Review of Recent Juvenile Cases (2009)

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

Evidence was factually sufficient to support deadly conduct adjudication.[In the Matter of E.S.](09-4-3)

On August 26, 2009, the Corpus Christi Court of Appeals concluded that in viewing the evidence in a neutral light, the evidence is not so weak that the conviction seems clearly wrong and manifestly unjust, and the trial court's determination is not against the great weight and preponderance of the evidence.

¶ 09-4-3. **In the Matter of E.S.**, MEMORANDUM, No. 13-08-00530-CV, 2009 WL 2623352 (Tex.App.-Corpus Christi, 8/26/09).

Facts: A little after 8:00 p.m., on the evening of July 9, 2008, Ramona Nunez sat on a chair in her front yard visiting with two grandchildren under the age of ten, her sixteen-year-old grandchild, J.A., and his teenage friend, J.G. Although the sun had set, it was not yet dark, and she noticed a blue station wagon driving down the street in front of her home. She informed J.A., who was seated at a nearby picnic table, that the station wagon was "coming real slow." The car stopped, with its passenger side immediately in front of the house. The driver, identified as E.S., reached across the passenger and began firing a gun. After firing two to four shots, E.S. drove away.

Nunez phoned 911, and officers were dispatched to her residence. Scared that the blue station wagon might return, J.A. and J.G. departed from Nunez's home before the police arrived. Officer John Turner was the first to arrive.

Officer Turner testified that upon his arrival, Nunez informed him that a blue station wagon had driven in front of her house and that E.S. had fired shots from the vehicle. Officer Turner searched the front yard and found a "crack" or "chip" in the windshield of a truck parked in Nunez's front yard. Officer Turner testified that the damage to the windshield indicated that a "projectile" such as a "bullet, BB, rock or something of that nature" had hit and "bounced off" the windshield. No bullets, fragments, or casings were found at the scene.

Officer Zachary De La Rosa testified that on the way to Nunez's residence, he received a radio alert that E.S. had been involved in the shooting. After using his computer to locate E.S.'s address, Officer De La Rosa proceeded to E.S.'s residence. Later testimony revealed that although E.S.'s residence was a "number of blocks away" from Nunez's residence, it was "not very far." While en route, Officer De La Rosa spotted a blue station wagon parked in a field across from E.S.'s home. Officer De La Rosa saw no one around the vehicle and was unable to tell whether anyone was inside. Before Officer De La Rosa could reach the station wagon, a train crossed the tracks in front of him, blocking his route. Officer De La Rosa turned and proceeded further down the road, parallel to the tracks until he was able to find a place to cross. He drove back towards E.S.'s residence. Upon his arrival, Officer De La Rosa observed that the station wagon was no longer parked in the

field across from E.S.'s residence, but rather, was parked either in the driveway of, or on the street near, E.S.'s residence. As he approached the station wagon, he saw three males at a distance of forty to fifty yards away from the vehicle, running away from it. Officer De La Rosa exited his vehicle and ran to apprehend the suspects. Officer De La Rosa eventually apprehended A.R., a friend of E.S., and the two other suspects, D.W. and T.T., were apprehended by other officers.

Officer Mark Pullin, while en route to Nunez's residence, heard over his radio that suspects believed to have been involved in the shooting had fled from a blue station wagon. Officer Pullin proceeded to assist other officers in apprehending the three suspects seen fleeing the station wagon. After the suspects were apprehended, Officer Pullin secured the station wagon. Officer Pullin found the vehicle parked near E.S.'s residence; the driver's side door was "slightly ajar," and the vehicle was making a "dinging sound" because the keys had been left in the ignition. While conducting a search of the vehicle, Officer Pullin found a spent .22 casing on the floorboard of the back seat, directly behind the driver's seat. A gun was never found, and neither the car nor the casing were dusted for fingerprints.

After securing the vehicle, Officer Pullin located E.S. at his residence. Upon questioning by Officer Pullin, E.S. denied owning a gun or having any firearms in his home; upon Officer Pullin's request to search his home, E.S. refused. E.S. told Officer Pullin that he had been at his house all day playing video games with "a white boy," but was unable to describe the "white boy" or give his name. Fearing lack of probable cause, Officer Pullin did not arrest E.S.

After presenting the testimony of A.R., the first suspect apprehended, Nunez, J.A., J.G., and the foregoing officers, the State rested its case. E.S.'s father, Eddie, then testified for the defense. Eddie stated that on July 9, 2008, he was at home "all day and all night." Eddie stated that at the time of the alleged shooting, E.S. was asleep on the couch in the living room, and that E.S. was home the entire night. Eddie testifed that he did not speak to police when they came to the home and spoke with E.S. that night, because he had not seen them. Additionally, Eddie testified that if the police had come to his residence that night, it was for "[n]othing serious," because, had it been a serious matter, "they would have called [him] outside." He also stated that J.G. had made threats to him in the past, and that after the alleged shooting, J.A. and J.G. exhibited a gun in his presence.

After considering the foregoing testimony, the trial court found that E.S. committed the offense of deadly conduct as to Nunez and J.A. [FN2] The court then ordered E.S. committed to TYC for a determinate sentence of ten years. This appeal ensued.

