

Opinion issued June 19, 2008



**In The
Court of Appeals
For The
First District of Texas**

NO. 01-07-00352-CR

FELIPE ALBERTO PEREZ, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 10th District Court
Galveston County, Texas
Trial Court Cause No. 05CR2072**

MEMORANDUM OPINION

After a bench trial, the trial court found Felipe Alberto Perez guilty of aggravated assault and found true two enhancements for prior felony convictions. Based on these findings, the trial court sentenced Perez to twenty-five years'

confinement. In his sole issue on appeal, Perez contends that the evidence is factually insufficient to support his conviction. We affirm.

Background

Perez, his friend Joseph Tate, and two other individuals were riding around Galveston in Perez's car when Perez drove into a service station. Tate and Perez left the car and began talking to two women, Kevinna Davis and Natalie Thomas, who were standing outside the station's convenience store while Kevinna's sister, Chasity Davis¹, and her friend Tonya Turner were inside buying some snacks.

Another car with four women, including Perez and Tate's girlfriends, had also stopped at the station. Those women emerged from their car and began arguing with Perez, Tate, Kevinna, and Thomas. Thomas testified that Perez threatened her, saying "[y]ou b - - - s got my girlfriends f - - - ed up. I'll put a hollow tip in you." Perez also threatened that he would fight Thomas and her friends and kill them. When Chasity and Turner came out of the store, Chasity saw her sister arguing with Tate and went to her sister's side. Next, two male friends of Chasity arrived and interjected themselves into the argument.

As the crowd gathered, the situation continued to degenerate. Joysana Zahradnik, a motorist who stopped at the station to buy gas, noticed the group of people arguing outside the store. When Zahradnik tried to use the gas pump, she

¹ We refer to the Davis sisters by their first names throughout the opinion to avoid any

discovered that it was not working, and then found out that the store clerk had locked the door. As Zahradnik returned to her car, she saw that another car, with Perez behind the steering wheel, had pulled up to a gas pump close to her car. Next, Zahradnik saw Perez stick his arm out of the car, point a gun, and start shooting as he drove away. Zahradnik also noticed shots coming from the passenger side of the car.

Chasity, on the other hand, testified that she saw Perez get into the passenger side of the car and that Tate was driving. From her vantage point near the right rear of the vehicle, she saw that Tate and Perez were both hanging out of the car. Chasity recounted that, as the car approached the edge of the lot, she saw gunfire coming from both sides. She did not, however, see Perez holding a gun. Chasity admitted that she was intoxicated at the time from having taken the recreational drug Ecstasy, but denied that it had affected her mental perception.

In any event, one bullet struck Chasity in the foot, and another hit Kevinna in the thigh. After the women reported the incident to the police, Perez and Tate were apprehended in League City as they were heading north toward Houston. A search of Perez's car yielded a Hi-Point 9-millimeter semiautomatic, and a Phoenix Arms .25 caliber semiautomatic. The State's ballistics expert testified that the bullet removed from Chasity's foot was fired from a .25 caliber pistol, and that

confusion.

other fragments found at the scene were discharged from the Phoenix Arms .25 caliber gun found in the car.

Perez testified in his own defense. He admitted shooting a .22 or .25 caliber gun, but denied shooting Chasity and Kevinna. According to Perez's trial testimony, he shot into the air two times and then gave the gun to Tate, who began shooting with it. In his pre-trial statement, however, Perez averred that after shooting the gun, he gave it to his friend Kevin, who was in the backseat.

Officer Papillion of the Galveston Police Department, who had interviewed Perez after he was taken into custody, also appeared at trial. She testified that Perez gave a voluntary statement in which he admitted that, while leaving the scene, he picked up a gun from the backseat, placed the car in drive, let the window down and shot the gun several times out of the window. Another Galveston police officer who came into contact with Perez approximately two months after the incident also testified that, while conversing with Perez, Perez admitted that he had "shot those two girls here [in Galveston]."

Sufficiency of the Evidence

Perez challenges the factual sufficiency of the evidence, contending that the State failed to provide factually sufficient evidence that he, not Tate, discharged the weapon, and is therefore entitled to a new trial. We disagree.

