
YEAR 2006 CASE SUMMARIES

By
The Honorable Pat Garza

Associate Judge
386th District Court
San Antonio, Texas

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Failure to file a motion for new trial waives factual sufficiency challenge on appeal. [In the Matter of F.F.G.](06-4-6)

On October 12, 2006, the Austin Court of Appeals held that because respondent failed to file a motion for new trial, he failed to preserve the issue of factual sufficiency for review.

¶ 06-4-6. **In the Matter of F.F.G.**, MEMORANDUM, No. 03-05-00854-CV, 2006 Tex.App.Lexis 8844 (Tex.App.— Austin, 10/12/06).

Facts: On March 7, 2005, at approximately 3:50 p.m., Goldia Earls was working when she received a call from her sister stating that someone had shattered Earls's dining room window with a rock. Earls told her sister to call the police, then headed home.

Once both Earls and the police had arrived at Earls's home, Lydia Martinez--Earls's next-door neighbor--came over and explained that she had seen the person who threw the rock through Earls's window. Martinez testified that she saw F.F.G., who is a white male, standing with three African-American teenagers in a circle outside her kitchen window. Martinez further testified that she saw F.F.G. carrying a rock which he threw through Earls's window, and then the four teenagers immediately ran across the street.

Martinez telephoned the police to report the crime. After the police arrived and listened to Martinez's account, they suspected F.F.G. because he was part of a group of boys matching Martinez's description that they had noticed playing down the street. According to her testimony, because F.F.G. lived across the street from both Martinez and Earls, Martinez recognized him and was able to identify him as the person who threw the rock through Earls's window. Martinez also testified that Earls was only a passing acquaintance whom Martinez did not know by name; that she had never had a problem with F.F.G. or his mother before; and that she did not know F.F.G. by name before the trial, but did recognize him from the neighborhood.

Both F.F.G.'s mother, Donna Sanders, and his supervisor, Shara Kohrs, testified that F.F.G. spent the day working for Guy Bundy and Kohrs fixing up a duplex around the corner from Earls's house. Sanders testified that she dropped F.F.G. off at work that morning and that F.F.G. had received a check for \$ 20 for his day's work. However, Sanders was not with her son at the time the rock was thrown through Earls's window.

Additionally, Kohrs testified that F.F.G. was working for her preparing a duplex to be rented, and that she did not see F.F.G. leave the work site. Further, Kohrs testified that even though she had not kept F.F.G. in her sight the entire time, she did not think it possible that F.F.G. could have left without her

knowledge.

Kohrs also testified that she had been involved in verbal altercations with both Earls and Earls's daughter and that she had previously called the police on several occasions because Earls's daughter had thrown rocks through Kohrs's windows. The juvenile court was also presented with evidence of Kohrs's criminal record.

F.F.G. testified that he did not throw the rock through Earls's window and did not see the actual perpetrator.

Finally, the court was presented with evidence that the cost of repairs to Earls's broken window totaled \$ 408.

Held: Affirmed

Memorandum Opinion: As a preliminary matter, we must address the state's argument that F.F.G. failed to properly preserve the issue of factual sufficiency by filing a motion for new trial.

Among the rights of adult criminal defendants is the right to factual sufficiency review of a conviction. *Clewis v. State*, 922 S.W.2d 126, 136 (Tex. Crim. App. 1996). However, the Texas Family Code mandates that juvenile delinquency proceedings are governed by the Texas Rules of Civil Procedure. *Tex. Fam. Code Ann. § 51.17(a)* (West Supp. 2006). Under *Texas Rule of Civil Procedure 324(b)(2)*, a motion for a new trial is required to preserve the issue of factual sufficiency for appellate review in the civil context. As a result, a juvenile who complains on appeal of the factual sufficiency of the evidence must have preserved the complaint through a motion for new trial. *In re M.R.*, 858 S.W.2d 365, 366, 36 Tex. Sup. Ct. J. 1015 (Tex. 1993) (per curiam); *Davila v. State*, 930 S.W.2d 641, 647 (Tex. App.--El Paso 1996, pet. ref'd).

Because F.F.G. failed to file a motion for new trial and therefore failed to preserve the issue of factual sufficiency for review, we must affirm the juvenile court's adjudication of F.F.G. as delinquent. *Tex. R. App. P. 33.1*.

Conclusion: F.F.G. did not properly preserve the issue of factual sufficiency for appeal by filing a motion for new trial. And even if the issue had been properly preserved, the proof of guilt was not too weak, nor was the contrary evidence presented too strong to rationally support the court's adjudication. As a result, we affirm the judgment of the trial court.