

Affirmed and Memorandum Opinion filed March 16, 2010.



In The

**Fourteenth Court of Appeals**

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NO. 14-08-00926-CR

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**DONALD GILL DELAUDER, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 268th District Court  
Fort Bend County, Texas  
Trial Court Cause No. 45886**

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**MEMORANDUM OPINION**

Donald Gill Delauder appeals the legal and factual sufficiency of the evidence supporting his conviction for aggravated assault with a deadly weapon. We affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

Appellant was charged by indictment with aggravated assault with a deadly weapon, alleged to have been committed on or about December 17, 2006. After a two-day jury trial, appellant was convicted and subsequently sentenced to twelve years' confinement in the Texas Department of Criminal Justice, Institutional Division.

## **A. State's Evidence**

Rayzale White testified that she and appellant had dated for a couple of years and by the time of the shooting, they had been living together at appellant's house for about four months. According to White, appellant left the house while she was preparing to go out to a club, and she was the first to return. She stated that she changed clothes and was lying on the bed watching television when she heard appellant call to her from the bedroom doorway. According to White, she looked at appellant, then turned away. White testified that appellant called her name a second time, and when she looked at him, he was holding a "big gun" in his hand. White stated that when she again turned away from him, appellant shot her in the back. According to White, appellant then said, "this is how demonic I am." Although White testified at one point that appellant said nothing other than her name before he shot her, she later testified that she and appellant had been having an argument and she was ignoring him.

Wounded, White then escaped the home through the back door, as appellant sat in a chair in the living room. She then made her way to a Texaco gas station where she used a pay phone to call 911. On cross-examination, White admitted that she had used cocaine the day before this incident.

Deputy Adam Cempa of the Fort Bend County Sheriff's Department was dispatched to White's location at 4:15 a.m. on the day of the shooting and arrived at the gas station at 4:24 a.m. According to Deputy Cempa, White told him appellant's name and the name of the street where the shooting took place. She additionally described the residence where the offense occurred and stated that a burgundy Ford Escape was parked in the driveway of the residence. After paramedics arrived to care for White, Deputy Cempa drove to the street White named and located the residence and vehicle she described. When no one responded to Deputy Cempa's knock, he walked around the building, and through a partially-open window, he saw a bed covered with a bloody sheet. Deputy Cempa then returned to his vehicle while a hazardous-entry team was dispatched to

the scene. Another officer, Sergeant Frank Cempa, Jr., testified that he was also at the scene and that officers knocked loudly at the door several times and even knocked on the windows but received no response. He then called for the hazardous-entry team. Sergeant Cempa further testified that he did not see a person sleeping in a chair in the house, and that he first saw appellant leaving the house in handcuffs.

Sergeant Carlos Castillo testified that he was a member of the hazardous-entry team that was sent to the same location and also examined the perimeter of the house. Like Deputy Cempa, Sergeant Castillo looked through a bedroom window and saw blood on the bed. He also saw blood on the back door, and through another window, he saw appellant asleep on a recliner. A member of the hazardous-entry team knocked on the back door, and appellant walked to the door, opened it, and was immediately detained. When Castillo entered the house, he found a pump-action shotgun and a box of ammunition next to the recliner where appellant had been seated.

Lieutenant Lester Phipps testified that appellant's hands were swabbed at the scene for gunpowder residue, but the samples turned over to Investigator Rick Waits were not tested. According to Lieutenant Phipps, such samples are not tested unless requested by the investigating detective or the district attorney's office. Waits testified that he arrived at appellant's residence at approximately 5:00 a.m., after appellant had been taken into custody and removed from the house. Waits photographed the scene and collected evidence. According to Waits, the shotgun had one shell in the chamber and three more in the cylinder. Although the gun was dusted for fingerprints, none were successfully obtained. Detective Russell Womble of the Fort Bend County Sheriff's Office interviewed White at the hospital and accompanied Detective Josh Dale when the latter interviewed appellant. Womble did not request that swabs of appellant's hands be tested for gunpowder residue.

Dr. Joanne Oakes treated White at Memorial Hermann Hospital's emergency room. According to Dr. Oakes, White was wearing a nightgown and stated that her boyfriend shot

her in the back while she was sleeping. The entrance wound was approximately three centimeters in diameter, and according to Dr. Oakes, could not have been self-inflicted. Dr. Oakes opined that White had been shot from a distance of less than ten feet. She further testified that White tested positive for cocaine, which does not affect memory and could have been ingested days earlier; that White's blood alcohol level of .05 was below the legal limit for intoxication; and that White was lucid, coherent, and cooperative. According to Dr. Oakes, White's injuries were life-threatening; multiple fragments of birdshot had penetrated her back, causing internal bleeding and deflating one of her lungs. Medical records further show that a fragment lodged in or near White's heart, and she sustained fractures to her eighth and ninth ribs and one of her vertebrae. Although doctors reinflated White's lung, they were unable to remove the birdshot from her body.

