COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

LUIS TORRES,	§	No. 08-13-00027-CR
Appellant,	§	Appeal from
v.	§	120th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC # 20120D02761)

O P I N I O N

Luis Torres appeals his conviction of aggravated assault of a public servant. After a jury found Appellant guilty, Appellant and the State entered into an agreement regarding punishment. In accordance with the agreement, the trial court assessed Appellant's punishment at imprisonment for five years. Finding no error, we affirm.

FACTUAL SUMMARY

Appellant failed to pay apartment rent, and his landlord brought an eviction action. After filing the eviction action, the landlord stopped by the Constable's Office and specifically warned Sgt. Marcos Chavez that Appellant, who worked as a security guard, had a gun. Sgt. Chavez made two attempts to personally serve Appellant with the notice of eviction, but Appellant was not home or did not answer the door. Consequently, Sgt. Chavez mailed the notice of eviction to Appellant and attached it to the front door. Appellant did not appear for the trial and the justice

of the peace entered a default judgment. The landlord obtained a writ of possession on May 14, 2012.

On May 21, 2012, Sgt. Chavez and Deputy Constable Oscar Ugarte went to the apartment complex to execute the writ of possession. Both Sgt. Chavez and Deputy Ugarte are certified peace officers. They obtained the key from the landlord and went to Appellant's apartment which was on the second floor. The door to Appellant's apartment has an outer metal door and an inner wooden door. Sgt. Chavez knocked on the metal door, identified himself, and explained that they were there to execute the writ of possession. Appellant opened the inner wooden door and Sgt. Chavez again identified himself and told Appellant their purpose in being there. Appellant told the deputy constables that he needed to go to the bathroom because he had diarrhea and he shut the door. Both Sgt. Chavez and Deputy Ugarte testified that neither of them had their weapons drawn during this encounter. After giving Appellant a few minutes, Sgt. Chavez knocked on the metal door again. Appellant shouted from inside the apartment that he had already told them he was ill and needed some time. Using the key given to him by the landlord, Sgt. Chavez unlocked the metal exterior door, left it slightly ajar, and knocked on the exterior door again. Appellant, who was agitated, opened the inner door just enough to reach through to the metal door. Appellant shouted at Sgt. Chavez, and pulled the metal door closed and locked it before Sgt. Chavez could gain entry to the apartment. Appellant also slammed the inner door closed. At that time, Sgt. Chavez instructed Deputy Ugarte to call for assistance because he no longer felt safe and he feared that Appellant intended to arm himself with the gun. In Sgt. Chavez's opinion, Appellant was resisting his efforts to execute the writ of possession by closing the doors and locking them. He further explained that he feared not only for the deputy constables' safety but for the safety of the general public as well.

The deputy constables went back downstairs and blocked off the road to preclude any cross-traffic and to protect the public's safety. Sgt. Chavez retrieved an AR-15 rifle from his vehicle and took cover by a sign downstairs. Sgt. Chavez instructed Appellant that he needed to come out of the apartment, but Appellant refused and he continued to shout back at Sgt. Chavez through the partially opened doors that he was not going to leave his apartment. Sgt. Chavez explained that Appellant would open the doors to shout down at him, but he would step back inside and close the doors again. At one point, Sgt. Chavez told Appellant that he was turning a civil matter into a criminal matter and he needed to come out of the apartment and surrender the property. Appellant, who sounded agitated, told Sgt. Chavez that he was not going to come down and the deputy constables needed to come back upstairs and get him. Sgt. Chavez perceived this as a threat to his safety. El Paso police officers and additional deputy constables arrived on the scene to provide assistance and some of them attempted to negotiate with Appellant. Appellant continued to refuse to surrender the apartment and the standoff continued. During this time period, Sgt. Chavez was the only officer with his weapon drawn and he provided cover for the other officers in the event Appellant came out of the apartment with his gun. Chavez testified that he held his weapon in the "low ready" position, and when Appellant came out of the apartment he would raise his weapon until he could determine whether Appellant was armed. Once he saw that Appellant did not have a weapon, he would lower the rifle. Appellant knew that Chavez had a weapon because he asked Chavez, "Why are you pointing a gun at me?" Deputy Constable Francisco Almada, who is a peace officer, arrived at the scene and spoke with Sgt. Chavez. Chavez advised him that they were going to file criminal charges against Appellant for interference with public duty and criminal trespass. Deputy Almada, who has crisis negotiation training, went upstairs to speak with Appellant. Almada could not get any

