

## Review of Recent Juvenile Cases (2007)

by  
The Honorable Pat Garza  
Associate Judge  
386th District Court  
San Antonio, Texas

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### **Trial court's judgement was reversed because the jury's finding was against the great weight and preponderance of the evidence.[Lancon v. State](07-1-11)**

**On December 27, 2006, the San Antonio Court of Appeals held that evidence was factually insufficient to support the jury's verdict and reverse the trial court's judgment and remanded the cause for a new trial.**

¶ 07-1-11. **Lancon v. State**, \_\_\_S.W.3d\_\_\_, No. 04-05-00164-CR, 2006 Tex.App.Lexis 11028 (Tex.App.— San Antonio, 12/27/06).

**Background:** Jorge Zuniga, Alfonso Villarreal, and Fernando Lancon were charged with the murder of eleven-month-old Federico Soliz III, the attempted murder of Hector Dominguez, and deadly conduct by knowingly discharging a firearm at Dominguez or in his direction. After Lancon was certified to stand trial as an adult, they were tried to a jury, which found Zuniga not guilty on all three counts and further found Villarreal (who admitted his complicity) and Lancon guilty as charged. Lancon was thereafter sentenced to incarceration in the Texas Department of Criminal Justice - Institutional Division for twenty-five years for murder, fifteen years for attempted murder, and ten years for deadly conduct. Lancon appeals.

Fernando challenges the factual sufficiency of the evidence in one respect only - to support the jury's implied finding that he was the shooter involved in the events on June 11, 2003. We will therefore first set out the standard of review and then proceed to lay out the facts that are basically undisputed, the evidence supporting the jury's verdict, and the evidence conflicting with it.

**Facts:** On June 11, 2003 at 9:20:43 p.m., the Laredo Police Department's 911 operator received a call concerning a shooting at the home of Federico Soliz, Sr. at 2809 Logan Avenue. Minutes before the shooting, a purple or maroon, four-door car equipped with tinted windows that were half-way down stopped in front of the Soliz home. Alfonso Villarreal exited the car from the rear passenger seat, and either Fernando Lancon ("Moiky") - according to the State's witnesses - or his shorter but very similar-looking younger brother Eduardo ("Wayo") - according to the defendants and their witnesses - exited the car from the front passenger seat and fired two shots from a .40 caliber automatic gun at or in the direction of Hector Dominguez, who was, moments earlier, standing on the sidewalk in front of the Soliz home with his friends Daniel Diaz and Fernando Soliz. n3 One of the shots traveled through the home's wall and into the living room, where it fatally wounded eleven-month-old Federico Soliz III. The entire incident lasted less than a minute.

n3 The casings recovered at the scene of the shooting were .40 caliber and manufactured by Smith & Wesson.

**Held:** Reversed and remanded.

**Opinion:** After reviewing all the evidence in a neutral light, we hold the evidence supporting the jury's implicit finding that the shooter in this tragic incident was Fernando Lancon, rather than Eduardo Lancon, is greatly outweighed by the contrary evidence. See *Cain*, 958 S.W.2d at 407. We arrive at this "'predominantly intuitive judgment'" n13 based on the objective unreliability of Dominguez's and Diaz's testimony that Fernando Lancon was the shooter coupled with the weight and quantity of the evidence that the shooter was not Fernando but Eduardo Lancon.

n13 *Johnson*, 23S.W.3d at 7 (quoting William Powers and Jack Ratliff, *Another Look at 'No Evidence' and 'Insufficient Evidence,'* 69 TEXAS L. REV. 515, 519 (1991)).

Both Dominguez and Diaz testified that at the time of the shooting, although there was some light was coming from the house and a street lamp at the corner; it was dark or at least getting dark; the incident happened very fast; Dominguez at least was afraid of getting shot; and Eduardo and Fernando looked alike. Certainly Dominguez and most likely Diaz n14 had smoked marijuana that day and were under its influence when the incident occurred, which one of the State's expert witnesses, Dr. Kimberly Molina, testified can delay mental activity and thinking and change perception. n15 Although Dominguez testified on direct examination that he was 100% sure that Fernando Lancon was the shooter, he later admitted that because it was dark and happened very fast, and he was afraid of getting shot, he did not get a good look at the shooter. Similarly, although Diaz testified on direct and re-direct examination that he got a good look at the shooter's face and was sure it was Fernando Lancon, he admitted on cross-examination that he did not know if he mistook Fernando for Eduardo, admitted they look a lot alike, it was dark, the incident happened very fast, and it was possible he saw Eduardo and not Fernando.

n14 Diaz testified that although he did not recall whether he smoked marijuana on June 11, he smokes it everyday; and Dominguez testified both he and Diaz were under the influence of marijuana when the shooting occurred.

n15 We note that the one eyewitness who was not under the influence of marijuana that night - Fernando Soliz - first named Fernando Lancon as the shooter but did not pick him out of a lineup.

