Affirmed and Opinion filed October 4, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00873-CR

TOMMY REESE CLEMONS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 838679

O P I N I O N

Appellant was charged by indictment with the offense of aggravated assault. The indictment alleged two prior felony convictions for the purpose of enhancing the range of punishment. Appellant waived his right to trial by jury. The trial court found appellant guilty of the charged offense, found the enhancement allegations true, and assessed punishment at fifty years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises four points of error. We affirm.

I. Factual Summary

As these four points of error challenge the sufficiency of the evidence to support appellant's conviction, we will begin with a summary of the evidence admitted at trial. The complainant testified that he had a romantic relationship with appellant's former girlfriend, Rosina Ceamster. The complainant went to Ceamster's apartment complex and telephoned Ceamster; she went to the security gate, let the complainant enter and the two proceeded to Ceamster's apartment. The complainant learned from Ceamster that appellant was in the apartment. Ceamster told the complainant that she and appellant were going to reconcile. A verbal argument ensued between the three during the course of which the complainant threw a beer can at appellant and ran from the apartment; Ceamster and appellant followed. When the complainant was unable to open the security gate, he began climbing the fence. Appellant stabbed the complainant with a pocket knife three times, once each in the forehead, stomach and hip. The complainant managed to scale the fence and proceeded to the nearest emergency room. These three lacerations were confirmed by the medical records, and a police officer who was dispatched to the hospital to investigate this incident. The wounds were sutured and the complainant was released.

Ceamster testified she was at the security gate talking to a friend when she saw the complainant enter her apartment. Ceamster returned to her apartment and a struggle began with Ceamster grabbing the complainant's shirt and ending with the complainant throwing a beer can toward appellant. Ceamster saw the complainant place his hand behind his back. It appeared to Ceamster as if the complainant was reaching for something. The complainant then turned and ran from the apartment and appellant followed.

Appellant testified he was struck in the face by an object while Ceamster and the complainant argued. The complainant then fled the apartment with appellant following. The complainant stopped on the stairway and threw another been can, which also hit appellant. The complainant then reached into his pocket and threatened appellant. Appellant grabbed the complainant's hand and a struggle ensued. Appellant admitted to pulling his pocket

knife, but was unsure whether he wounded the complainant. On cross-examination, appellant was impeached with three prior felony convictions.

II. Standards of Appellate Review.

The four points of error contend the evidence is legally and factually insufficient either because the testimony of the complainant was not credible, or because the State did not rebut appellant's assertion of self defense. 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).

Under a factual sufficiency review, we employ a separate and distinct standard of appellate review. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). The primary difference is how the appellate court views the evidence. Instead of viewing the evidence in the light most favorable to the verdict, the evidence is viewed in a neutral light, favoring neither party. *Clewis v. State,* 922 S.W.2d 126, 134 (Tex. Crim. App. 1996). In this neutral light, "the appellate court reviews the fact finder's weighing of the evidence and is authorized to disagree with the fact finder's determination." *Clewis,* 922 S.W.2d at 133. The *Johnson* Court cautioned, however, that this review must employ appropriate deference to prevent an appellate court from substituting its judgment for that of the fact finder. *See Johnson,* 23 S.W.3d at 7. 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. This approach occasionally permits some credibility assessment but usually requires deference to the jury's conclusion based on matters beyond the scope of the appellate court's legitimate concern. *Ibid,* (citing George E. Dix & Robert O. Dawson, 42 TEXAS PRACTICE--CRIMINAL PRACTICE AND PROCEDURE §§ 36.69 (Supp.1999)). We are

empowered to consider and weigh all the evidence and set aside the verdict if we conclude the evidence is insufficient or if the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust, regardless of whether the record contains some evidence of probative force in support of the verdict. *See Pool v. Ford Motor Co.,* 715 S.W.2d 629, 635 (Tex.1986). Under this standard, if the complaining party is attacking the factual sufficiency of an adverse finding on an issue to which he did *not* have the burden of proof, he must demonstrate that there is insufficient evidence to support the adverse finding.

III. The Complainant's Credibility.

The first point of error argues the evidence is legally insufficient because "the complainant's testimony is simply not worthy of belief." Under a legal sufficiency challenge, the fact-finder 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). The fact-finder may therefore accept one interpretation of the facts and reject another, or reject any or all of a witness's testimony. *See Pizano v. State*, 489 S.W.2d 284, 285 (Tex. Crim. App. 1973). On appeal, we will not review the credibility of the witnesses. *Esquivel v. State*, 506 S.W.2d 613, 615 (Tex. Crim. App. 1974); *Lawrence v. State*, 700 S.W.2d 208, 211 (Tex. Crim. App. 1985). Our only inquiry is whether the fact-finder's decision was rational. When the evidence is viewed in the light most favorable to the prosecution, we cannot say the trial court's decision to find the essential elements of aggravated assault proven beyond a reasonable doubt was irrational. The first point of error is overruled.

The second point of error advances the same argument but does so under a factual sufficiency challenge. As noted above, when resolving such an issue we can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record. In the instant case, there are no such matters before us. The complainant stated he was stabbed three times by appellant. His testimony was not impeached and his injuries are confirmed by the medical records. On the other hand, appellant testified that he was armed

with a knife during his struggle with the complainant, but was not certain that he caused the injuries. This was purely a credibility question, which was best settled by the trial court. We are in no better position to resolve that issue. Therefore, we do not find the trial court's verdict to be so against the great weight and preponderance of the evidence as to be manifestly unjust. The second point of error is overruled.

IV. Rebutting Self Defense.

The third point of error argues the evidence is legally insufficient because the State never rebutted appellant's assertion of self defense. When resolving such a claim, we look not to whether the State presented evidence that refuted appellant's defensive testimony, but instead determine whether there was legally sufficient evidence to allow the fact-finder to find the essential elements of the charged offense beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). The conviction is an implicit finding rejecting the defendant's self-defense theory. *Id.* at 914. Our resolution of the first point of error, therefore, necessarily resolves this point. Consequently, the third point of error is overruled.

The fourth point of error advances the same argument, but in the context of a factual sufficiency challenge. However, the problems appellant confronts here are the same ones we resolved against him in the second point. The complainant testified that he was in flight from appellant when stabbed three times. On the other hand, appellant testified he pulled his knife in self defense, believing the complainant was similarly armed. By its verdict, the trial court obviously believed the complainant's and rejected appellant's version of the events. Under the complainant's version, appellant was not justified in using deadly force. TEX. PEN. CODE ANN. § 9.32(a)(2). Therefore, we cannot say the trial court's implicit rejection of appellant's self defense claim was so against the great weight and preponderance of the evidence as to render the conviction manifestly unjust. The fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird[1]
Justice

Judgment rendered and Opinion filed October 4, 2001.

Panel consists of Justices Yates, Edelman, and Baird.

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