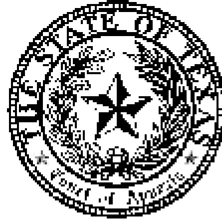
Affirmed and Opinion filed December 7, 2000.



In The

Fourteenth Court of Appeals

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NO. 14-98-01295-CR

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ED HUBERT ROGERS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 785,900

O P I N I O N

Appellant Ed Hubert Rogers appeals his conviction for aggravated assault in two points of error, contending that the evidence of his intent is both legally and factually insufficient. We disagree and affirm.

Rogers argued with the complainant, Albert Arthurs, about money that Arthurs had loaned to him, but which he had never repaid. Rogers first tried to attack Arthurs with a knife. When Arthurs wrestled the knife away and went inside his home to call the police, Rogers returned with a handgun. He fired two shots in the air and two shots into the house, claiming that he wanted to kill Arthurs.

In his first and second points of error, Rogers argues that the evidence of his intent is legally and factually insufficient. When reviewing the legal sufficiency of the evidence, we look at 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. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995). The trier of fact is the exclusive judge of the credibility of witnesses and of the weight to be given their testimony. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996). Likewise, reconciliation of conflicts in the evidence is within the exclusive province of the jury. *See id.*

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). 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 fact finder. *See id.* 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. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

Under the penal code, a person commits aggravated assault if he knowingly or intentionally threatens another with imminent bodily injury by using or exhibiting a deadly weapon during the commission of the assault. *See* TEX. PEN. CODE ANN. §§ 22.01(a)(1) & 22.02(a)(2) (Vernon 1994 & Supp. 2000). Intent can be inferred from the acts of the accused or the surrounding circumstances, which include not only acts, but words and conduct. *See Lee v. State*, 21 S.W.3d 532, 540 (Tex. App.—Tyler 2000, no pet.).

The evidence at trial shows that Rogers attacked Arthurs with a knife, saying that he was going to kill him. When Arthurs wrestled the knife away, Rogers returned with a handgun and

again expressed his desire to kill him. He fired two shots into the air and an additional two shots directly at Arthurs, who was trying to protect his infant daughter inside the doorway of the home. The latter two shots shattered two windows in Arthurs's house, and one bullet embedded in a wall. Rogers's expressed desire to kill Arthurs and his attacks with the knife and gun present legally sufficient evidence of his intent. We thus overrule point of error one.

Further, in reviewing all the evidence, we also find factually sufficient evidence of Rogers's intent. While Rogers testified at trial that he did not attack Arthurs with a knife or shoot at his home, Arthurs unequivocally stated that Rogers had pointed the gun and shot directly at him. At trial, Rogers also claimed that the window in Arthurs's home had been broken for months. However, a police officer who responded to Arthurs's emergency call for help found him and his three-month-old daughter covered in shattered glass. Such conflicts in the evidence are left to the fact finder's determination. *See Jones*, 944 S.W.2d at 647. Additionally, Roger's testimony is not so contrary to the overwhelming weight of the evidence as to make the fact finder's verdict clearly wrong and unjust. *See Stone v. State*, 823 S.W.2d 375, 381 (Tex. App.—Austin 1992, pet. ref'd, untimely filed). Accordingly, we also overrule point of error two.

Having overruled both of Rogers's points of error, we affirm his conviction.

/s/ Sam Robertson
Justice

Judgment rendered and Opinion filed December 7, 2000.

Panel consists of Justices Robertson, Sears, and Lee.[*]

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

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[*]Senior Justices Sam Robertson, Ross A. Sears, and Norman Lee sitting by assignment.