closer than ten feet from Appellant who was standing near the apartment door. Each time Almada tried to take a step closer, Appellant became upset and told him to not come any closer. Appellant told Almada that he was upset with Sgt. Chavez because he had been disrespectful. Almada explained to Appellant that he would ask Sgt. Chavez to leave the immediate area and Appellant could speak to him instead. He also told Appellant that they were there on official business to execute the writ of possession and he would help Appellant store his possessions and locate a place to stay temporarily. Appellant became angry when he saw Sgt. Chavez downstairs by a dumpster, and he told Almada that he was going inside of the apartment to use the restroom and he would be back in 45 seconds. Almada described Appellant as being upset, irate, and aggressive when he made these statements. Almada immediately "feared the worst" because he thought Appellant was "too upset" and might be going back inside of the apartment to retrieve his weapon. Appellant retreated back into the apartment and closed the door.

Almada consulted with the other officers and decided he had to use his Taser on Appellant to bring the confrontation to as safe a conclusion as possible. Appellant abruptly came out of the apartment and still appeared irate. Deputy Juarez attempted to distract Appellant by speaking to him and Almada deployed his Taser striking Appellant in the stomach area. The Taser had no effect on Appellant and he ran back into the apartment. Two of the deputy constables kicked the apartment door open and entered. Almada and other officers followed them inside. As soon as Almada entered, he saw that Appellant was pointing a gun at his chest and in the general direction of the other officers. Almada yelled, "Gun!" and deployed the Taser again. It had minimal effect on Appellant and he did not drop the weapon. Consequently, all of the officers left the apartment and took cover.

Some of the officers ran to the right and were able to get down the stairwell, but Almada

and Juarez went to the left when they exited and were trapped in an exposed area of the apartment complex for approximately an hour. During this time period, Appellant taunted them by stating, "That's funny that you guys are scared of a water gun." Almada asked Appellant whether it was really a water gun and Appellant said, "You know what? Why don't you come in here and find out?"[1] Almada told Appellant that he should turn the weapon over to the officers and come out of the apartment, but Appellant did not do so. The El Paso Sheriff's Office Negotiation Team and SWAT arrived on the scene and Appellant agreed to speak with the Sheriff's Office. Almada and Juarez were able to leave the area only through the use of a ballistic shield provided by the El Paso Police Department.

Appellant testified that Sgt. Chavez had his weapon drawn when he knocked on the apartment door and demanded that Appellant vacate the premises. Appellant told Chavez that he was "not moving anywhere as long as there's a weapon pointed at me." According to Appellant, Chavez backed away from the apartment with his weapon still drawn. Appellant subsequently saw Chavez pointing a rifle at him from behind a dumpster, and he refused to leave the apartment as long as a weapon was pointed at him. Appellant next spoke with El Paso police officers and he told them he felt threatened because Sgt. Chavez was pointing a weapon at him and he did not feel safe. Appellant also spoke with Deputy Almada and told him that he would not leave as long as Sgt. Chavez was pointing a gun at him. He told Almada that he was coming out of the apartment and would leave with him but he needed to use the bathroom first. When Appellant came back outside, the deputy constables used on Taser on him. Appellant explained that he had been trained how to resist the effect of a Taser by not moving for five seconds and he then removed the leads. Fearing for his life, Appellant went back inside of the apartment. When

[1] The weapon Appellant pointed at the officers was not a toy gun. After Appellant was finally taken into custody, Sgt. Chavez examined the gun and saw that it was a black Taurus .357. The gun was fully loaded and the hammer was cocked back.

the officers kicked in the door and entered, a box containing Appellant's gun fell next to him and he instinctively grabbed it by the grip. He denied putting his finger on the trigger, pulling back the hammer, or pointing it at anyone.

