IN THE MUNICIPAL COURT OF APPEALS

OF THE CITY OF EL PASO, TEXAS

MARTIN TERRAZAS, Appellant, vs. STATE OF TEXAS, Appellee.	§ § § § § § § § §	**No. 07-MCA-3160**

OPINION

Appellant appeals his conviction in Municipal Court for failing to control speed causing an accident. A fine of $75.00was assessed.

On appeal, Appellant contends that the evidence was legally and factually insufficient. A reporter's record is part of the record before this Court.

In reviewing the legal sufficiency of the evidence, this Court is constrained to view the evidence in the light most favorable to the judgment to determine whether any rational trier of fact could find the essential elements of the offense, beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781 (1979); *Butler v. State,* 769 S. W. 2d 234, 239 (Tex. Crim. App. 1989); *Humason v. State,* 728 S,W.2d 363, 366 (Tex. Crim. App. 1987). More particularly, sufficiency of the evidence should be measured by the elements of the offense. *Malik v. State,* 953 S. W. 2d 234, 239-40 (Tex. Crim. App. 1997).

The review is not to ascertain whether the evidence establishes guilt beyond a reasonable doubt. *Stoker v. State,* 788 S. W. 2d 1, 6 (Tex. Crim. App. 1989), *cert. denied,* 498 U.S. 951, 111 S. Ct. 371 (1990); *Dwyer v. State,* 836 S.W. 2d 700, 702 (Tex. App.—El Paso 1992, pet, ref'd). It is not to resolve any conflict in fact, weigh any evidence, or evaluate the credibility of any witnesses, and thus, the fact-finding results of a criminal trial are given great deference. *Menchaca v. State,* 901 S.W.2d 640,

650-52 (Tex. App. – El Paso 1995, pet. Ref'd); *Adelman v. State,* 828 S.W.2d 418 (Tex. Crim. App. 1992). Instead, our only duty is to determine whether both the explicit and implicit findings of the trier of fact are rational, by viewing all the evidence admitted at trial in the light most favorable to the verdict. *Adelman,* 828 S.W.2d at 421-22. In so doing, we resolve any inconsistencies in the evidence in favor of the verdict. *Matson,* 819 S.W. 2d at 843 (quoting *Moreno v. State,* 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). The trier of fact, not the appellate court, is free to accept or reject all or any portion of any witness's testimony. *Belton v. State,* 900 S.W. 2d 886, 897 (Tex.App.—El Paso 1995, pet.ref'd).

In reviewing the factual sufficiency of the evidence to support a conviction, the Court views all the evidence in a neutral light, favoring neither party. *Johnson v. State,* 23 S.W. 3d 1,7 (Tex. Crim. App. 2000); *Clewis v. State,* 922 S. W.2d 126, 129 (Tex. Crim. App. 1996). Evidence is factually insufficient, if it is so weak that it would be clearly wrong and manifestly unjust to allow the verdict to stand, or if the finding of guilt is against the great weight and preponderance of the available evidence. *Johnson,* 23 S.W.3d at 11. Therefore, the question we must consider in conducting a factual sufficiency review is whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof. *See id.* At 8-9; *Clewis,* 922 S.W.2d at 136. The fact finder is the judge of credibility of the witnesses and may "believe all, some, or none of the testimony." *Chambers v. State* 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). Consequently, we may find the evidence factually insufficient only where necessary to prevent a manifest injustice from occurring. *See Johnson,* 23 S.W.3d at 9, 12; *Cain v. State,* 958 S.W.2d 404, 407 (Tex Crim. App. 1997).

The offense which Appellant was convicted is found in Section 545.351 (b) (2) of the Tex. Trans. Code, and states:

"An operator shall control the speed of the vehicle as necessary to avoid colliding with another person or vehicle that is on or entering the highway in compliance with law and the duty of each person to use due care."

