

**Affirmed and Memorandum Opinion filed August 3, 2010.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-09-00346-CR**

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**ALBIN ADALIN ZELAYA-ZELAYA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 180th District Court  
Harris County, Texas  
Trial Court Cause No. 1089402**

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**MEMORANDUM OPINION**

Appellant, Albin Adalin Zelaya-Zelaya, was charged with the felony offense of burglary of a habitation with the intent to commit aggravated assault and robbery. Tex. Penal Code Ann. § 30.02(a)(1) (Vernon 2003). The jury found appellant guilty and sentenced him to confinement for life in the Institutional Division of the Texas Department of Criminal Justice. Appellant now challenges this conviction on appeal. We affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

Law enforcement officials with the Federal Bureau of Investigation ("FBI") and the Houston Police Department set up a sting operation to catch a band of robbers led by an

individual known as “Turko.” A private citizen, Elmer Garcia, agreed to cooperate with law enforcement officials in their effort to apprehend Turko and his band. Garcia told law enforcement about a businessman from Belize who travelled to Houston to purchase cars and other equipment for shipment back to Belize. According to Garcia, this businessman carried large amounts of cash to make his purchases. In cooperation with the FBI and the police, Garcia gave Turko information that the businessman would be arriving in Houston with a large amount of cash and would be staying in two rooms at a specified motel.

In the early morning hours of September 22, 2006, Turko’s crew arrived at the motel where Garcia had told Turko the businessman was staying. There were five men with Turko, one of whom was appellant. The five men, all armed with handguns, broke into the two rooms specified by Garcia. The men discovered that the rooms were empty as the businessman had not travelled to Houston. Instead, the two motel rooms had been rented by FBI Special Agent Brian Ritchie on behalf of the FBI specifically to conduct the sting operation. Realizing they had been set up, all members of Turko’s crew fled on foot but they were all ultimately captured.

## **DISCUSSION**

In two issues, appellant contends the evidence is legally and factually insufficient to establish that the complainant named in the indictment, Special Agent Ritchie, was the owner of the burglarized motel.

### **I. The Standard of Review**

In a legal sufficiency review, we view all 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. 307, 319, 99 S.Ct. 2781, 2789, 61 L. Ed. 2d 569 (1979); *Salinas v. State*, 163 S.W.3d 734, 737 (Tex. Crim. App. 2005). The jury, as the sole judge of the credibility of the witnesses, is free to

believe or disbelieve all or part of a witness' testimony. *Jones v. State*, 984 S.W.2d 254, 257 (Tex. Crim. App. 1998). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses to, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). Reconciliation of conflicts in the evidence is within the jury's discretion, and such conflicts alone will not call for reversal if there is enough credible evidence to support a conviction. *Losada v. State*, 721 S.W.2d 305, 309 (Tex. Crim. App. 1986). An appellate court may not re-evaluate the weight and credibility of the evidence produced at trial and in so doing substitute its judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). Inconsistencies in the evidence are resolved in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We do not engage in a second evaluation of the weight and credibility of the evidence, but only ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Harris v. State*, 164 S.W.3d 775, 784 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

In a factual sufficiency review, we consider all the evidence in a neutral light. *Prible v. State*, 175 S.W.3d 724, 730–31 (Tex. Crim. App. 2005). The evidence may be factually insufficient in two ways. *Id.* at 731. First, when considered by itself, the evidence supporting the verdict may be so weak that the verdict is clearly wrong and manifestly unjust. *Id.* Second, where the evidence both supports and contradicts the verdict, the contrary evidence may be strong enough that the beyond-a-reasonable doubt standard could not have been met. *Id.* In conducting a factual sufficiency review, we must employ appropriate deference so we do not substitute our judgment for that of the fact finder. *Jones v. State*, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996). Our analysis must consider the evidence appellant claims is most important in allegedly undermining the jury's verdict. *Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

## II. Analysis

A person commits the offense of burglary of a habitation if, without the effective consent of the owner, the person enters the habitation with the intent to commit a felony, theft, or assault. Tex. Penal Code Ann. § 30.02(a)(1). Ownership of a burglarized premises may be proven in one of three ways: (1) title; (2) possession, whether lawful or not; or (3) a greater right to possession than the defendant. *Id.* at § 1.07(a)(35); *Alexander v. State*, 753 S.W.2d 390, 392 (Tex. Crim. App. 1988). Thus, under the Penal Code, any person who has a greater right to the actual care, custody, control, or management of the property than the defendant can be alleged as the “owner.” *Id.*

Here, Special Agent Ritchie, as well as Houston Police Sergeant Patricia Graham, testified that Ritchie had rented the two rooms for the FBI to conduct the investigation. Special Agent Ritchie also testified that none of the member’s of Turko’s crew had permission to enter either of the motel rooms. We conclude this is legally sufficient evidence that Ritchie had a greater right to possession of the motel rooms than appellant. *See Salas v. State*, 548 S.W.2d 52, 53–54 (Tex. Crim. App. 1977) (commenting that the renter of a hotel room can be an owner under burglary statute). We overrule appellant’s first issue.

We also conclude the evidence is factually sufficient to support appellant’s conviction. We reach this conclusion despite appellant pointing out the lack of documentary evidence supporting Special Agent Ritchie’s testimony that he rented the motel rooms for the purpose of the FBI’s investigation. Moreover, we note that appellant did not offer any evidence demonstrating that he had any possessory right in the motel rooms, much less one greater than Special Agent Ritchie’s on September 22, 2006. *See Mauldin v. State*, 628 S.W.2d 793, 795 (Tex. Crim. App. 1982) (“In light of the testimony of Sustaire that he was the owner of the building, and in the absence of any evidence to the contrary, we hold the evidence sufficient to support the indictment.”); *St. Julian v. State*, 852 S.W.2d 592, 595 (Tex. App.—Houston [14th Dist.] 1993), *rev’d on other grounds*,

874 S.W.2d 669 (Tex. Crim. App. 1994) (finding the evidence sufficient to convict the defendant of burglary with intent to commit a felony when the apartment manager and a postal inspector testified regarding postal inspector's possession and control over apartment mailroom for investigation of thefts from mailboxes and the defendant did not offer any evidence asserting a possessory right in the apartment building or mailboxes). We overrule appellant's second issue.

#### CONCLUSION

Having overruled appellant's issues on appeal, we affirm the trial court's judgment.

/s/     John S. Anderson  
          Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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