Opinion issued March 25, 2010

In The
Court of Appeals
For The
First District of Texas

NO. 01-09-00156-CR

KEYO KERSHUN KINGSLEY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 1093652

MEMORANDUM OPINION

The trial court found appellant, Keyo Kershun Kingsley, guilty of the

offense of aggravated assault with a deadly weapon[1] and assessed his punishment at confinement for 10 years. In his sole issue, appellant contends that the evidence is legally and factually insufficient to support his conviction.

We affirm.

Background

After hearing the evidence presented in two separate cases tried together in a single proceeding, the trial court found appellant guilty of assaulting the complainant, Pate Muse, with a deadly weapon, but not guilty of assaulting Sir Bell with a deadly weapon.

The complainant testified that on the night of November 18, 2008, he attended a party at the Best Western Inn on FM 1960. When the party had ended, the complainant, driving his white SUV, attempted to exit the parking lot by way of a private drive that ran from the motel to FM 1960, but a car, driven by Sir Bell, stopped in front of the complainant and blocked the exit. When the driver of a blue Buick Park Avenue, which was in the line of cars behind the complainant, tried to go around him on his passenger's side, the complainant accidentally caused his SUV to collide with the blue Park Avenue. The blue Park Avenue "swerved in the ditch a little bit," went a little farther, and then stopped. Unsure if the two cars had collided, the complainant looked at his passenger, Daniel Giles. Hearing gunshots,

[1] *See* TEX. PENAL CODE ANN. § 22.02(a)(2) (Vernon 2003).

the complainant turned and saw the gunshots, one of which struck his left arm, coming from the direction of the blue Park Avenue. When the complainant looked up, he saw the blue Park Avenue speeding away. On cross-examination, the complainant conceded that he could not identify the person who had shot him "because it was dark that night."

Sir Bell testified that before going to the party, he had gone to appellant's home, where he saw two cars parked in appellant's driveway, a purple Chevrolet Caprice and a Buick Park Avenue. Bell explained that about five cars, "three" of which belonged to appellant, left appellant's house to go to the party. Appellant drove a "black [C]aprice," and Bell drove a "gray truck." When the group arrived at the motel, the party was ending, and they stayed only briefly as appellant remained in the black Caprice. As Bell was leaving, he stopped his gray truck just before exiting the parking lot to talk to someone in another car, and he blocked the white SUV driven by the complainant from leaving the parking lot. Bell then saw a "blue car" in the group of cars trying to exit, but he did not recognize the "tall, dark skin person," who was driving the blue car, "as one of the people that [he] had seen that night. "The blue car swung around the white [SUV,] [and] [t]he white [SUV] hit the blue car." As the blue car drove towards FM 1960, the driver, from about "30 feet – 35, 40 feet" away, "started shooting back towards the rest of the vehicles." Although he could not identify the driver of the blue car, Bell saw the

driver "holding a gun out the window shooting."

Bell admitted that in his statement previously made to Harris County Sheriff ("HCS") Sergeant M. Schmidt, he had identified appellant as the driver of the blue car from which the shots were fired. However, Bell denied previously telling Schmidt or Giles that he was "concerned about retaliation" from appellant or his family. Bell explained that he had identified appellant as the shooter to Schmidt because Giles had, on the day before Bell gave his statement to Schmidt, told Bell that appellant shot him.

On cross-examination, Bell stated that he identified appellant to Sergeant Schmidt as the shooter because he was "heavily medicated" and Giles "had already told [him] that it was [appellant]," not because he actually saw appellant shooting at him. Bell conceded that he had seen appellant's black Caprice at the party, but he did not see it again after he had been shot.

Dewarence Abbs, a friend of appellant's, testified that he, Giles, and appellant's two brothers, Demetries Amos and Kristian Williams went to the party in different cars, three of which belonged to appellant, and one of which belonged to Williams and Giles. Abbs drove a blue "Park Avenue," Williams another "Park Avenue," "blue . . . with black rims," and Giles yet another "Park Avenue." Abbs explained that appellant left the party in the blue Park Avenue that Abbs drove to the party and Abbs left the party in a "bluish-purple" Caprice, which belonged to

appellant. As he was leaving the party, Abbs saw the white SUV hit the blue Park Avenue that appellant was driving. Moments later, he then saw appellant "start[] shooting" back at the vehicles from "outside" the blue Park Avenue.

On cross-examination, Abbs explained that the car from which the shots came "looked like [appellant's car]" and he "[assumed] it was [appellant] because . . . [he] thought that [the car] was one of [appellant's] cars." On redirect examination, Abbs again identified the blue Park Avenue that appellant had been driving when he left the party as the car from which the shots were fired and said, "I saw [appellant]" shooting. He admitted that in the statement that he had previously made to Sergeant Schmidt he had stated that "[appellant] stopped and opened his door and got out of his car and started shooting." Abbs also admitted that he was nervous about testifying "because of what might happen."[2] Although, on further cross-examination, Abbs clarified that he was just "nervous about being in court," on further re-direct examination, he explained that he was "afraid" of what Williams, appellant's brother, might do.