Appellant contends that he was traveling east on I-10 within the speed limit at approximately 50 to 55 mph when another vehicle cut in front of him abruptly, and that traffic was slowing down in front of him because of a tractor trailer. Although Appellant took evasive action he was unable to stop because of the sudden stop that the other party made. Appellant further contends that he was unable to stop because his brakes did not work properly, and evidently submitted a recall notice to the Judge indicating that this vehicle was subject to such complaint. For each of those reasons Appellant contends that the accident could not have been avoided, and that the evidence is both legally and factually insufficient. The evidence which Appellant introduced supports those contentions.

The State, on the other hand, called two witnesses, the first of which was the driver of the other vehicle. Her testimony was to the effect that she was on the freeway and this trailer was going up and the car in front of me had to stop, so I stopped. Suddenly she was hit from behind, and identified Appellant as the driver of the vehicle which struck her. She further denied that she stopped suddenly and because she saw the vehicles in front of her stopping she had a chance to stop correctly. Then, a passenger in the vehicle was called and she basically supported the driver's version of the facts, that being, that they saw the vehicle in front of them slowing, and they had time to stop. Neither one of those witnesses were subjected to cross examination, and neither testified as to any facts relating to Appellant's speed.

In sum, they testified they were able to stop, but Appellant wasn't. In fact, the record is devoid of any evidence of speed causing this accident, which is an essential element of the charge. The record requires the Court to assume that since Appellant did not or could not stop, he failed to control his speed. Such assumption is unwarranted.

Applying the above standards as to the legal sufficiency of the evidence, and viewing the evidence in the light most favorable to the judgment this Court concludes that the Trial Judge, as the fact finder could not find the essential elements of the offense beyond a reasonable doubt. The duty of this Court is to determine if the findings of the trier of fact are rational and give great deference to the fact finding results. So Appellant's challenge as to the legal sufficiency of the evidence is sustained. The

mere fact that an accident occurred, which in a fair reading of the record, characterizes the only evidence produced by the State, is not sufficient to prove beyond a reasonable doubt that the cause of the accident was due to a failure to control speed. Clearly, there may be other reasons for an accident, some classified as unavoidable, some caused by an act of God such as inclement weather conditions, as well as, driver inattention or carelessness not related to speed, and finally, defective brakes or some other vehicle malfunction, and lastly, sudden or emergency stopping of vehicles which leave little or no time for a driver to react. The evidence was balanced between the city's witnesses testifying that they were able to correctly and safely bring their vehicle to a stop without colliding with other traffic, and Appellants contention that he was faced with a sudden emergency. The fact finder is the judge of the credibility of the witnesses and the weight to be given to their testimony, and this Court cannot disregard that fact finding function of the Trial Court. But the Court must be mindful that the proof of guilt must be established beyond a reasonable doubt, and therefore this Court feels that the evidence in that respect was insufficient. Additionally, although this Court is previously held that a malfunction of a speedometer is not a defense to a speeding charge, the context of this type of charge, a malfunction of an operating system of the vehicle certainly may be sufficient to establish that the cause of the accident was other than Appellant's failure to control speed which the State must prove under the allegations of the complaint.

Proving failure to control speed causing an accident requires some proof that speed was a contributing factor, and this record is devoid of any evidence that speed contributed to the result. The failure to link the causal factor of speed to the accident is fatal to the proof.

The judge of this Court, having been a Trial Judge himself, knows how difficult these cases can be, but the prosecutors and judges should be cautioned that proof of the accident alone may not be sufficient evidence for the Court to find that failure to control speed caused it.

Therefore, having that the evidence is factually insufficient; the judgment of the Trial Court is hereby reversed and rendered in Appellants favor, and judgment of acquittal be entered in his behalf.

Signed this 16th day of NOV., 2007.

JUDGE

JUDGMENT

This case came on to be heard, the same being considered, because it is the opinion of this Court that there was error in the Judgment, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things reversed and rendered in Appellant's favor, and judgment of acquittal be entered in his behalf.

SIGNED this 16th day of NOV., 2007.

JUDGE