#### **B. Appellant's Evidence**

Appellant's neighbor Eorline Rager testified that appellant's wife died nine months to a year before these events. She further testified that she had not seen White before. According to Rager, appellant never locked the doors to his house. A few hours after appellant's arrest, Rager entered appellant's house through the unlocked back door to care for appellant's pets, and she stated that she saw no sign that anyone other than appellant was living there. She testified that there were no women's cosmetics in the house, and that the women's clothes she saw in appellant's closet belonged to appellant's late wife. She did not observe any blood on the floor, windows, or the bed, but she noted that a piece of the mattress measuring approximately twelve inches square had been removed.

Another neighbor, Lebert John Prihoda, testified that appellant's wife died about twelve months before these events. He stated that he lives next door to appellant and did not hear a shot on the morning of December 17, 2006, but he was "sleeping pretty hard" and it is possible that a gun could have been discharged without waking him. Prihoda testified that he has used shotguns for about sixty years. He opined that if someone was shot with a twelve-gauge shotgun at a distance of six feet, any shot that missed the person's

bones would exit the other side of the person's body. He further stated that he entered appellant's bedroom the day before he testified and drew a chart of the bedroom as he observed it, which he replicated for the jury.<sup>1</sup> According to Prihoda, the bedroom door is thirteen feet from the place on the mattress where blood-stained fabric was removed, and the shotgun seized from appellant's house is about forty-two inches long. He stated that a shot from a twelve-gauge shotgun at that distance "would do a lot of damage." When shown photographs of appellant's bedroom taken immediately after the shooting, however, Prihoda was unable to recognize anything in the room, including the location of a window. He agreed it was "very possible" that the bedroom as he observed it on June 23, 2008, had changed since December 17, 2006.

Appellant's sister Maria Milligan testified that appellant's wife died in August 2006, and she does not believe that appellant was living with anyone in December 2006; however, she testified that she had been introduced to White at appellant's house approximately two weeks before the shooting. She further stated that on the same day, White accompanied appellant when he drove Milligan's son home. Milligan testified that when she arrived to secure appellant's house at about 10:00 a.m. on December 17, 2006, Mr. and Mrs. Rager were already there. She stated that she saw no blood anywhere and no women's clothing other than those that had belonged to appellant's late wife, but she did observe that a square had been cut from a mattress. According to Milligan, the Texaco station is 0.6 miles from appellant's house.

The jury found appellant guilty of aggravated assault as charged in the indictment, and further found that a deadly weapon—namely, a firearm—was used or exhibited during the offense. After hearing further evidence, the jury assessed punishment at twelve years' confinement in the Texas Department of Criminal Justice, Institutional Division, and this appeal timely ensued.

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<sup>1</sup> Neither drawing was entered into the record.

## II. ISSUES PRESENTED

A person commits assault if, *inter alia*, the person intentionally, knowingly, or recklessly causes bodily injury to another. Tex. Penal Code Ann. § 22.01(a)(1) (Vernon Supp. 2009). A person who uses or exhibits a deadly weapon during an assault commits the offense of aggravated assault. *Id.* § 22.02(a)(2). Here, appellant was charged and convicted of intentionally, knowingly, and recklessly causing White bodily injury by shooting her; the State further alleged, and the jury found, that he used or exhibited a firearm during the assault. In two issues, appellant challenges the legal and factual sufficiency of the evidence supporting his conviction and the jury's finding that he used or exhibited a deadly weapon during the commission of an assault.

## III. STANDARD OF REVIEW

To claim legal insufficiency is, in effect, to argue that the case is so lacking in evidentiary support that it never should have been submitted to a jury at all. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). When evaluating a legal-insufficiency claim, we examine the evidence in the light most favorable to the verdict 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, 318–19 (1979); *Mason v. State*, 905 S.W.2d 570, 574 (Tex. Crim. App. 1995).

When reviewing the factual sufficiency of the evidence to support a conviction, we review all the evidence in a neutral light, favoring neither party. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006); *Drichas v. State*, 175 S.W.3d 795, 799 (Tex. Crim. App. 2005). We then ask (1) whether the evidence supporting the conviction, although legally sufficient, is nevertheless so weak that the jury's verdict seems clearly wrong and manifestly unjust, or (2) whether, considering conflicting evidence, the jury's verdict is against the great weight and preponderance of the evidence. *Watson*, 204 S.W.3d at 414–15, 417; *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

## IV. ANALYSIS

### A. Legal Sufficiency

Appellant first contends the evidence is legally insufficient to support his conviction because the complainant is not credible. This argument is based on factual assertions that are not directed to any element of the offense with which appellant was charged and convicted. Moreover, the majority of appellant's assertions are either unsupported or contradicted by the record. According to appellant, neighbors testified that he went to bed early and kept several shotguns inside his residence, but no such testimony is found in the record. He asserts that White testified the Texaco station where she telephoned for help is two blocks from appellant's house; in fact, White testified the distance is "[a]bout half a mile." He contends that White testified she had known appellant for "a couple of months" and was unaware that his wife had recently died, but in fact, White testified that she had been in a sexual relationship with appellant for two years and began living with him after appellant's wife passed away four months before the shooting. Although appellant points out that two of his neighbors never met White, his sister testified that both she and her son had been introduced to White at appellant's home two weeks before the shooting.

