appellant of the charged offense and assessed punishment at four years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant contends the evidence is legally and factually insufficient to support the jury's verdict. We affirm.

I. Standards of Appellate Review.

When we are asked to determine whether the evidence is legally sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). However, under a factual sufficiency review, the evidence is viewed in a neutral light favoring neither party. *Clewis v. State*, 922 S.W.2d at 134. In this 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. However, this review must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). The degree of deference a reviewing court provides must be proportionate with the facts it can accurately glean from the trial record. *Id.* at 8. A factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. Under *Johnson*, if the complaining party is attacking the factual sufficiency of an adverse finding on an issue on which he did *not* have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding. In reviewing an insufficiency of the evidence challenge, the court of appeals must first consider, weigh, and examine all of the evidence that supports and that is contrary to the jury's determination. Having done so, the court should set aside the verdict only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *Id.* at 10.

II. Factual Summary.

The State called four witnesses and offered a stipulation of evidence in its case-in-chief; appellant did not offer any testimony or other evidence. The testimony of three of the State's witnesses is essential for our resolution of appellant's sufficiency challenges.

The complainant testified she was in a relationship with appellant. Their relationship produced a daughter who resided with the complainant. On the date alleged in the

indictment, the complainant and her daughter returned home from a family outing. Upon their arrival, appellant approached the complainant, tried to hug her, and got his hand caught in her necklace. The complainant did not wish to be hugged and pushed appellant, causing the necklace to break. Instead of leaving as requested, appellant followed the complainant into her apartment. Later, the complainant left her apartment and called the police. Eventually two police officers arrived. One officer spoke English and the other spoke Spanish. The complainant told the officers her injury was caused by accident.

Houston police officer, William Elsbury, was dispatched to the scene of the alleged assault. He spoke briefly with appellant who was in the complainant's apartment. Shortly thereafter, the complainant returned from calling the police. The complainant told Elsbury that she had been assaulted, motioning as if she had been struck on the chin. The complainant demonstrated by balling her hand into a closed fist. Elsbury saw redness and minor swelling to the complainant's chin and saw an eight inch mark on the side of her neck that possibly had been caused by a necklace or shirt being jerked. Because the complainant was primarily speaking Spanish, Elsbury requested that a Spanish-speaking officer be dispatched to the scene.

Officer Ramon Flores arrived at the scene and interviewed the complainant in Spanish. Flores noticed the complainant had a red mark on her neck and another on her chin. The complainant told Flores that appellant grabbed her necklace from behind and, when she turned, struck her in the face. According to Flores, the complainant did not state that her injuries were sustained as a result of appellant trying to hug her.

III. Arguments and Analysis

Appellant contends the evidence is legally and factually insufficient because the complainant testified her injuries were caused by the unintentional and accidental conduct of appellant. The complainant's version of the events given at trial is in direct conflict with her statements to Elsbury and Flores at the scene of the alleged offense. The complainant's statements to Elsbury were admitted without objection. Our law provides that hearsay

admitted without objection shall not be denied probative value. TEX. R. EVID. 802. The complainant's statements to Flores were admitted over objection. But our law provides that once evidence is admitted, even if admitted erroneously, it may be considered in determining the sufficiency of the evidence. *Rodriguez v. State*, 819 S.W.2d 871, 873 (Tex. Crim. App. 1991). Therefore, we may consider the complainant's statements in our resolution of this point of error.

As noted above, when the legal sufficiency is challenged, we view the evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319. We should not position ourselves as a thirteenth juror in assessing the evidence. Rather, our position is to ensure the rationality of the verdict. *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Under our law, the jury is the sole judge of the credibility of the witnesses and of the weight to be given their testimony. TEX. CODE CRIM. PROC. ANN. art. 38.04*; Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. 1981). A jury may therefore accept one interpretation of the facts and reject another, or reject any or all of a witness's testimony. *Pizano v. State*, 489 S.W.2d 284, 285 (Tex. Crim. App. 1973).

In the instant case, the complainant's statements to Elsbury and Flores established appellant assaulted the complainant by "striking her with his hand" as alleged in the indictment. The jury was free to believe that version of the events rather than the complainant's in-court testimony. This was precisely the credibility determination prescribed by article 38.04. We cannot say the jury's decision to believe the complainant's statements to Elsbury and Flores at the scene, and to disbelieve the complainant's testimony was irrational. Consequently, we find the evidence legally sufficient to support the jury's verdict.

We now turn to consider whether the evidence is factually sufficient. Under this analysis, we view the evidence in a neutral light favoring neither party. *Clewis*, 922 S.W.2d at 134. However, a factual sufficiency analysis can consider only those matters bearing on

credibility that can be fully determined from a cold appellate record. *Johnson*, 23 S.W.3d at 8. In the instant case we are presented not with the classic swearing match between two witnesses, but with two contradictory versions of the same event from a single witness. A complaining witness's recantation does not automatically render the evidence insufficient. *Peters v. State*, 997 S.W.2d 377, 382 (Tex. App.—Beaumont 1999, no pet.). Moreover, this is not a situation where the question of credibility can be fully determined from the cold appellate record. Instead, we have a situation where the jury, who was able to personally observe the demeanor of Elsbury, Flores and the complainant, was better positioned to resolve the credibility issue. That issue was necessarily resolved against appellant. Employing the appropriate level of deference to the jury, we find the evidence is factually sufficient.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird[1]
Justice

Judgment rendered and Opinion filed September 20, 2001.
Panel consists of Justices Edelman, Frost, and Baird.
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Justice Charles F. Baird sitting by assignment.