Standard of Review

When evaluating factual sufficiency, we consider all the evidence in a neutral light to determine whether the fact finder was rationally justified in finding guilt beyond a reasonable doubt. *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006). We set the verdict aside only if (1) the evidence is so weak that the verdict is clearly wrong and manifestly unjust or (2) the verdict is against the great weight and preponderance of the evidence. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). Under the first prong of *Johnson*, we cannot conclude that a verdict is “clearly wrong” or “manifestly unjust” simply because, on the quantum of evidence admitted, we would have decided to acquit. *Watson*, 204 S.W.3d at 417.

Under the second prong of *Johnson*, we cannot declare that a conflict in the evidence justifies a new trial simply because we disagree with the fact finder’s resolution of that conflict. *Id.* We must defer to the fact finder’s credibility determinations. *Swearingen v. State*, 101 S.W.3d 89, 97 (Tex. Crim. App. 2003). Mindful that the fact finder is free to disbelieve any or all of a witness’s testimony, we may not find that the evidence is factually insufficient to support a verdict under the second prong of *Johnson*, unless we can say, with some objective basis in the record, that the great weight and preponderance of the evidence contradicts the verdict. *See Watson*, 204 S.W.3d at 417; *Margraves v. State*, 34 S.W.3d 912, 919 (Tex. Crim. App. 2000); *Cain v. State*, 958 S.W.2d 404, 407 n.5 (Tex. Crim.

App. 1997). We must also discuss the evidence that, according to the appellant, most undermines the verdict. *See Sims v. State*, 99 S.W.3d 600, 603 (Tex. Crim. App. 2003).

Aggravated Assault

To prove that Perez is guilty of aggravated assault as charged in the indictment, the State had to prove beyond a reasonable doubt that Perez “[i]ntentionally, knowingly, or recklessly caus[ed] bodily injury to another, and us[ed] or exhibit[ed] a deadly weapon during the commission of the assault.” TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(2) (Vernon Supp. 2007).

Perez’s specific contention on appeal is that the great weight and preponderance of the credible evidence indicates that Tate, not Perez, was the person who actually shot Chasity. Perez explains that his own testimony should receive considerable weight because, in the course of testifying in his own defense, he admitted to being a felon in possession of a firearm, and that contradictions in the State’s evidence make it factually insufficient to support the conviction. The applicable standard of review, however, prevents us from attributing any weight to particular witness’s testimony based on our own perception of that witness’s credibility. Our deference to the trial court’s credibility determinations leads us to presume the trial court was able to resolve any conflicts in the evidence.

Factually sufficient evidence supports Perez's conviction despite any conflicts in the evidence. Zahradnik, a disinterested witness, explained that she was sure that Perez was the one who was driving and shooting because she noticed the large tattoo on his arm. It is well established that the testimony of a single eyewitness may support a conviction. *Davis v. State*, 177 S.W.3d 355, 359 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Accordingly, Zahradnik's testimony is factually sufficient to support the conviction.²

Further, the presence of factually sufficient evidence that Perez fired the shots that caused Chasity's injury eclipses any dispute concerning whether Tate or Perez fired the shots. Perez's admission that he was using the smaller caliber gun, coupled with the forensic evidence retrieved from the gunshot wounds, provides factually sufficient support for the trial court's finding of guilt.

The State's evidence is not so weak that the verdict is clearly wrong and manifestly unjust, nor is the verdict against the great weight and preponderance of the evidence. Accordingly, we hold that factually sufficient supports Perez's conviction.

² Perez also asserts that the evidence is insufficient to support a finding that he fired the shots that wounded Chasity and Kevinna because Zahradnik testified that Perez was looking *when* he was shooting, not *where* he was shooting. Because a conviction for aggravated assault requires only proof that the defendant acted recklessly in causing injury to another, this distinction is immaterial. The State was not required to prove that Perez was aiming at Chasity or Kevinna to obtain a conviction. See TEX. PENAL CODE ANN. § 22.01(a)(1) (Vernon Supp. 2007).

Conclusion

We hold that the evidence is factually sufficient to support Perez's conviction. We therefore affirm the judgment of the trial court.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Jennings and Bland.

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