It is the responsibility of the jury to judge the credibility of witnesses and reconcile conflicts in the evidence. *Wesbrook*, 29 S.W.3d at 111. And it is well-established that the testimony of a single eyewitness can prove all of the elements of an offense beyond a reasonable doubt. *Aguilar v. State*, 468 S.W.2d 75, 77 (Tex. Crim. App. 1971) (testimony of one eyewitness that accused shot complainant in the back was sufficient to support conviction for assault with intent to murder). Here, it is undisputed that a gunshot wound caused White bodily injury. She testified without contradiction that appellant shot her, and his intent to do so may be inferred from his words and conduct, as she described them. *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (explaining that intent can be inferred from circumstantial evidence).

In sum, every element of the charged offense and the jury's finding is supported by the record. Viewing all the evidence in the light most favorable to the verdict, we conclude that a rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. We therefore overrule appellant's first issue.

## **B. Factual Sufficiency**

In support of his argument that the evidence is factually insufficient, appellant asserts that the record shows he was asleep when the police arrived. He further states that he continued sleeping so deeply, "seemingly unaware of the shooting," that "he did not wake up after officers banged on the door, and was only then awakened some three hours after police surrounded the home." He contends there is evidence that he owned several shotguns, and that the complainant did not know him well and was intoxicated at the time of these events.

Like the assertions made in support of his legal-sufficiency argument, these statements are neither directed to any element of the charged offense nor supported by the record. Deputy Cempa and Sergeant Cempa were among the first on the scene; both looked in the windows of residence, and neither saw appellant, sleeping or otherwise. Although appellant did not respond when they knocked loudly on the windows and doors, there is no evidence he was asleep at that time. It was only after the hazardous-entry team arrived that anyone reported seeing him. At that time, appellant was sleeping in a recliner in the living room with a loaded pump-action shotgun and a box of ammunition beside him. When an officer from the hazardous-entry team knocked on the back door, appellant answered it and was taken into custody. Inasmuch as Deputy Cempa arrived at the gas station at 4:24 a.m. and Investigator Waits testified that appellant already had been removed when he arrived at the house at approximately 5:00 a.m., it appears that appellant was taken into custody within about a half hour after the first officer arrived at the house. There was no evidence that appellant owned multiple shotguns or that any other guns were found in his home. Finally, White's testimony that she and appellant had been involved in



a sexual relationship for two years at the time of these events is uncontroverted, as is Dr. Oakes's testimony that appellant's blood-alcohol level was below the legal limit to establish intoxication.

Appellant also points out that his fingerprints were not found on the gun and the State did not match the gun to the complainant's injuries. It is true that no usable fingerprints were obtained from the gun, and the pellets from the shotgun shell are unavailable because they are still lodged in White's body; however, appellant cites no authority that the evidence of aggravated assault by shooting someone with a firearm is factually insufficient absent testimony that the ammunition that entered the complainant's body was fired from a specific weapon, or that the accused's fingerprints were found on that weapon.

Appellant additionally states that others had access to the residence and he commonly left his doors unlocked. Although this is true, it is also true that White testified that she and appellant were the only ones in the house at the time of the shooting. Appellant further contends that, according to White, no conversation preceded the shooting; however, White also testified that she and appellant had been arguing and she was ignoring him when he shot her. He states that White had been out with others before the shooting and "had engaged in both drug and alcohol activity," but there is no evidence that White's abilities to accurately perceive, communicate, or recall the events of that evening were impaired at any time. Although appellant also points out that he has no history of violence, this can be said of every person for at least some part of his or her life, but for every offender, there is a first offense.

Finally, appellant argues that his "mere presence in the home" and his "proximity to a shotgun," taken separately or together, are factually insufficient to support the jury's verdict or its finding that he used or exhibited a firearm during an assault. But these two factors were not the only evidence submitted for the jury's consideration. White's testimony that appellant exhibited a gun and used it to shoot her in the back is

uncontroverted. She identified appellant by name as the offender, described the house where the shooting occurred, and told police the make, model, and color of a vehicle parked outside the house. She also described the weapon, identified her location within the house at the time of the shooting, and told them that she left the house through the back door. Using this information, police found appellant's house and vehicle just as White represented them. They observed blood on the back door White claimed she used when leaving the house, and they saw bloodstains on the bed where White said her wounds had been inflicted. Inside the residence, police not only discovered the person White identified, but found him seated beside a loaded gun fitting White's description.

Viewing all the evidence in a neutral light, we cannot say that the jury's verdict is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust, nor is the verdict against the great weight and preponderance of the evidence. We therefore overrule appellant's second issue.

## V. CONCLUSION

Having concluded that the evidence is legally and factually sufficient to support the verdict and the jury's finding that appellant used or exhibited a firearm while committing the charged offense, we affirm the trial court's judgment.

/s/ Jeffrey V. Brown  
Justice

Panel consists of Justices Yates, Boyce, and Brown.

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