Evidence considered sufficient to support finding of aggravated assault with a deadly weapon.[In the Matter of F.D.M.](12-2-6)

On April 12, 2012, the Houston (1 Dist.) Court of Appeals held that the evidence was sufficient to support the jury's finding beyond a reasonable doubt that appellant committed the offense of aggravated assault with a deadly weapon.

¶ 12-2-6. **In the Matter of F.D.M.**, MEMORANDUM, No. 01-11-00426-CV, 2012 WL 1249520 (Tex.App.-Hous. (1 Dist.), 4/12/12).

Facts: Aguga is a corrections officer for the Texas Department of Criminal Justice who earned extra money in his off-hours by selling ice cream from an ice cream truck. Late one afternoon while he was driving the ice cream truck, a group of teenagers flagged Aguga down and began asking him about his ice cream. One or two of the teenagers disappeared around the back of the truck, while Aguga continued answering questions for the other teenagers. Aguga heard a shot on the other side of the truck. He turned and was struck by a bullet in the neck. The teenager on the other side of the truck shot him a second time, in the shoulder. All of the teenagers then fled the scene.

Aguga was hospitalized for a month and had to have multiple surgeries as a result of his gunshot wounds. While he was in the hospital, and again at trial, Aguga identified F.D.M. as the teenager who had the gun and who shot him. He testified that none of the other teenagers was armed.

A. Craft lives in the neighborhood where Aguga was shot. She was entering the neighborhood as Aguga was exiting the ice cream truck, bleeding from the gunshot wounds. She witnessed the teenagers around the truck start running away, but she was unable to identify any of them. She testified that one of the teenagers was on a small bike.

C.R. was also in the neighborhood when Aguga was shot. C.R. testified that he was in the neighborhood that afternoon spending time with friends when they ran into F.D.M. C.R. testified that when he approached F.D.M., F.D.M. shooed him away and told him that he was going to rob the ice cream man. C.R. thought that F.D.M. was joking. C.R. testified that he subsequently heard two pops that sounded like firecrackers. He then saw Aguga screaming for help. He also testified that he saw F.D.M. and another acquaintance jogging away from the ice cream truck.

J.B. was with C.R. when they encountered F.D.M. He testified that F.D.M. waived them away because “he was about to do something bad.” He further testified that he witnessed F.D.M. shoot Aguga and run away. He stated that he had seen F.D.M. with a gun several days earlier. J.B. identified the gun F.D.M. used in the shooting as a .32–caliber and testified that he had seen it at F.D.M.'s house days before the shooting. J.B. testified that he was not wearing his glasses when he witnessed the shooting but that he knew F.D.M. and could recognize him without glasses.

R.T. also testified about the day of the shooting. He testified that he was on his bike, talking to the ice cream man when F.D.M. approached. According to R.T., F.D.M. asked for a dollar,

stating that he would pay R.T. back because he was “fixing to get the ice cream man.” R.T. testified that F.D.M. pulled out a gun when he said this, and R.T. understood him to be saying that he was going to shoot the ice cream man. R.T. testified that he saw F.D.M. approach the side of the ice cream truck and heard shots but did not see the shooting. R.T. also testified that after the shooting F.D.M. threatened to beat him up if he called the police.

Deputy T. Pasket was the first officer on the scene after the shooting. He testified that they recovered two shell casings at the scene. Sergeant R. Minchew, to whom the case was assigned, testified that the shell casings were from a .32–caliber gun. Sergeant Minchew also testified that Crime Stoppers received an anonymous tip that a young man named “Chris was the shooter” and that the young man lived on Carola Forest in the neighborhood where the shooting occurred. Sergeant Minchew spoke with an officer assigned to the neighborhood and identified F.D.M. as “Chris.” At trial, all three of the young men who knew F.D.M. called him by the name “Chris,” and another deputy testified that F.D.M. lived on Carola Forest.