Sergeant M. Schmidt testified that he investigated the shooting and interviewed Bell at the hospital, where Bell was "coherent and conscious" and not impaired. Bell, "from his own personal knowledge," told Schmidt that appellant

[2] Abbs began "sweating profusely" while testifying, and the court took a short recess.

was the shooter and "he saw [appellant]." Bell explained to Schmidt that "he was concerned about making a statement and identifying [appellant] because [Giles] . . . is a friend of [appellant] and [Giles] knew where [Bell] lived."

Standard of Review

We review the legal sufficiency of the evidence by considering all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (citing *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979)). In doing so, we give deference to the responsibility of the fact-finder to fairly resolve conflicts in testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Id.* However, our duty requires us to "ensure that the evidence presented actually supports a conclusion that the defendant committed" the criminal offense of which he is accused. *Id.*

In a factual sufficiency review, we view all the evidence in a neutral light, both for and against the finding, and set aside the verdict if the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, i.e., that the verdict seems "clearly wrong and manifestly unjust," or the proof of guilt, although legally sufficient, is nevertheless against the great weight and preponderance of the evidence. *Watson v. State*, 204 S.W.3d 404, 414–15 (Tex.

Crim. App. 2006). We note that the fact finder is in the best position to evaluate the credibility of witnesses, and we afford due deference to the fact finder's determinations. *Marshall v. State*, 210 S.W.3d 618, 625 (Tex. Crim. App. 2006). Although we should always be "mindful" that a fact finder is in the best position to decide the facts and that we should not order a new trial simply because we disagree with the verdict, it is "the very nature of a factual-sufficiency review that . . . authorizes an appellate court, albeit to a very limited degree, to act in the capacity of a so-called 'thirteenth juror.'" *Watson*, 204 S.W.3d at 414, 416–17. Thus, when an appellate court is "able to say, with some objective basis in the record, that the great weight and preponderance of the (albeit legally sufficient) evidence contradicts the [fact finder's] verdict[,] . . . it is justified in exercising its appellate fact jurisdiction to order a new trial." *Id.* at 417.

Legal and Factual Sufficiency

In his sole issue, appellant argues that the evidence is legally and factually insufficient to support his conviction because the trial court, based on the "same evidence," found him not guilty of assaulting Sir Bell in "the very same criminal episode." He asserts that "no credible evidence" was presented to "definitely identify him" as the individual who shot the complainant.

A person commits the offense of aggravated assault if the person commits assault and "uses or exhibits a deadly weapon during the commission of the

assault." TEX. PENAL CODE ANN. § 22.02(a)(2) (Vernon 2003).

We first note that inconsistent verdicts in prosecutions based on the same evidence do not require a reversal on the ground of legal or factual insufficiency of the evidence. *See Green v. State*, 233 S.W.3d 72, 84 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); *Moranza v. State,* 913 S.W.2d 718, 724 (Tex. App.—Waco 1995, pet. ref'd); *see Ruiz v. State*, 641 S.W.3d 364, 366 (Tex. App.—Corpus Christi 1982, no pet.) (fact-finder's desire to be lenient may lead to inconsistent verdicts). To assess a reason for an inconsistency would necessarily require that we engage in "pure speculation," which we will not do. *Green,* 233 S.W.3d at 84 (quoting *United States v. Powell*, 469 U.S. 57, 66, 105 S. Ct. 471 (1984)). Instead, we review the legal and factual sufficiency of the evidence supporting the conviction challenged on appeal. *Moranza*, 913 S.W.2d at 724.

In support of his legal sufficiency challenge, appellant attacks the credibility of Bell. He emphasizes that Bell "was under heavy medication" when he identified appellant as the shooter to Sergeant Schmidt, and Bell only identified appellant because Giles had told him that appellant was the shooter. He also emphasizes that although the complainant testified that the shots came from a "white Buick," Bell testified that they came from a "black car"; although Abbs stated that the shooter stood outside of the car, Bell testified that the shooter fired the shots from within the car; Abbs was "less than credible" because he had a

criminal record; the firearm from which the shots were fired was never recovered; and there is no evidence that appellant had a firearm in his possession on the night of the shooting.

The gist of appellant's complaints is that Bell and Abbs were not credible. However, the fact-finder is the exclusive judge of the credibility of witnesses and the weight to be given their testimony; it is the exclusive province of the fact-finder to reconcile conflicts in the evidence. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000).

