



**In The  
Court of Appeals  
Sixth Appellate District of Texas at Texarkana**

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No. 06-09-00107-CR

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DAVID HEATH FOUSE, Appellant

V.

THE STATE OF TEXAS, Appellee

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On Appeal from the 8th Judicial District Court  
Hopkins County, Texas  
Trial Court No. 0820355

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Before Morriss, C.J., Carter and Moseley, JJ.  
Memorandum Opinion by Justice Carter

## MEMORANDUM OPINION

David Heath Fouse has filed an appeal from six convictions. Three are for the first degree felony of aggravated sexual assault on a child (under fourteen—B.P.), and three are for the second degree felony of sexual assault on a child (under seventeen—R.R. and C.J.). A single brief has been filed to address all six appeals. Fouse testified at trial. He admitted that he was convicted in 1999 of the felony offense of assault on a peace officer and the state jail felony offense of burglary of a building, and admitted having sexual intercourse with B.P. and C.J.

In this case, Fouse was accused of sexually assaulting R.R., a child younger than seventeen years of age,<sup>1</sup> a second degree felony enhanced by one prior conviction, causing punishment to be assessed at the first degree level. According to R.R., Fouse entered into her home without invitation and used force to sexually assault her. At that time, Fouse's best friend had recently broken up with R.R., who was fifteen years old; at that point, in 2008, Fouse was twenty-seven years old. Fouse denied having any relationship of any sort with R.R. The jury found him guilty and assessed punishment for that act at sixty years' imprisonment.

On appeal, Fouse raises a single issue: contending that we should reverse and remand his conviction for sexual assault on a child as to victim R.R. He argues that the evidence is factually insufficient to support the verdict.

In a factual sufficiency review, we review all the evidence, but do so in a neutral light instead of the light most favorable to the verdict. We determine whether the evidence supporting

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<sup>1</sup>TEX. PENAL CODE ANN. § 22.011(a)(2)(A) (Vernon Supp. 2009).

the verdict is either too weak to support the fact-finder's verdict, or, considering conflicting evidence, is so outweighed by the great weight and preponderance of the evidence that the jury's verdict is clearly wrong and manifestly unjust. *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009); *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008); *Roberts v. State*, 220 S.W.3d 521, 524 (Tex. Crim. App. 2007).<sup>2</sup>

In this case, the testimony of R.R. and Fouse is diametrically opposed. Fouse contends he never went to R.R.'s house during the relevant time period and never had any sexual relationship with her. R.R. testified that Fouse not only had sexual relations with her when she was fifteen years of age, but also that he used force in doing so. This is precisely the kind of situation that calls on a jury to evaluate the evidence and arrive at a decision about the facts. Even if contradictory witness testimony may be compelling, the jury is the sole judge of what weight to give to such testimony. *Lancon*, 253 S.W.3d at 705. We should afford "almost complete deference to a jury's decision when that decision is based upon an evaluation of credibility." *Id.* (citing *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006)). Here, the jury determined R.R.'s testimony was the more credible of the two.

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<sup>2</sup>In this analysis, we use a hypothetically correct jury charge to evaluate both the legal and factual sufficiency of evidence. *Grotti v. State*, 273 S.W.3d 273 (Tex. Crim. App. 2008). Such a charge accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Villarreal v. State*, 286 S.W.3d 321 (Tex. Crim. App. 2009); *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

The jury had evidence before it from which it could have reached one of two diametrically different conclusions. It exercised its function as the trier of facts, there is evidence to support its finding, and the contrary was not proven by the great weight and preponderance of the evidence to such an extent that the verdict is clearly wrong and unjust. *See Sells v. State*, 121 S.W.3d 748, 754 (Tex. Crim. App. 2003). The evidence is thus factually sufficient to support the verdict.

We affirm the judgment.

Jack Carter  
Justice

Date Submitted: April 28, 2010  
Date Decided: April 29, 2010

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