A few days after the shooting, Sergeant Minchew visited Aguga while he was recovering in the hospital. Aguga gave a written statement and, in a photographic lineup, identified F.D.M. as the person who shot him. Sergeant Minchew testified that he asked Aguga, who was still not fully able to speak due to the neck wound, how sure he was about the identification and Aguga mouthed that he was “very sure.”

F.D.M. presented testimony from one witness at trial-his mother, S.W. She also testified that everyone knew him as “Chris.” She did not know where her son was at the time of the shooting. She testified that R.T. had come to her house to see her son after the shooting, contrary to his testimony that he did not see F.D.M. after the shooting until F.D.M. later threatened him not to go to the police.

Although juvenile cases are civil proceedings, we review challenges to the sufficiency of the evidence to support a finding that a juvenile engaged in delinquent conduct using the standards applicable to criminal cases. *In re C.J.,* 285 S.W.3d 53, 55–56 (Tex.App.-Houston [1st Dist.] 2009, no pet.); *In re G.A.T.,* 16 S.W.3d 818, 828 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). This Court reviews criminal sufficiency-of-the-evidence challenges under a single standard of review-the Jackson standard-regardless of whether the appellant raises a legal or factual sufficiency challenge. *See Ervin v. State,* 331 S.W.3d 49, 52–54 (Tex.App.-Houston [1st Dist.] 2010, pet. ref d) (applying *Brooks v. State,* 323 S.W.3d 893, 894–913 (Tex.Crim.App.2010) and *Jackson v. Virginia,* 443 U.S. 307, 320, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)); *see also Bearnth v. State,* No. 01–09–00906–CR, 2011 WL 5110241, at *2 (Tex.App.-Houston [1st Dist.] Oct. 27, 2011, no pet.).

Under the Jackson standard, evidence is insufficient to support a conviction if, considering all the record evidence in the light most favorable to the verdict, no rational fact-finder could have found that each essential element of the charged offense was proven beyond a reasonable doubt. *See Jackson,* 443 U.S. at 317, 319, 99 S.Ct. at 2788–89; *Laster v. State,* 275 S.W.3d 512, 517 (Tex.Crim.App.2009). Evidence is insufficient under this standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere “modicum” of evidence probative of an element of the offense; (3) the evidence

conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *See Jackson,* 443 U.S. at 314, 318 n. 11, 320, 99 S.Ct. at 2786, 2789 & n. 11; *Laster,* 275 S.W.3d at 518. The Jackson standard gives full play to the responsibility of the fact finder to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson,* 443 U.S. at 319, 99 S.Ct. at 2789; *Clayton v. State,* 235 S.W.3d 772, 778 (Tex.Crim.App.2007). An appellate court presumes the fact finder resolved any conflicts in the evidence in favor of the verdict and defers to that resolution, provided that the resolution is rational. *See Jackson,* 443 U.S. at 326, 99 S.Ct. at 2793.

Held: Affirmed

Memorandum Opinion: To prove that F.D.M. committed the aggravated assault with which the State charged him, the State had to prove that F.D.M. "intentionally, knowingly, or recklessly cause[d] bodily injury to [Aguga]" and "use[d] or exhibit[ed] a deadly weapon" when he did so. TEX. PENAL CODE ANN. §§ 22.01(a)(1), 22.02(a)(2) (West 2011). F.D.M. contends that the State's case rests primarily upon the testimony of two witnesses—Aguga and J.B.—and that the testimony of these witnesses is not credible.

F.D.M. argues that Aguga's testimony is not credible for two reasons. First, F.D.M. asserts that Aguga "testified that he felt like he was being surrounded and had to leave," and that "[u]nder these circumstances, [Aguga] could easily misidentify the individual who shot him." This contention is undermined by the testimony at trial. Aguga identified F.D.M. as his shooter and testified that he had a good view of F.D.M.'s face when F.D.M. shot him. Sergeant Minchew also testified that Aguga indicated that he was "very sure" when he identified F.D.M. as the shooter in the photographic lineup.