Held: Affirmed

Memorandum Opinion: In conducting a legal sufficiency review, we must ask whether " *'any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'--not whether *'it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' " *Laster v. State,* 275 S.W.3d 512, 517 (Tex.Crim.App.2009) (quoting *Jackson v. Virginia,* 443 U.S. 307, 318-19 (1979) (emphasis in original)). We do not reevaluate the weight and credibility of the evidence, and we do not substitute our own judgment for the trier of fact. *King v. State,* 29 S.W.3d 556, 562 (Tex.Crim.App.2000) (en banc); *Beckham v. State,* 29 S.W .3d 148, 151 (Tex.App.-Houston [14th Dist.] 2000, pet. ref'd). Instead, we consider whether the jury reached a rational decision. *Beckham,* 29 S.W.3d at 151. We must resolve any inconsistencies in the evidence in favor of the judgment. *Curry v. State,* 30 S.W.3d 394, 406 (Tex.Crim.App.2000).

In conducting a factual sufficiency review, we review the evidence in a neutral light to determine whether the evidence is so weak that the jury's verdict seems clearly wrong and manifestly unjust or the jury's verdict is against the great weight and preponderance of the evidence. *Watson v. State,* 204 S.W.3d 404, 414-15

(Tex.Crim.App.2006). We will not reverse the jury's verdict unless we can say with some objective basis in the record that the great weight and preponderance of the evidence contradicts the verdict. *Id.* at 417.

We measure the sufficiency of the evidence by the elements of the offense as defined by the hypothetically correct jury charge. *Malik v. State,* 953 S.W.2d 234, 240 (Tex.Crim.App.1997); *Adi v. State,* 94 S.W.3d 124, 131 (Tex.App.-Corpus Christi 2002, pet. ref'd). The hypothetically correct jury charge for deadly conduct requires proof that a person knowingly discharges a firearm at or in the direction of: (1) one or more individuals, or (2) a habitation, building, or vehicle and is reckless as to whether the habitation, building, or vehicle is occupied. Tex. Penal Code Ann. § 22.05(b). A person acts knowingly, or with knowledge, "when he is aware of the nature of his conduct or that the circumstances exist" or "he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b) (Vernon 2003). A person acts recklessly, or is reckless, when "he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." *Id.* § 6.03(c).

E.S. argues that the evidence is insufficient because: (1) "there was no tangible evidence to support the allegation"; (2) "the State's eyewitnesses were not credible"; and (3) E.S. "had an alibi for the time of the shooting." We disagree.

Nunez, J.A., and J.G. each testified that on the evening of July 9, 2008, a blue station wagon, driven by E.S., stopped in front of Nunez's home, and E.S. pointed a gun out of the passenger side window and fired two to four shots. Nunez testified that at the time of the shooting, she was able to identify E.S. because he "used to go to [her] house" and she knew his grandparents. J.A. testified that, despite the bottom of E.S.'s face being covered by a bandana, he was able to identify E.S. as the gunman because he and E .S. had been friends "a year or two" prior to the shooting. J.G. testified that he recognized E.S. because he and E.S. had been friends a few years before the shooting. Additionally, officers testified that after the alleged shooting, they found a cracked windshield on a truck parked at Nunez's home. The officers also testified that shortly after the shooting, they located a blue station wagon, which matched the description of the one allegedly driven by E.S. during the shooting. The blue station wagon was found near the driveway of E.S.'s residence, and a spent .22 caliber casing was found behind the driver's seat.

Viewed in the light most favorable to the verdict, from the testimony and facts surrounding the shooting, a rational trier of fact could have found that E.S. knowingly discharged a firearm in the direction of Nunez and J.A. Accordingly, we conclude that the evidence was legally sufficiency to support E.S.'s conviction. *See Laster,* 275 S.W.3d at 517-18.

E.S.'s father, Eddie, testified that E.S. was at home on the night of July 9, 2008. E.S. argues that the only evidence linking him to the shooting was the testimony of Nunez, J.A., and J.G., and that these alleged eyewitnesses are not credible. E.S. specifically argues that Nunez's testimony of the events on July 9, 2008 is contradictory to the events she described to officers when they arrived on the scene. Officer Turner testified that when he spoke to Nunez upon responding to her 911 call, Nunez did not tell him that J.G. had been at her home at the time of the shooting. However, at trial, Nunez insisted that J.G. was at her home at the time of the shooting, and that she had told police about him. Additionally, Nunez told officers at the scene that E.S. was seated in the passenger seat of the blue station wagon and that there were only three individuals in the car at the time of the shooting (two in the front seat and one in the backseat). At trial, Nunez testified that E.S. was the driver of the blue station wagon and that there were four individuals in the vehicle (two in the front seat and two in the back seat).

Reconciliation of conflicts in the evidence is within the exclusive province of the fact finder. *See Mosley v. State,* 983 S.W.2d 249, 254 (Tex.Crim.App.1998). Viewing the evidence in a neutral light, we conclude that the evidence is not so weak that the conviction seems clearly wrong and manifestly unjust, and the trial court's

determination is not against the great weight and preponderance of the evidence. *See* *Watson,* 204 S.W.3d at 414-15.

Conclusion: We conclude that the evidence is factually sufficient to support E .S.'s conviction. Having determined that the evidence is legally and factually sufficient to support E.S.'s conviction, we overrule his first issue.