**Affirmed and Memorandum Opinion filed October 5, 2010.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-09-00320-CR**

**ROLANDO SIERRA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 40th District Court**
**Ellis County, Texas**
**Trial Court Cause No. 33198CR**

## MEMORANDUM OPINION

A jury found appellant Rolando Sierra guilty of aggravated assault with a deadly weapon, assessed punishment at ten years' imprisonment and a fine of $10,000, and recommended community supervision. In accordance with the jury's verdict, the court suspended the sentence and placed appellant on ten years' community supervision. In three issues, appellant challenges the sufficiency of the evidence to support the jury's finding of guilt and argues the trial court erred in admitting certain evidence. We affirm.

## I. FACTUAL AND PROCEDURAL BACKGROUND

Based on events occurring in the late afternoon and early evening of April 14, 2008, appellant was indicted for the family violence assault of Jennifer Carter and the aggravated assault of Frank Boehler. The two charges were tried together before a jury, which found appellant not guilty of family violence assault and guilty of aggravated assault.

According to testimony elicited by the State, Jennifer telephoned her mother, Rebecca Carter, several times on the day of the alleged assault. Jennifer asked Rebecca to collect Jennifer and her children from the home Jennifer shared with appellant. According to Rebecca's common-law husband, David Hunter, Jennifer told Rebecca she and appellant had been fighting and appellant had thrown her against the wall. When Jennifer's son called Rebecca, she finally decided to go to Jennifer's house.

Hunter drove Rebecca and Boehler, a family friend who was visiting Hunter and Rebecca, in Hunter's pickup truck. After they arrived at appellant's and Jennifer's home, Rebecca agreed to talk to appellant with Jennifer and told the men to wait outside. Appellant, however, was angry that Jennifer had invited her mother inside and began yelling at Jennifer. At that point, the two men went inside, and Boehler said, "Why don't you just listen to her?" Appellant ran to Boehler and hit him in the face. They started fighting, and appellant tried to throw Boehler through a window. According to Boehler, Rebecca or Jennifer separated the men and Boehler thought the fight was over except appellant told Boehler, "he's got something for me" and ran to his room.

Everyone else left the house when appellant ran to the back bedroom. Boehler went to the truck, grabbed a hammer, and, according to Rebecca, started toward the house with the hammer in his hand. Rebecca then saw Boehler stop, turn around, and start to run. While Boehler was running, Rebecca heard a gunshot passing over her head. Appellant was running after Boehler and shooting. Boehler threw the hammer in the truck and ran around toward the front of the truck. According to Rebecca, the two men then ran around the truck and appellant shot Boehler, who fell face down. Appellant then shot

Boehler again. According to Boehler, one shot passed through his hip and another through his diaphragm and liver. A bullet hole was also found in the house across the street.

Rebecca heard appellant tell Boehler he was going to kill him. Rebecca shouted, "no," and appellant walked away.

Rebecca testified Boehler did not have the hammer when appellant shot him. According to Hunter, before appellant shot Boehler in the back, Boehler was saying, "I give up."

In addition to phoning Rebecca, Jennifer also had called her brother Jason several times. Jason and his girlfriend arrived during the shooting and Jason observed Boehler "running with his hand in the air and [appellant] was just following shooting." Boehler had his hands up, did not have anything in his hands, and was repeating, "It's over."

Appellant testified in his own behalf. According to appellant, Rebecca entered his house, cursing at him and calling him names. A short time later, Hunter and Boehler entered. Both looked aggressive, and Boehler was "crashing his hands together." Appellant told Rebecca to get out.

Boehler then told appellant to "shut . . . up" and not talk to Rebecca "like that." Next, Boehler approached appellant. Appellant believed Boehler and Hunter were going to attack him and told them to leave. When appellant tried to grab Boehler's shirt, Boehler blocked him and appellant punched Boehler. Boehler punched back, and appellant tried to throw him through a window. Boehler tried to bite appellant, and appellant kneed Boehler, knocking him unconscious. When appellant turned toward Hunter, Boehler ran from the house, saying something to appellant. Appellant saw Boehler get something from the truck and believed Boehler had a gun.

Appellant went to his room to get a gun to protect himself. He saw Rebecca trying to hold Boehler outside, so he ran to the door and fired a shot as soon as he saw Boehler.

