Affirmed and Opinion filed March 7, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00410-CR

EVERETT ASA JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 6
Harris County, Texas
Trial Court Cause No. 1022639

O P I N I O N

Appellant, Everett Asa Johnson, appeals from his conviction for misdemeanor assault. After appellant waived a jury trial, the trial court found him guilty and assessed punishment at one years' confinement in the county jail. In four points of error, appellant attacks the legal and factual sufficiency of the evidence. We affirm.

The Evidence

Larry Benoit testified he was standing outside his apartment complex at approximately 3:00 a.m. on September 23, 2000, when he observed three people, a "white gentleman," a "black gentleman," and a "black female," standing together talking. Benoit turned to see a police vehicle pulling into a driveway to his left and then he heard a scream. When he looked back at the group, he saw that the white male had fallen to the ground. The black male and female then got into an automobile and drove away. Benoit said the white male stood up and began staggering towards a nearby bowling alley. The automobile stopped and backed up, and the black male emerged and looked around the area where the white male had fallen. According to Benoit, the black male then ran toward the white male, and punched him in the back of the head. Benoit said he could see "two or three more licks thrown." He also specifically said he saw the white male trying to protect himself but not "fist fighting" with the black male. Benoit then went to tell the police officer, who had just pulled into the apartment complex, about the assault.

Officer Larry Gene Aldrich of the Baytown Police Department testified that on the night in question he arrived at the apartment complex on an unrelated matter when he was contacted by Larry Benoit. After Officer Aldrich spoke with Benoit, he got in his patrol car and entered the street. He observed a vehicle pulling away from the curb, and he saw a white male, the complainant, sitting on the curb with blood on his face. Aldrich then initiated a stop of the vehicle. He identified appellant as being in the passenger seat. Aldrich further said he spotted something red on appellant's hands that appeared to be blood. Appellant then told the officer that the complainant had tried to sell him cocaine, but when he refused to purchase, the complainant assaulted him and that he assaulted the complainant to defend himself. Later, after appellant was arrested, he gave a more detailed account of the incident to Officer Aldrich. According to Aldrich, appellant stated that after the complainant tried to sell him cocaine, he told the complainant he did not "do" cocaine.

Appellant further stated that he and Tonisha, the driver of the vehicle, got in their vehicle to leave, but the complainant flagged them down and they stopped to see what he wanted. It was then that the altercation ensued. Aldrich further stated that appellant told him the altercation occurred while appellant remained in the vehicle. Aldrich testified, however, that the complainant's wounds were not consistent with that statement. The white male later admitted to Aldrich that he had tried to sell cocaine to appellant.

Medical records were admitted to establish that the white male suffered extensive physical injuries as a result of the attack, including fractures of the sinus cavity, the nasal bone, and ribs. Photographs were also admitted of appellant, showing red marks on his hands and shirt, which Aldrich testified looked like dried blood.

Standards of Review

Appellant contends the evidence is legally and factually insufficient to sustain the conviction because (1) the State failed to prove that appellant struck the victim with his hand, as alleged in the indictment, and (2) the State failed to rebut the defense of self-defense. In reviewing legal sufficiency, we examine the evidence in the light most favorable to the verdict and ask whether any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Santellan v. State*, 939 S.W.2d 155, 160 (Tex. Crim. App. 1997). We accord great deference to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences therefrom. *See Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). We further presume that any conflicting inferences from the evidence were resolved by the jury in favor of the prosecution, and we must defer to that resolution. *See id.* at 133 n.13. In conducting this review, the appellate court is not to re-evaluate the weight and credibility of the evidence but must act only to ensure the jury reached a rational decision. *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988).

In reviewing the factual sufficiency of the evidence, we examine all of the evidence without the prism of "in the light most favorable to the prosecution" and set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Johnson v. State*, 23 S.W.3d 1, 7 (Tex. Crim. App. 2000). We consider all of the evidence in the record and not just the evidence which supports the verdict. *Santellan*, 939 S.W.2d at 164. The court is authorized to disagree with the jury's determination, even if probative evidence exists which supports the verdict. *Clewis*, 922 S.W.2d at 133. However, a factual sufficiency review must be appropriately deferential to avoid substituting the appellate court's judgment for that of the fact finder or intruding upon the jury's role as the sole judge of the weight and credibility of testimony. *Johnson*, 23 S.W.3d at 7. Unless the record clearly reveals that a different result is appropriate, we must defer to the jury's determination concerning the weight given to contradictory testimony. *Id*. at 8.

The Assault

Appellant first contends the evidence is legally and factually insufficient to demonstrate that he used his hand in carrying out the assault. Both the complaint and the information in this case alleged that appellant:

> did then and there unlawfully intentionally and knowingly cause bodily injury to . . . Complainant, by STRIKING THE COMPLAINANT WITH HIS HAND.