The trial court included in the charge a self-defense instruction. The jury rejected Appellant's claim of self-defense and found him guilty of aggravated assault of a public servant as charged in the indictment.

CHARGE ERROR

In his sole issue, Appellant raises three complaints related to the self-defense instruction: (1) the trial court did not include a presumption of reasonableness instruction related to Appellant's use of force; (2) the charge did not include a multiple assailant self-defense instruction; and (3) the self-defense instruction included in the charge is erroneous because it is the general self-defense instruction rather than the self-defense/resisting-arrest instruction for a peace officer. The State responds, in part, that Appellant was not entitled to a self-defense instruction, and therefore, the issues presented amount to harmless error.

Standard of Review

Appellate review of alleged jury charge error typically involves a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex.Crim.App. 2012); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984)(op. on reh'g). First, we must determine whether error occurred. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex.Crim.App. 2013). If there is error in the charge, we must then analyze whether sufficient harm resulted from the error to require reversal. *Wooten*, 400 S.W.3d at 606. Under this second step, the degree of harm necessary for reversal usually depends on whether the appellant properly preserved the error by objection. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App. 2003). Our analysis is also guided by the long-standing

rule that if a defendant is not entitled to an instruction, but the trial court nevertheless gives the instruction, any error in the instruction is harmless. *See Hughes v. State*, 897 S.W.2d 285, 301 (Tex.Crim.App. 1994)(where defendant was not entitled to a mitigating evidence instruction, any error in the instruction given by the trial court was harmless because it could not have contributed to the jury's answers to the special issues); *Burks v. State*, 40 Tex.Crim. 167, 49 S.W. 389, 391 (Tex.Crim.App. 1899)(a defective self-defense charge was not reversible error because defendant was not entitled to a charge on self-defense). If Appellant was not entitled to a self-defense instruction in the first place, any error related to the instruction is harmless.

Appellant Denied Committing the Offense

A defendant is entitled to an instruction on the law of self-defense if there is some evidence that he intended to use force against another and he did use force, but he did so only because he reasonably believed it was necessary to prevent the other's use of unlawful force. *Ex parte Nailor*, 149 S.W.3d 125, 132 (Tex.Crim.App. 2004). Self-defense is a "justification" defense. *See* TEX.PENAL CODE ANN. § 9.31 (West 2011)(providing that a person is justified in using force against another in certain circumstances). Consequently, a defendant is not entitled to an instruction on self-defense unless he first admits to committing the charged conduct and offers self-defense as a justification for the conduct. *See Ex parte Nailor*, 149 S.W.3d at 132-133 & n.33; *Ford v. State*, 112 S.W.3d 788, 794 (Tex.App.--Houston [14th Dist.] 2003, no pet.). Denial of the charged conduct is inconsistent with a claim of self-defense. *Sanders v. State*, 707 S.W.2d 78, 81 (Tex.Crim.App. 1986).

A person commits the offense of aggravated assault on a public servant if he intentionally or knowingly threatens a person that the actor knows to be a public servant with imminent bodily injury while the public servant is lawfully discharging an official duty and employs a deadly

weapon in the assault. *See* TEX.PENAL CODE ANN. §§ 22.01(a)(2), 22.02(b)(2)(B)(West 2011 and Supp. 2016). The indictment alleged that Appellant intentionally or knowingly threatened Francisco Almada with imminent bodily injury, a person he knew was a public servant lawfully discharging an official duty, and Appellant used or exhibited a deadly weapon, a pistol, during the commission of the assault.

