



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-0242-19

WILLIAM ROGERS, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRTEENTH COURT OF APPEALS
REFUGIO COUNTY**

SLAUGHTER, J., filed a concurring opinion.

CONCURRING OPINION

I join the Court's opinion, which correctly reverses Appellant's conviction for burglary of a habitation and remands the case for a new trial based on harmful jury-charge error.¹ The narrow issue raised on discretionary review is whether the trial court harmfully

¹ I note here that Appellant was originally convicted of two offenses: burglary of a habitation under Penal Code Section 30.02(a)(3), and aggravated assault under Penal Code Section 22.02(a)(2). Because the burglary indictment alleged that Appellant had entered a habitation without the

erred by refusing Appellant's requested defensive instructions. Appellant did not raise the separate issue of the trial court's almost-complete exclusion of evidence that would have supported Appellant's request for those defensive jury instructions. In my view, the trial court's actions deprived Appellant of his right to present a complete defense. Thus, I feel compelled to address the issue even though it was not raised.

The trial court here did not simply make discretionary evidentiary rulings; it actively prohibited Appellant from raising or mentioning any justification defensive theories in front of the jury and refused to allow Appellant to present evidence that might have supported those theories. Appellant admitted to engaging in the charged conduct. Thus, based on a long line of precedent from this Court, the trial court was obligated to allow Appellant to present evidence supporting his justification defenses. Instead, the trial court's rulings and active interference, which prevented the jury's consideration of these justification defenses, significantly undermined Appellant's constitutional right to present a complete defense and ultimately deprived Appellant of his only real plausible avenue for acquittal. Given the circumstances here involving multiple related errors by the trial court, this Court's majority opinion correctly considers the totality of the trial court's conduct in determining that Appellant is entitled to a new trial.

I. Background

a. Relevant Facts

owner's effective consent and thereafter committed or attempted to commit aggravated assault, the court of appeals held that this allegation subsumed the facts required for the aggravated assault charge; thus, punishing Appellant for both offenses would violate double jeopardy. *Rogers v. State*, 527 S.W.3d 329, 336 (Tex. App.—Corpus Christi 2017). Accordingly, the court of appeals vacated the aggravated assault conviction. *Id.* Therefore, only the burglary-of-a-habitation conviction is before us at this juncture.

To provide a complete picture of the magnitude of the errors committed in this case, I believe it is important to highlight the evidence Appellant sought to introduce at trial. While some of these facts are addressed in the Court's opinion as evidence that was presented to the jury, I am also including additional facts that were not presented to the jury. We are aware of the following based on Appellant's presentation in a bill of exception.²

Appellant, a married man, was engaged in a long-term affair with Sandra Watson, a married woman. Appellant and Sandra met in June 2011 through a dating app. Sandra initially told Appellant she was widowed. Once she told him the truth, Appellant began helping Sandra devise a plan to leave her husband, David Watson. Despite never divorcing David, Sandra and Appellant dated seriously for nearly two years. In that time, they got together several times per week, shared a bank account, and exchanged an estimated 70,000 text messages – 187 of which were exchanged on the date of the offense, according to Appellant. They also exchanged house keys and alarm system passcodes for each other's homes. From time to time during the affair, Sandra had Appellant use her house key and alarm code to let himself into her house to feed her cats while she was away and David was at work.

² See TEX. R. APP. P. 33.2 (“To complain on appeal about a matter that would not otherwise appear in the record, a party must file a formal bill of exception.”); TEX. R. EVID. 103(a)(2), (c) (“A party may claim error in a ruling to admit or exclude evidence” and “if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.” . . . “In a jury trial, the court must allow a party to make the offer outside the jury's presence and before the court reads its charge to the jury. At a party's request, the court must direct that an offer of proof be made in question-and-answer form.”). As this Court has previously acknowledged, “[t]he right to make a bill of exception is absolute” and “a trial court does not have discretion to deny a request to perfect a bill of exception.” *Kipp v. State*, 876 S.W.2d 330, 333 (Tex. Crim. App. 1994).