He fired again, but thought he had missed twice. When appellant fired the third time, Boehler fell on the grass. Appellant walked around Boehler with the gun still pointed at Boehler, then retreated. On cross-examination, appellant admitted Boehler never pointed a gun at him.

Appellant also presented the testimony of Nelda Allstot and Ruby Wesley, next-door neighbors who had witnessed the shooting. Allstot was in her back yard when she heard the pickup driver braking. Although she initially testified the driver left skid marks on the road, on cross-examination, she admitted she had observed the marks later and could not be one hundred percent certain the truck made them. Allstot believed she saw someone she thought was a teenager with a hatchet in his hand. This person had been in a rage when the truck first arrived. Allstot testified the teenager was still running after he was shot the first time (i.e., after the second shot was fired), but in her statement given just after the shooting she indicated that the teenager fell after being hit the first time and appellant then shot him again.

Wesley, Allstot's mother, testified she went to the front porch to watch what was happening next door. She also testified a young man was carrying a hatchet. She did not see him drop the hatchet, but she did not see it in his hands after he first ran back to the house with it. On cross-examination, Wesley stated the young man was hiding behind the truck when appellant shot him. In her statement to the police, Wesley had described the "hatchet" as a claw hammer.

The trial court instructed the jury on self-defense. The jury rejected the defense and found appellant guilty of aggravated assault as charged in the indictment.

## II. ANALYSIS

### A. Challenges to Legal and Factual Sufficiency of the Evidence

In issue one, appellant argues the evidence is "factually/legally insufficient" to support the jury's finding of guilt. He does not argue the evidence is insufficient to

support any of the elements of aggravated assault, but argues only that the evidence is insufficient to support the jury's rejection of his claim of self defense.

In evaluating a legal-sufficiency challenge, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991). The trier of fact "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The trier of fact may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the trier of fact resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). Therefore, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

In a factual-sufficiency review, we examine the evidence in a neutral light. *Grotti v. State*, 273 S.W.3d 273, 283 (Tex. Crim. App. 2008). Only one question is to be answered in a factual-sufficiency review: Considering all of the evidence in a neutral light, was a trier of fact rationally justified in finding guilt beyond a reasonable doubt? *See id.* Evidence can be factually insufficient in one of two ways: (1) when the evidence supporting the verdict is so weak that the verdict seems clearly wrong and manifestly unjust; and (2) when the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *See id.* A reversal for factual insufficiency cannot occur when the greater weight and preponderance of the evidence actually favors conviction. *See id.*

Although an appellate court has the ability to second-guess the trier of fact to a limited degree, the factual-sufficiency review still should be deferential to the trier of fact's role as the sole judge of the weight and credibility given to any witness's testimony, with a high level of skepticism about the verdict required before a reversal can occur. *See id*.

On a self-defense claim, the defendant has the burden of production and must bring forth some evidence to support the particular defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). But, once the defense is raised, the State bears the burden of persuasion to disprove the defense. *Id.* The burden of persuasion is not one that requires the production of evidence; rather, it requires only that the State prove its case beyond a reasonable doubt. *Id.* The issue of self-defense is a fact issue to be determined by the jury, which is free to accept or reject any defensive evidence on the issue. *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). When a jury finds the defendant guilty, there is an implicit finding against the defensive theory. *Zuliani*, 97 S.W.3d at 594.

When reviewing a legal-sufficiency challenge on the issue of self-defense, a reviewing court views the evidence in the light most favorable to the verdict to see if any rational trier of fact could have found (1) the essential elements of murder beyond a reasonable doubt, and (2) against appellant on the self-defense issue beyond a reasonable doubt. *Hernandez v. State*, 309 S.W.3d 661, 665 (Tex. App.—Houston [14th Dist. 2010, pet. filed). "In a factual-sufficiency review of the rejection of a self-defense claim, we view 'all of the evidence in a neutral light and [ask] whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence.'" *Id.* at 666 (quoting *Zuliani*, 97 S.W.3d at 595).

A person commits the offense of assault if that person intentionally, knowingly, or recklessly causes bodily injury to another. TEX. PENAL CODE ANN. § 22.01(a)(1) (Vernon Supp. 2009). The offense becomes aggravated assault if the person committing the

assault uses a deadly weapon during the commission of the assault. *Id.* § 22.02(a)(2). A firearm is a deadly weapon. *Id.* § 1.07(a)(17).