The State suggests that appellant's contention is essentially a claim of variance. We agree. A variance occurs when there is a discrepancy between the allegations in the charging instrument and the proof at trial. *Gollihar v. State*, 46 S.W.3d 243, 246 (Tex. Crim. App. 2001). Basically, in a variance situation, the State has proven the defendant guilty of a crime, but has proven that the crime was committed in a manner that varies from the allegations in the charging instrument. *Id*. The Court of Criminal Appeals routinely treats variance claims as insufficiency of the evidence problems. *Id*. at 247. The general

rule is that a variance not prejudicial to the defendant's substantial rights is immaterial and thus not a cause for reversal. *Id*. at 247–48.

We need not determine whether the alleged variance in the present case prejudiced appellant's substantive rights because our review of the evidence reveals no actual variance between the charging instrument and the proof offered at trial. Appellant contends the testimony of Larry Benoit, that he saw a black male "punch" a white male, is insufficient to support the trial court's determination that appellant caused bodily injury to the complainant "by striking the complainant with *his hand*" (emphasis added). The trial court was certainly free to assign to the term "punch" it's meaning in ordinary usage. *See Murphy v. State*, 44 S.W.3d 656, 662 (Tex. App.—Austin 2001, no pet.) ("Jurors are presumed to know and apply the common and ordinary meaning of words."). The dictionary defines "punch" as "[t]o hit with a sharp blow of the fist." THE AMERICAN HERITAGE DICTIONARY 680 (4th ed. 2001). The dictionary defines "fist" as"[t]he *hand* closed tightly with the fingers bent against the palm" (emphasis added). *Id*. at 323. It was, therefore, well within the discretion of the trial court to interpret "punch" as a strike with the hand. There is no variance between the pleading and the proof. *See Carroll v. State*, 698 S.W.2d 278, 279 (Tex. App.—Fort Worth 1985, pet. ref'd) (rejecting variance claim and finding it "hypercritical" to argue that evidence of hitting with hand is not sufficient proof of hitting with fist, as charged in indictment; citing *Allen v. State*, 36 Tex. Crim. 436, 37 S.W. 738 (1896)). We find the evidence is legally and factually sufficient to support the conclusion that appellant struck the complainant with his hand. Accordingly, we overrule appellant's first two points of error.

Self-Defense

Appellant next contends the State failed to rebut his assertion of self-defense. "A person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force." TEX. PEN. CODE ANN. § 9.31 (Vernon Supp. 2002). The

State has the burden of persuasion in disproving evidence of self-defense; however, this is not a burden of production, requiring the State to affirmatively produce evidence refuting the self-defense claim; instead, it is a burden requiring the State to prove defendant's guilt beyond a reasonable doubt. *Juarez v. State*, 961 S.W.2d 378, 385 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (citing *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991)).[1] This burden of proof applies to reviews of both legal and factual sufficiency. *Juarez*, 961 S.W.2d at 385 n.5. Generally, self-defense is considered an issue of fact to be determined by the fact finder. *See Saxton*, 804 S.W.2d at 913–14. The fact finder, therefore, remains free to accept or reject any defensive evidence on the issue. *See id*. at 914. A finding of guilt implicitly rejects the self-defense theory. *Id*.

Appellant contends the self-defense issue was raised by the testimony of Officer Aldrich, who stated that appellant told him that he had been attacked by the complainant and that he was only acting in self-defense when he struck the complainant. Again, we turn to the testimony of Larry Benoit, the only testifying eyewitness to the episode. Benoit testified that after he heard the scream and saw the white male on the ground, he did not take his eyes off the scene until he went to contact the police officer. Benoit did not describe any conduct by the white male that indicated he used or attempted to use force against appellant. In fact, Benoit asserted that the white male did not engage in "fist fighting" with the black male but was only trying to protect himself. Furthermore, Officer Aldrich testified that he observed no injuries on the defendant that night. Photographs taken depicting appellant's condition that night were also admitted into evidence and were available for the judge to consider. Other than the evidence of his statements to Aldrich at the scene of the disturbance, appellant references no evidence tending to establish self-defense, and our review of the record has found none. It was within the discretion of the trial court to determine the weight

[1] Appellant cites to *Stone v. State*, 751 S.W.2d 579 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd), for the proposition that the State must rebut self-defense beyond a reasonable doubt. This standard for the burden of proof was expressly overruled in *Saxton. See* 804 S.W.2d at 913.

given to those statements. *See Saxton*, 804 S.W.2d at 913–14. We find there was legally and factually sufficient evidence to support the trial court's implicit rejection of self-defense and to support the State's case for assault. *See id*. at 914. Accordingly, we overrule appellant's third and fourth points of error.

The judgment of the trial court is affirmed.

/s/ Eva M. Guzman
Justice

Judgment rendered and Opinion filed March 7, 2002.

Panel consists of Justices Yates, Seymore, and Guzman.

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