To be entitled to a self-defense instruction, Appellant was required to first admit that he intentionally or knowingly threatened Deputy Almada with imminent bodily injury and he used a deadly weapon during the commission of the offense. Appellant testified that the gun fell next to him when the officers forcibly entered the apartment and he picked up the gun out of instinct, but he never pointed it at anyone. Because Appellant denied having any intent to threaten anyone with imminent bodily injury and he further denied pointing the pistol at anyone, including Deputy Almada, Appellant denied committing the offense of aggravated assault. *See Ex parte Nailor*, 149 S.W.3d at 133; *Ford*, 112 S.W.3d at 794; *Wegner v. State*, No. 01-04-00729-CR, 2006 WL 727707 (Tex.App.--Houston [1st Dist.] March 23, 2006, pet. ref'd)(holding that the defendant was not entitled to instruction on self-defense in prosecution for aggravated assault, where defendant admitted only that he got out of his truck while holding a shotgun and denied that he had threatened the complainant with imminent bodily injury by pointing the shotgun at her). Consequently, Appellant was not entitled to a self-defense instruction, and any defect in the instruction actually given was harmless. Likewise, the trial court's failure to include instructions on the presumption of reasonableness or multiple assailants does not constitute reversible error.

Officers Did Not Use Deadly Force

Even if Appellant had not denied committing the offense, he was not entitled to a self-

defense charge because there is no evidence the officers used greater force than necessary when attempting to execute the writ of possession or when attempting to place Appellant under arrest for interference with public duties. When the deputy constables first encountered Appellant, they were attempting to execute a writ of possession. Consequently, it is helpful to understand the officers' authority in that context. The Texas Property Code permits an officer executing a writ of possession to use reasonable force in executing the writ and to physically remove the tenant from the premises. A landlord who prevails in an eviction suit is entitled to a judgment for possession of the premises and a writ of possession. TEX.PROP.CODE ANN. § 24.0061(a) (West 2014). The writ of possession must order the officer executing the writ to deliver possession of the premises to the landlord, to instruct the tenants to leave the premises immediately, and, if the tenants fail to comply, to physically remove them. *See* TEX.PROP.CODE ANN. § 24.0061(d)(2). A sheriff or constable is expressly authorized by statute to "use reasonable force in executing a writ under [Section 24.0061]. TEX.PROP.CODE ANN. § 24.0061(h).

When Appellant refused to obey the deputy constables' instructions to leave the premises and he locked himself inside of the apartment, his actions transformed the encounter from a civil matter to a criminal matter. The record reflects that the officers believed Appellant had committed the offense of interference with public duties. *See* TEX.PENAL CODE ANN. § 38.15 (West 2011). A peace officer is justified in using force against another when and to the degree the actor reasonably believes[2] the force is immediately necessary to make or assist in making an arrest or search. TEX.PENAL CODE ANN. § 9.51(a). If, however, an officer uses excessive force to make an arrest, the officer exceeds his statutory authority. *See Daugherty v. State*, 146

[2] The Penal Code defines "reasonable belief" as a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. TEX.PENAL CODE ANN. § 1.07(42)(West Supp. 2016).

Tex.Crim. 488, 176 S.W.2d 571, 575 (Tex.Crim.App. 1943); *Ryser v. State*, 453 S.W.3d 17, 30-31 (Tex.App.--Houston [1st Dist.] 2014, pet. ref'd)(officer convicted of official oppression for use of excessive force when making arrest). Further, the use of excessive force to make an arrest can justify a limited use of force by the suspect in self-defense. *Daugherty*, 146 Tex.Crim. 488, 176 S.W.2d at 575; *Ryser*, 453 S.W.3d at 29-30.