Two days after Christmas in 2012, Appellant returned to his home after being away for the holiday to find that many items were out of place indicating that someone had been inside the home. Upon checking the alarm system, Appellant discovered that the passcode he set for Sandra was used to access the home. Appellant immediately messaged Sandra to ask why she had been in his house. Appellant received a response, but the message did not sound like it was from Sandra. It included language Sandra would not ordinarily use, was very vague, and was not signed “me” as was almost every one of her messages. When Sandra’s response failed to confirm that she had not given Appellant’s alarm passcode to anyone else, Appellant replaced his entire alarm system.

The next time Appellant and Sandra got together face-to-face, Sandra told Appellant that on Christmas Eve, David had gone through her Facebook account, read her messages, and discovered the affair. David had also seen Appellant’s Facebook page, knew he was married, had his wife’s contact information, and knew where Appellant worked. Sandra also disclosed that David had seen her personalized alarm code to Appellant’s house.

A few weeks later, between February 10th and the 14th, Appellant estimated that Sandra sent him about 850 text messages. She also called him twice, which was highly unusual. During one of these phone calls, she was “real frantic” and told Appellant that she thought David was going to kill her cats. She asked Appellant multiple times to go to her house and check on them. On February 14th, after Sandra again urged Appellant to check on her cats, he responded that he was too busy that day. But Sandra was adamant. Eventually, Appellant relented after Sandra assured him that David would be working late and would not be at home.

So, on February 14th, Appellant stopped by Sandra's house on his way home from work, parked about half a mile away, used his key to get in, entered the alarm code to deactivate the system, and fed Sandra's cats. But, while Appellant was still inside the home, he saw David arrive. Because Appellant was unable to leave before David came inside, he hid in a closet. Inside this closet was a gun safe and one of the guns was sitting on top of the safe.

According to Appellant, David found him inside the closet, shouted "YOU!" in a "loud, booming voice," and lunged at him with a knife in his hand. Fearing for his life, Appellant grabbed the gun from on top of the gun safe. While the two fought over it, the gun discharged into David's groin. The struggle continued for some time, and they moved between rooms fighting over the knife and the gun. Eventually, Appellant was able to escape to his truck.

Appellant's version of events would have been supported by the testimony of Sandra's adult daughter, Catarina,³ had the trial court allowed her to testify. According to Catarina's bill of exception testimony, Catarina accused Sandra of orchestrating the event between Appellant and David because it "didn't sound like [Appellant]." In response to Catarina's accusation, she claimed that Sandra "just said, well, I can see how you would think that but . . . And then she didn't say anything, she just kind of shrugged it off"

Catarina further offered that David was abusive both to her and to her mother. She claimed that David threatened her repeatedly. Specifically, he told Catarina that if she "ever

³ Catarina is Sandra's biological daughter, whom Sandra left when Catarina was four years old. The two reconnected when Catarina turned 18, and Catarina then lived with Sandra and David for a time.

betrayed him that he could find [her] without . . . even trying, and that he could touch anyone in the world without even using his own hands.” David “always scared [her],” so Catarina eventually moved out of the Watson home “so [she] wouldn’t have to come back.” As for David’s abuse of Sandra, Catarina stated that she would see bruises on Sandra’s arms and legs the morning following evenings when she heard them fighting. When she asked her mother why she stayed with David, Sandra replied that “once he died she’ll get all his money” and that “if she wanted to she could just kill him.”

b. The trial court’s exclusion of evidence.