A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *Id.* § 9.31(a). A person is justified in using deadly force: (1) if he would be justified in using force under section 9.31 of the Texas Penal Code; and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. *Id.* § 9.32(a)(1), (2)(A). The actor's belief the use of deadly force was immediately necessary is presumed to be reasonable if the actor (1) knew or had reason to believe that the person against whom deadly force was used unlawfully and with force entered or was attempting to enter unlawfully and with force the actor's occupied habitation, and (2) did not provoke the person against whom the force was used, and (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor. *Id.* § 9.32(b).

It is undisputed that appellant shot Boehler twice, injuring Boehler in the hip, liver, and diaphragm. Although, after the initial altercation inside appellant's house, Boehler went to the truck and started to return carrying a hammer, Rebecca testified Boehler stopped, turned around, and ran. Appellant then fired a shot, missing Boehler. Boehler testified he threw the hammer in the truck and put his hands in the air, but appellant shot again, hitting Boehler in the hip. After Boehler fell face down, appellant shot a third time, hitting Boehler in the back. Viewed in the light most favorable to the verdict, the evidence is legally sufficient to establish aggravated assault and to support the jury's implicit rejection of appellant's theory of self-defense. *See Hernandez,* 309 S.W.3d at 665.

Appellant, however, contends the following evidence, in addition to his own testimony, supports his theory of self-defense: (1) Jennifer's testimony (a) Boehler was in a rage when he arrived at her home, was "all bowed up" and "crazy," when he entered, (b)

after leaving the house, Boehler went to the truck and retrieved a weapon that had a long black handle, and (c) Boehler was running back to the house, and looked as if he was about to hurt someone when appellant quickly came from the house and shot Boehler; (2) Allstot's testimony (a) Boehler was stomping back to the house, holding an object with a long handle and acting with determination, (b) Boehler stopped for a second and ran to the truck after appellant fired the first shot, but never threw the object down, (c) although Boehler bent to one side after the second shot, he continued to run until appellant fired the third shot, and (d) Boehler never held his hands up as though he were retreating or giving up; and (3) Boehler's (a) equivocal testimony about whether he had smoked marijuana on the night of incident and (b) his admission he had retrieved a hammer from the truck, walked back toward appellant's residence and never gave any verbal indication he was ending the fight.[1]

Jennifer shared a home with appellant, and he was the father of two of her children. Allstot viewed the events from the distance of her neighboring porch. Viewing the evidence in a neutral light, we cannot conclude that the evidence supporting the verdict is so weak the verdict seems clearly wrong and manifestly unjust or that the supporting evidence is outweighed by the great weight and preponderance of the contrary evidence so as to render the verdict clearly wrong and manifestly unjust. *See Hernandez*, 309 S.W.3d at 666. The evidence is factually sufficient to support the jury's verdict and the implicit rejection of appellant's theory of self-defense.

Having concluded the evidence is legally and factually sufficient to support the jury's verdict, we overrule appellant's first issue.

[1] On direct examination, however, Boehler testified that, after the first shot, he put his hands in the air and told appellant, "I'm done." According to Boehler, appellant then "proceeded to jump off the porch and chase me around the truck."

## B. Challenges to Evidentiary Rulings

In issues two and three, appellant challenges the trial court's admission of two pieces of evidence. We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Mozon v. State,* 991 S.W.2d 841, 847 (Tex. Crim. App. 1999). Under this standard, we reverse only if the trial court's ruling is outside the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g).

### 1. Did the trial court abuse its discretion in admitting Boehler's testimony about a statement appellant made?

In issue two, appellant contends the trial court admitted impermissible hearsay. The statement to which appellant refers occurred in the following context:

> Q. [BY THE PROSECUTOR] How did the fight come to an end?
>
> A. I don't know if it was Jennifer or if it was Becky that finally got in between us and split us apart.
>
> Q. All right. Was the fight over at that point?
>
> A. Yes, sir. Besides Rolando [appellant] telling me he's got something for me.
>
> Q. All right. Well, that fight was over; is that correct?
>
> A. Yes, sir.
>
> Q. And then what did he say to you?
>
> A. Then he said - -
>
> [DEFENSE COUNSEL]: Objection, Judge, hearsay.
>
> THE COURT: Overruled.
>
> Q. [BY THE PROSECUTOR] What did he say to you?
>
> A. He said that I've got something for you.