Subject to the exception provided in Section 9.31(b) of the Penal Code, a person is justified in using force against another in self-defense 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.PENAL CODE ANN. § 9.31(a). Section 9.31(b) provides that the justification of self-defense is not available in several different circumstances. TEX.PENAL CODE ANN. § 9.31(b)(2). Pertinent to this case, self-defense is not justified when the force is being used to resist an arrest or search that the actor knows is being made by a peace officer, even though the arrest or search is unlawful, unless the actor's resistance is justified under Subsection (c). TEX.PENAL CODE ANN. § 9.31(b)(2). Under Subsection (c), the use of force to resist an arrest or search is justified: (1) if, before the actor offers any resistance, the peace officer (or person acting at his direction) uses or attempts to use greater force than necessary to make the arrest or search; and (2) when and to the degree the actor reasonably believes is necessary to protect himself against the peace officer's (or other person's) use or attempted use of greater force than necessary. TEX.PENAL CODE ANN. § 9.31(c). Consequently, Appellant was not entitled to an instruction on self-defense unless there is some evidence in the record to show that before he offered any resistance, the officers used or attempted to use excessive force to make the arrest. *See Porteous v. State*, 259 S.W.3d 741, 748 (Tex.App.--Houston [1st Dist.] 2007), *pet. dism'd, improvidently granted*, 253 S.W.3d 288 (Tex.Crim.App.

2008).

Appellant asserts that both Sgt. Chavez and Deputy Almada used excessive force. Appellant claimed in his testimony that Sgt. Chavez had his weapon drawn when he first knocked on the apartment door. Other evidence showed that Sgt. Chavez pointed his rifle at Appellant during the stand-off but never used it. Chavez explained that he raised his weapon each time Appellant exited the apartment, but lowered it again after confirming Appellant was not armed. There is no evidence that Sgt. Chavez's actions amounted to excessive force. *See Porteous*, 259 S.W.3d at 748. A person may not assume that the threatened use of force by a peace officer will become more than a threat or that the use of such force will be greater than necessary to effect an arrest. *Id.*; *see Texas Department of Public Safety v. Petta*, 44 S.W.3d 575, 579 (Tex. 2001).

Deputy Almada used a Taser on Appellant once with only minimal effect before Appellant ran back inside of his apartment. Appellant testified that the officers tackled him and used the Taser on him a second time and it was only then that he picked up his handgun which had conveniently fallen next to him. Deputy Almada testified that when he and the other officers entered the apartment, Appellant pointed a gun at Almada's chest and he deployed the Taser again in an effort to subdue Appellant and force him to drop the gun. It stunned Appellant somewhat, but he did not drop the weapon and the officers were forced to flee the apartment to take cover. An officer's use of a Taser can rise to the level of excessive force such that a self-defense instruction is warranted. *See Perez v. State*, No. 02-12-00147-CR, 2013 WL 1759900, at *1-2 and n.3 (Tex.App.--Fort Worth April 25, 2013, pet. ref'd)(trial court erred by denying defendant's request for a self-defense instruction where evidence showed officers used Taser on

defendant twenty-six times).[3] Based on the facts presented and accepting as true Appellant's testimony that Almada "tased" him twice before Appellant picked up the gun, an ordinary and prudent peace officer could reasonably believe that using a Taser was immediately necessary to make or assist in making an arrest. Consequently, Almada's use of a Taser does not rise to the level of excessive force. *See Gonzales v. Kelley*, No. 01-10-00109-CV, 2010 WL 2650615, at *7 (Tex.App.--Houston [1st Dist.] July 1, 2010, no pet.). For the foregoing reasons, we conclude that Appellant was not entitled to a self-defense instruction. We overrule Issue One and affirm the judgment of the trial court.

September 28, 2016

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Rodriguez, J., Dissenting

(Do Not Publish)

[3] The use of a Taser is not *per se* unreasonable under the Fourth Amendment, but excessive use of a Taser can rise to the level of a Fourth Amendment violation and result in the suppression of evidence. *See Hereford v. State*, 339 S.W.3d 111, 125-26 (Tex.Crim.App. 2011)(in drug prosecution, the officers' repeated use of stun guns on defendant in effort to compel defendant to remove drugs from his mouth was unreasonable, and therefore, the trial court did not err by suppressing evidence).