Dominguez also testified on direct examination that the purple car was parked next to the curb in front of the Soliz home, where the pickup in the photograph of the Soliz home was located and that he was three feet away from the shooter; but he later testified that the shooter shot from a distance that was the width of two vehicles - the purple car and a white Cadillac that he testified was parked next to the curb in front of the Soliz home during the entire incident - a distance that would be in excess of ten feet. Notably, no one else testified that a white Cadillac was parked in front of the Soliz home that night; and the photograph of the scene taken shortly after the shooting reflects a pickup truck was parked there. When asked to explain the discrepancy, Dominguez testified the photograph was inaccurate.

Dominguez was also certain that the gun was in the shooter's right hand. But Fernando Lancon testified and demonstrated by writing his name that he is left-handed. Dominguez first testified that the shooter was wearing a blue New York Yankees cap with the visor turned to the front and later testified that it was the driver who was wearing a blue cap; but Diaz was sure the shooter was not wearing a cap. Dominguez also testified that, although he saw a white Cadillac pass down the street from the Soliz home, he did not see who was in the car and did not tell the police that Fernando was driving the car; but Cantu testified that when he asked Dominguez who had shot at him, Dominguez replied Fernando Lancon and then said "There he goes; there goes Fernando; there they go in the white car." Likewise inconsistent was Dominguez's testimony regarding the timing of the events that night and that he was sure of the times to which he testified because Diaz was wearing a watch; however, Diaz testified he was not wearing a watch that night. More troubling is

Dominguez's testimony that he ran to the right and back of the house either when he saw the gun or heard it being cocked and, when the shooter started to fire, he was "in the back of the house"; but he also testified that he saw Fernando Lancon pull the trigger and shoot. Finally, although both Dominguez and Diaz testified that Zuniga was the driver, the jury acquitted Zuniga - not surprising perhaps in light of Jose Gonzalez's testimony that he was actually the driver and Diaz's admission that in fact he did not see not see the driver and picked Zuniga out of the photographic lineup because "some witness told [him] [Zuniga] was driving." n16 Similarly troubling is Dominguez's testimony that he picked Fernando Lancon out of the lineup because knew what Fernando looked like, not necessarily because he remembered Fernando from shooting. n17

n16 Dominguez's identification of Zuniga as the driver was also called into question by the testimony of Investigator Jorge Luis Maldonado, who testified that during Dominguez's videotaped interview on the night of the shooting Dominguez stated that all he could see of the driver of the maroon car was his cap; he did not see his face.

n17 Neither Dominguez nor Diaz was ever shown a lineup that included Eduardo Lancon because Cantu believed his theory was so solid he perceived no reason to include Eduardo Lancon in the lineups or even to question him regarding the shooting.

These weaknesses and inconsistencies in Dominguez's and Diaz's testimony certainly detract from its reliability. But, standing alone, these factors would not convince us that the evidence is factually insufficient to support the jury's implicit finding that Fernando, rather than Eduardo, was the shooter. *Compare Johnson, 23 S.W.3d at 8* (holding that "[a] factual sufficiency analysis can consider only those few matters bearing on credibility that can be fully determined from a cold appellate record" but affirming court of appeals' judgment reversing because of factual sufficiency because record revealed and court of appeals recognized that "accuracy of victim's identification of appellant was questionable because of the adverse conditions that existed during her brief and obstructed view of the assailant") *with Cain, 958 S.W.2d at 409* (noting that fact that victim was "drunk, had troubling remembering the assault, and had been extremely intoxicated previously" "bear on the amount of credibility [the victim's] testimony should receive"). But what does convince us that the evidence is factually insufficient to support the jury's verdict is viewing the eyewitnesses' testimony - complete with the weaknesses, inconsistencies, and equivocations outlined above - in light of the consistent, detailed testimony set forth above from the defense witnesses, including two of the three participants who admitted their complicity in the shooting (Villarreal and Gonzalez) and identified Eduardo Lancon as the shooter, and the aunts of both Eduardo and Fernando (Yolanda Villarreal, Lydia Fernandez, and Leticia Martinez), each of whom testified that she heard Eduardo admit to having been the shooter moments after the shooting took place. Both factors, taken together, convince us that reversing the judgment against Fernando Lancon and ordering a new trial is "necessary to arrest the occurrence of a manifest injustice." *Johnson, 23S.W.3d at 9.*

**Conclusion:** Because our neutral review of all the evidence, both for and against the jury's finding, demonstrates that the proof of guilt, although adequate if taken alone, is nevertheless against the great weight and preponderance of the evidence, we reverse the trial court's judgment and remand the cause for a new trial.

**Dissent:** The jury heard all of the contrary evidence and obviously found Dominguez's and Diaz's testimony more credible than that of the opposing witnesses. The amount of weight to be given any particular testimony, or the amount any testimony should be discounted, must come from the jury alone and not from an appellate court. Moreover, I cannot agree the contrary evidence leads to an entire failure of proof and I am therefore unable to conclude that the evidence is so weak as to be clearly wrong and manifestly unjust.

Accordingly, I would affirm the judgment of the trial court.