Here, the complainant testified that he had accidentally caused his SUV to collide with a Buick Park Avenue, and after the car stopped further down the road, he was wounded by shots fired from the direction of the car. Even disregarding the testimony of Bell, Abbs, a friend of appellant, testified that he saw appellant driving his blue Park Avenue, the complainant's SUV collide with the blue Park Avenue, and appellant fire the shots that injured the complainant. Although evidence of his prior convictions was admissible for impeachment purposes, the fact that Abbs had prior convictions for the state jail felony offense of possession of narcotics and the misdemeanor offense of possession of marijuana did not render his testimony inherently unreliable and legally insufficient to support a conviction. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (stating that "witness may be believed even though some of his testimony may be

contradicted"); *Houston v. State*, 667 S.W.2d 157, 160 (Tex. App.—Houston [14th Dist.] 1982, no pet.) (fact-finder could have believed witness with "numerous" prior convictions). Although the trial court, as fact-finder, could consider Abbs's prior convictions in assessing his credibility, it was still free to find his testimony credible. *Wesbrook*, 29 S.W.3d at 111; *Sharp*, 707 S.W.2d at 614. Viewing the evidence in the light most favorable to the verdict and resolving all conflicts in the testimony in favor of that verdict, a reasonable trier of fact could have found beyond a reasonable doubt that appellant assaulted the complainant with a deadly weapon. Accordingly, we hold that the evidence is legally sufficient to support appellant's conviction.

In support of his factual sufficiency challenge, appellant re-urges the same arguments made in his legal sufficiency challenge. He further asserts that "the evidence does not clearly establish [appellant] was in the car near the scene of the shooting." It is true that Bell testified that appellant drove a "black [C]aprice" to the party; he did not see appellant change vehicles; he only saw "arms hanging out of the window" from the blue car from which the shots were fired; and he could not see the shooter. Bell also testified that the statement that he gave to Sergeant Schmidt was a combination of facts from his own personal knowledge and information that Giles had given him, specifically that appellant was the shooter and had switched from driving the "black [C]aprice" when he arrived at the party

to driving "his blue Buick" when he left the party. It is also true that Abbs testified that he "assumed" that appellant was the shooter because the shots were fired from one of appellant's cars, not that he actually saw appellant firing at the other cars. Moreover, the complainant could not identify the individual who fired the shot that injured him,[3] and no firearm matching the bullets, jackets, and casings found at the scene was recovered from appellant or any of his vehicles.

We again note that the trial court was the exclusive judge of the credibility of witnesses and the weight to be given their testimony. *See Wesbrook*, 29 S.W.3d at 111. Also, the fact that the firearm used in the shooting was not recovered does not render the evidence insufficient. *See Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004). Circumstantial evidence is as probative as direct evidence and is alone sufficient to establish guilt. *Id.* For example, in *In re A.P.*, the complainant was unsure of the identity of a second shooter and a second firearm

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[3] In his appellate brief, appellant asserts that the complainant said the shots were fired from a "white Buick." A careful review of the reporter's record shows that appellant has misinterpreted the complainant's testimony:

> [Trial Counsel]: You say the car that was . . . coming out in front of the parking lot . . . that was a white [Buick], you believe?
>
> [Witness]: Yes, ma'am, I believe.

The complainant's testimony was that the "white Buick" was the car that blocked the other cars from leaving the parking lot, not the car from which the shots were fired. The complainant testified, "I was trying to come out, but this one—this [white] Buick right here was in my way."

had not been recovered by police officers. 59 S.W.3d 387, 391 (Tex. App.—Fort Worth 2001, no pet.). The evidence showed that a person wearing a white shirt was a passenger in the car from which shots were fired at the complainant, the complainant had seen the defendant wearing a white shirt, the defendant had been in the car with the other shooter just before the shots were fired, a gun was found near the defendant in the car, and the defendant was with the other shooter shortly after the shooting. *Id*. The court held that this evidence was sufficient to show the defendant was one of the shooters even though the second firearm was not recovered. *Id*.

Likewise, the trial court in this case could reasonably have found that appellant fired the shot that injured the complainant. The trial court could have found that appellant drove to the party in one car and, at the party, switched to driving the blue Buick Park Avenue, which later collided with the complainant's white SUV. Although Abbs, on cross-examination, stated that he had "assumed" that appellant was the shooter, he clearly stated on direct examination, and clarified on redirect examination, that he "saw" appellant shoot in the direction of the complainant after appellant had gotten out of his blue Park Avenue. Moreover, the trial court, in regard to their inconsistent testimony, could have reasonably believed that both Abbs and Bell were intimidated by appellant and his brother, Williams.

We conclude that the verdict is not "clearly wrong and manifestly unjust"

and the proof of guilt is not against the great weight and preponderance of the evidence. *See Watson*, 204 S.W.3d at 414–15. Accordingly, we hold that the evidence is factually sufficient to support appellant's conviction.

We overrule appellant's sole issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Hanks, and Bland

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