As mentioned above, the trial court excluded much of Appellant’s testimony at trial. The court did not permit Catarina to testify before the jury, and Sandra did not testify.⁴

The exclusion of Appellant’s defensive evidence was initiated through the State’s pre-trial motion in limine. The motion sought to exclude “[a]ny discussion during voir dire and/or trial on the merits of the laws relating to justification, necessity, apparent danger, self-defense, deadly force in defense of person, mutual combat, or consent to use of force.” The trial court granted the motion but initially limited the ruling to voir dire. The court told defense counsel, “[I]f it gets to where we have an instruction on self-defense, I will give you adequate time to explain that to the panel.” Then, while discussing pretrial motions before voir dire, defense counsel asked to revisit the motion in limine. The following exchange took place:

Counsel: I don’t know, Judge, how the Court can grant [the motion in limine] denying all our possible defenses without hearing any of the evidence. Not only that, it denied my client the presumption of innocence,

⁴ It is unclear from the record why Sandra did not testify. It appears she was served with a subpoena, and during pretrial proceedings both the State and Appellant indicated that they expected her to testify.

denies me the right to challenge for cause on a defensive theory and, thirdly, Your Honor, I can't even exercise a peremptory challenge intelligently if I can't go into the areas that I expect the testimony to show.

[. . .]

Trial court: Any discussion during voir dire and/or trial on the merits of the law relating to this justification, necessity, apparent danger, self-defense, deadly force and . . . I've ruled on self-defense. I've ruled on deadly force in defense of person.

[. . .]

Counsel: On those two, Judge. But here we don't even know what the background of that is going to be and that's a possible defense for the defendant and I need to voir dire the jury to see what their attitude is and whether they're going to follow the law if so instructed in that area.

[. . .]

Trial court: I've already ruled on those motions, I'm not going to reconsider them.

Counsel: I cannot talk to the – I just want to clarify for the Court. I cannot talk to the jury about these items to voir dire?

Trial court: No. You cannot talk to the jury about anything that would constitute a self-defense or justification for the actions of your client. It's the same thing.

Counsel: Well, I understand, Judge. Without getting a jury that's going to listen to the testimony wherein you might instruct on a necessity or a self-defense once you hear the testimony, I'm picking a jury blindfolded. I don't know what their attitude is. Maybe they said there's no defense at all ever. And I don't have a – and I might have a possible challenge for cause but I also would have a peremptory challenge and I can't exercise it if I don't talk to them about it. And that's the Court's ruling?

Trial court: Yes.

Through this exchange, the trial court issued a clear prohibition on any discussion of justification defenses during voir dire. The question of whether Appellant could introduce evidence supporting a justification defense during trial, however, was left unresolved.

In response to another pretrial motion, the trial court ruled that evidence of the affair between Appellant and Sandra must be excluded because it is “not relevant.” Initially, the court acknowledged that such evidence may go to witness bias and could therefore be used as impeachment evidence, particularly as it related to Sandra’s husband. However, during trial the court consistently sustained the State’s objections to the defense’s questions seeking to elicit testimony about the affair. And during David’s testimony, he never mentioned Appellant’s and Sandra’s affair, claimed to have no knowledge of who Appellant was at the time of the incident, and said that he only learned Appellant’s name from the police afterwards. Appellant was not allowed to challenge this testimony.

By the time Appellant took the stand, the trial court had made clear that it would not allow Appellant to raise any justification defenses. It solely permitted him to introduce a minimal amount of defensive evidence through his own testimony—namely, that Sandra had asked him to feed her cats on the day in question, and that he had been given a key and the alarm code to enter the house. Appellant was also able to testify that David was armed with a knife when he entered the closet and shouted, “YOU!” upon seeing Appellant. But aside from these basic facts, Appellant was not permitted to delve into any of the evidence regarding the affair, his prior connection to David, or his mental state at the time of the conduct, all of which might have supported his claim of self-defense.

For example, during Appellant’s direct examination, the trial court, *sua sponte*, interrupted Appellant’s testimony and initiated a discussion with counsel off the record. The judge’s interruption came immediately after defense counsel asked Appellant to

describe his mental state during the altercation. After an off-record discussion at the bench, the court went back on the record, outside the presence of the jury, and said:

This is further explanation for the defense of this Court's position on the issue of self-defense or fearing for your life. I have advised [defense counsel] that he cannot go into that and he cannot elicit testimony about whether [Appellant] was afraid of the situation that he found himself in in the Watson home for this reason. [Appellant] made a conscious decision . . . to go to the home of David Watson without David Watson's consent. He did have Mrs. Watson's consent I'm convinced, but he also knew at that time that Mrs. Watson would not be present at the time he was at the home and he knew there was a possibility that David Watson could be there because David Watson was loose in the general public. The fact that he went to his home knowing that he did not have David Watson's consent and was, unfortunately, confronted by David Watson in that action takes away from him the right to claim self-defense because he created the situation that he found himself in and he cannot be in any way found to be defending himself once he creates that situation. So I'm advising you in the presence of your client and your co-counsel that you may not venture off into anything that alludes to or invades the province of self-defense.

