Affirmed and Opinion filed October 28, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01295-CR

SERGIO ESCOBAR, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 268th District Court
Fort Bend County, Texas
Trial Court Cause No. 28,050

O P I N I O N

Appellant, Sergio Escobar, appeals his conviction for manslaughter. TEX. PEN. CODE ANN. § 19.04 (Vernon 1993) The jury assessed his punishment at confinement for ten years in the Texas Department of Criminal Justice, Institutional Division. In one point of error, appellant contends that the evidence was factually insufficient to support the conviction. We affirm.

In his sole point of error, appellant argues that the evidence was factually insufficient to support the conviction because he was justified in using deadly force. When reviewing a factual sufficiency point, all evidence must be viewed without the prism of "in the light most favorable to the prosecution" and we should

set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App. 1996). We should be appropriately deferential and avoid substituting our judgment for that of the jury. *See Id*. at 133. Our fact jurisdiction should only be exercised to prevent a manifestly unjust result. *See Id*. at 135.

The record shows that on March 23, 1996, appellant and several members of the La Raza Trece gang drove to the complainant's house. When members of La Raza Trece arrived, the complainant, his brother and two members of the Southside Crips were at the complainant's house. Apparently, members of the Southside Crips had been "messing" with Little D, a member of the La Raza Trece. The testimony at trial indicated that between eight and twenty members of La Raza Trece were present. The two sides exchanged words and decided to fight across the street in Mayfair Park.

Both sides disagree as to who threw the first punch. Needless to say, a fist fight began. Appellant testified that he watched most of the fight from a picnic table with his ex-girlfriend. A friend had placed a .45 pistol next to him on the picnic table and told him to watch the weapon. Appellant claimed that he had left the gang six months before the shooting and was not interested in fighting. He testified that his only involvement in the fight occurred when he saw his friend, Steven Negrete, on the ground. Appellant went to his aid and pushed Negrete's attacker. Other than that push, appellant testified that he was not involved in the fight.

During the fist fight, members of both gangs testified that they heard gun shots. Again, members and associates of each gang claimed that the rival gang fired the first shots. Appellant testified that when he went to help Negrete off the ground, he saw the complainant come out of his house with a gun and the complainant began firing the weapon. Steven Negrete testified that the complainant was firing a Tec-9. Appellant claimed that he feared for his life so he went to retrieve the .45 pistol. He then fired four times in the direction of the complainant. The evidence showed that it was a bullet from appellant's gun that killed the complainant.

David Palacios, the complainant's brother, said it was appellant's group that fired their guns first. Palacios said that his family did own a Tec-9 and that he saw the gun before and after the shooting under the bed where it was kept. He also stated that he never saw his brother with a gun. Witnesses for both

the State and appellant testified that the complainant may have fired a gun, but could not state who fired the first shot. Other defense witnesses claimed it was the complainant who began shooting first.

Appellant argues that he acted in self defense. The State is not required to affirmatively produce evidence to refute a self-defense claim, but must prove its case beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d 910, 912 (Tex. Crim. App.1991). The issue of self defense is an issue of fact to be determined by the jury and the jury is free to accept or reject the appellant's evidence. *Id.* at 913-14. After reviewing all the evidence, we hold that the evidence is factually sufficient to support the verdict. Appellant's sole point of error is overruled. We affirm the conviction.

Ross A. Sears
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Justices Sears, Cannon, and Lee.*

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* Senior Justices Ross A. Sears, Bill Cannon, and Norman Lee sitting by assignment.