As an initial matter, we observe the testimony to which appellant subsequently objected, i.e., Boehler's testimony appellant said he "had something" for Boehler, was previously introduced by Boehler's unresponsive, and unobjected-to, testimony the fight was over except for appellant's telling Boehler "he's got something for me." To preserve error for appellate review, a party must timely object and obtain a ruling. *See* TEX. R. APP. P. 33.1(a)(1)(A). To be considered timely, the objection must be made at the first opportunity or as soon as the basis of the objection becomes apparent. *See Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). Appellant has not preserved this issue for review. *See Luna v. State*, 268 S.W.3d 594, 604 (Tex. Crim. App. 2008) (appellant's objection to testimony was untimely because it was made after question was asked and answered).

Even were the issue preserved, however, it is without merit. A criminal defendant's own statements, when being offered against him, are not hearsay. *See* TEX. R. EVID. 801(e)(2); *Trevino v. State*, 991 S.W.2d 849, 853 (Tex. Crim. App. 1999).

For these reasons, we overrule appellant's second issue.

**2. Did the trial court abuse its discretion in admitting two State's exhibits?**

In issue three, appellant complains of the trial court's admission of State's Exhibits 71 and 72. As explained by Investigator Michael Hix, of the Ellis County Sheriff's Department, Exhibit 71 is a satellite photograph of the area where the offense occurred, with measurements and elements added to show the locations of the pickup truck and bullet fragments and shell casings found at the crime scene.[2] Exhibit 72 is "an aerial view, another satellite photograph, of the whole entire housing addition where those residences [described by the witnesses] are located." Exhibit 72 includes house numbers over the residences.

[2] Specifically, Hix testified, "Actually [I] took a satellite photograph obtained from Ellis County 9-1-1 addressing [sic] office here and added these elements in there just for courtroom display only. This is not a photograph of the crime scene. It is a pictorial to show what we found at the crime scene."

Appellant objected to the admission of these exhibits on the ground they were "misleading and erroneous." Counsel argued, "[T]hey don't faithfully represent what they purport to represent. I see that these are photographs of objects that are drawn in that differ from previous photos that were admitted." After apparently viewing the exhibits, the trial court overruled appellant's objection and admitted the exhibits.

In this court, appellant argues the trial court should have excluded the evidence under Texas Rule of Evidence 403, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." TEX. R. EVID. 403. Specifically, he complains about the placement of the pickup truck on the satellite photograph, contending its placement "mislead the jurors to believe that it was not on Appellant's property and only within the public street. Appellant's position is that the photograph was altered in such a way as to enhance the detriment to appellant."[3] Appellant does not explain the significance of the precise location of the truck in Exhibit 71 and does not explain why Exhibit 72 was prejudicial. Assuming, without deciding, that appellant's complaint at trial comported with his complaint on appeal, we conclude the trial court did not abuse its discretion in admitting the demonstrative evidence.

In Exhibit 71, the passenger's side of the truck appears to be immediately adjacent to the grass. Hix explained to the jury that Exhibit 71 was not a photograph of the crime scene and the added elements were only for courtroom display. Exhibit 71 contains a measurement line locating the truck fifty-six feet, ten inches, from appellant's porch, a distance comporting with Hix's testimony that the distance from the porch to the truck was "approximately 56, 57 feet."

[3] This complaint is potentially relevant only to Exhibit 71.

The jury saw multiple photographs of the truck taken shortly after the shooting and showing the truck in relation to appellant's house and showing the bullet fragments and shell casings in relation to the truck. Hix, who took the photographs and identified them at trial, testified he did not recall whether the truck was "completely on the street or a little bit in the grass." In short, if the truck was partially on the grass, the incursion was small.

For the foregoing reasons, we cannot say that the trial court abused its discretion by concluding that the danger of unfair prejudice did not greatly outweigh the probative value of the exhibits. Accordingly, we overrule appellant's third issue.

## III. CONCLUSION

The trial court's judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Anderson, Frost, and Seymore.
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