In response, defense counsel made clear that he disagreed with the court's ruling but would adhere to it.

The trial court's interruptions were not just reserved for the trial testimony. It also interfered with Appellant's bill of exception testimony. Within the first few minutes of questioning on the bill of exception, the trial court interrupted Appellant's testimony and asked, "Are all of your proffers going to be this long?" And when counsel asked Appellant about his mental state during the altercation, the trial court incorrectly told counsel that he was "rehashing stuff" that had already been covered during Appellant's examination before the jury. This statement was untrue because, as noted above, the court had prevented Appellant from testifying about his mental state in front of the jury. In response, counsel explained that he was "trying to get in parts that maybe were not [covered]." The trial court,

however, indicated that the defense had lost its chance: “If they’re not in the record then they’re not in the record because [lead defense counsel] elected not to ask questions about them. I’m not going to let you retry that part of the case that has already been tried.”

When defense counsel attempted to create bills of exception for the additional witnesses that the trial court had barred from testifying, the judge again interfered. During Catarina’s bill of exception testimony, the trial judge interrupted to tell defense counsel that they were taking too much of the court’s time and that counsel was limited to five minutes for completion of Catarina’s and a third witness’s bill of exception testimony. After that, the court would not entertain any further testimony.

When counsel moved on to the next witness, he promised the court that while it would be short, he needed to question two witnesses rather than one. In response, the trial court again expressed frustration with the defense: “[Counsel], you’re infringing on the patience of the Court. This is crazy.” Counsel explained that he needed “to get this in for the record” and gave a brief explanation of the testimony. The first witness’s purpose was to corroborate Appellant’s account about him taking care of Sandra’s cats. The court declined “to receive that evidence” because it was “not relevant to any issues in the case.” It did, however, allow testimony from the second witness, who testified that Appellant had previously taken care of his animals (and vice versa), and Appellant would use a key and security codes to get into his house. In all, the trial court only allowed the defense about 25 minutes to create bills of exception for all its witnesses, including Appellant himself.

II. The trial court’s rulings collectively interfered with Appellant’s ability to present a complete defense.

Having laid out the evidence excluded at trial, it is clear that the trial court's actions collectively undermined Appellant's ability to defend himself. It certainly should have been clear to all the parties involved that Appellant was left practically defenseless as a result of the trial court's rulings and active interference.

The United States Constitution "guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). When a trial court's rulings collectively operate to undermine a defendant's fair opportunity to defend himself, due process concerns are implicated. A court's evidentiary rulings excluding evidence might rise to the level of a constitutional violation under two scenarios: first, "when a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence which is vital to his defense; and" second, "when a trial court's clearly erroneous ruling excluding otherwise relevant, reliable evidence which forms such a vital portion of the case effectively precludes the defendant from presenting a defense." *Williams v. State*, 273 S.W.3d 200, 232 (Tex. Crim. App. 2008) (citing *Potier v. State*, 68 S.W.3d 657, 659–62 (Tex. Crim. App. 2002)). "In other words, the erroneous ruling" implicates the Constitution if it "goes to the heart of the defense." *Wiley v. State*, 74 S.W.3d 399, 405 (Tex. Crim. App. 2002).

The trial court's rulings in this case collectively rise to the level of a constitutional violation. Here, the trial court consistently precluded the possibility of multiple defensive theories—often on its own accord without prompting by the State—and regularly expressed frustration with defense counsel for attempting to develop a defense. Ultimately,

this case is a prime example of the ways in which a trial court's evidentiary rulings can undermine "the heart of the defense." *See Wiley*, 74 S.W.3d at 405.