Jurors may rely on testimony from the victim to identify a shooter and on the victim's identification of his or her shooter in a photographic lineup. *See Harmon v. State,* 167 S.W.3d 610, 614 (rejecting argument that evidence was insufficient to support conviction when only one witness, the victim, was able to identify defendant as shooter); *see also Akbar v. State,* 190 S.W.3d 119, 124 (Tex.App.Houston [1st Dist.] 2005, no pet.) (relying on victim identification of shooter); *Gilstrap v. State,* 65 S.W.3d 322, 329 (Tex.App.-Waco 2001, pet. ref'd) (same); *Epps v. State,* 24 S.W.3d 872, 880 (Tex.App.-Corpus Christi 2000, pet. ref'd) (same); *Jones v. State,* 867 S.W.2d 175, 176 (Tex.App.-Beaumont 1993, no pet.) (same). Even the testimony of a single eyewitness may be sufficient to support a conviction. *Davis v. State,* 177 S.W.3d 355, 359 (Tex.App.-Houston [1st Dist.] 2005, no pet.) (citing *Aguilar v. State,* 468 S.W.2d 75, 77 (Tex.Crim.App.1971)); *Lewis v. State,* 126 S.W.3d 572, 575 (Tex.App.-Texarkana 2004, pet. ref'd). Here, two witnesses identified F.D.M. as the shooter and several witnesses identified him as present at the time of the shooting and as having made statements indicative of guilt prior to the shooting.

Second, F.D.M. argues that Aguga could not identify the shooter when Sergeant Minchew first visited him in the hospital. But F.D.M. misstates the testimony. Sergeant Minchew was unable to speak to Aguga the first time he visited the hospital because of his medical condition.

The testimony F.D.M. cites in his brief relates to Sergeant Minchew's second visit to Aguga in the hospital, at which time Aguga did identify F.D.M. as the shooter.

F.D.M. next contends that J.B.'s testimony was not reliable because the sun was “kind of in his eyes at the time of the shooting, and he was not wearing his glasses. J.B. testified that he knew F.D.M. and was able to identify F.D.M. without his glasses, and F.D.M. presented no evidence to contradict this testimony. As the sole judges of credibility, the jurors are free to believe or disbelieve all or any part of a witness's testimony. *Penagraph v. State,* 623 S.W.2d 341, 343 (Tex.Crim.App.1981); Davis, 177 S.W.3d at 358. Thus, it was the exclusive province of the jury to determine the credibility of J.B.'s testimony that he had been able to identify F.D.M. without his glasses.

F.D.M. also argues that “[t]he State produced several witnesses who heard the appellant say, shortly before the alleged offense, that he was going to rob the ice cream man,” but “the probative value of this testimony is easily discounted by the testimony of C.R ., who” said that F.D.R. ‘ “joke[d] around a lot’ and dismissed the statement as [F.D.R.] simply ‘playing.’ “ F.D.R. asserts that C.R. believed that he was not serious about robbing anyone, and “[t]here was no reason for the jury to think otherwise.” We disagree. Four witnesses placed F.D.M. at the scene of the crime; two witnesses identified F.D.M. as the shooter; one witnesses identified the type of gun F.D.M. used in the shooting and placed the same type of gun in F.D.M.'s home days before the shooting and in his possession immediately before the shooting. Additionally, one witness testified that F.D.M. threatened to beat him up if he went to the police. *See Wilson v. State,* 7 S.W.3d 136, 141 (Tex.Crim.App.1999) (holding that evidence of threatening witness is evidence of consciousness of guilt) (citing *Ransom v. State,* 920 S.W.2d 288, 299 (Tex.Crim.App.1996) (op. on reh'g)). This evidence reasonably could have caused the jury to conclude that F.D.M. was not joking when he made statements to others that he was going to rob the ice cream man immediately before the shooting.

Conclusion: We hold that the evidence is sufficient to support the jury's finding beyond a reasonable doubt that F.D.M. committed the offense of aggravated assault with a deadly weapon. We therefore affirm the trial court's judgment.