While not all the testimony within the bills of exception would have been admissible, much of it was. And if admitted, this evidence would have significantly enhanced Appellant's ability to raise the defensive issues before the jury. For example, whereas Appellant was wholly prevented from addressing his mental state before the jury, had he been permitted to do so he could have explained that he was in fear for his life when he saw David entering the closet with a knife. He could have also provided context and explanation about his history with David and Sandra, including that David had learned about his affair with Sandra shortly before the incident. This would have provided a possible motive for David to act aggressively towards Appellant. Appellant's testimony on this point might have also undermined David's credibility, given that David did not acknowledge knowing Appellant and instead told police that Appellant was a "stranger" who wanted to rob him. Further, Catarina's testimony could have corroborated much of Appellant's story about his relationship with Sandra and could have called into question David's credibility by alleging that he was abusive and had threatened both Catarina and Sandra. In all these ways, the additional evidence the jury did not hear deprived it of a complete picture of the events. Coupled with the absence of Appellant's requested instructions, the jury was left with virtually no option but to convict Appellant. In short, but for the trial court's interference with Appellant's defense, Appellant would have introduced additional, and far more compelling, evidence to support the requested defensive jury instructions.

A series of erroneous rulings such as occurred here can cause ripple effects throughout a case that ultimately may render the proceedings fundamentally unfair in violation of due process. Here, regardless of whether Appellant's version of events or excluded testimony was credible, I have no doubt that he was deprived of a fair opportunity to have the jury decide these issues. It is the jury's province to evaluate the credibility of defensive evidence, not the trial judge's.⁵ The trial court denied Appellant his fundamental right to have the jury pass on the issue of his guilt after having a complete picture of the relevant facts. Not only did the court prevent the introduction of evidence to support justification defense jury instructions, it also then wrongly faulted Appellant for failing to introduce sufficient evidence to support the requested charges. Simply put, it all comes down to the trial court's improper interference with Appellant's ability to defend himself at trial.

III. Conclusion

⁵ Along these same lines, I note that the State Prosecuting Attorney's Brief in this case asserts that, even accepting Appellant's version of events as true, as a matter of law, he could not claim self-defense in this case. The basis for this assertion is that Sandra's husband's use of force against Appellant would have been lawful in any event because Appellant was found hiding in the bedroom closet. *See* SPA's Brief on Discretionary Review, at 2 (contending that Appellant was not entitled to a self-defense instruction as a matter of law; "no jury should be permitted to acquit a defendant who shoots someone he knows is a homeowner who has no reason to expect to find the defendant hiding in his bedroom closet"); *see also* TEX. PENAL CODE § 9.31(a) (providing that use of force is justified when the actor reasonably believes it is "immediately necessary to protect the actor against the other's use or attempted use of *unlawful* force") (emphasis added). But the question of whether David had reason to expect to find Appellant in his home presented a fact issue for the jury. That is to say, at least some evidence suggested that David knew who Appellant was before the assault, knew of the affair between Appellant and Sandra, and perhaps even suspected or knew that Appellant had been asked to go feed the cats on the day in question. Had Appellant been permitted to fully develop the defensive testimony on these matters, perhaps there would have been a rational basis for the jurors to find that David was not threatened by Appellant but was instead the aggressor, thereby making his impending use of force against Appellant unlawful. Thus, under these particular circumstances, I cannot agree that this Court should hold that self-defense was precluded as a matter of law.

The Court correctly reverses Appellant's conviction and remands for a new trial based on harmful jury-charge error. Even without the wrongly excluded evidence and the trial court's interference, Appellant managed to introduce just enough evidence to entitle him to the requested instruction on self-defense. What is more, the trial court's erroneous exclusion of Appellant's defensive evidence seriously undermined Appellant's ability to present a complete defense and, had it been raised, this would have constituted an additional basis for reversal. With these additional thoughts, I join the Court's opinion.

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