Affirmed and Memorandum Opinion filed March 30, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00076-CR

BILL COLLINS A.K.A. WILLIE OTIS COLLINS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 54th District Court
McLennan County, Texas
Trial Court Cause No. 2007-1624-C2

MEMORANDUM OPINION

Appellant was convicted of one count of aggravated assault and one count of evading arrest. *See* Tex. Penal Code Ann. §§ 22.01, 22.02(a)(2), 38.04(a) (Vernon 2003). The jury assessed punishment at twenty years' confinement in the Texas Department of Criminal Justice, Institutional Division for the aggravated assault count, and two years' confinement in the Texas Department of Criminal Justice, State Jail Division for the evading arrest count—to run concurrently. Appellant challenges his conviction in two issues: (1) the trial court erred by overruling his *Batson* challenge and (2) the trial court erred by limiting his self-defense instruction in the jury charge. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant and the complainant had a long-standing feud over a female named Frankie Roulhac, whom the complainant was dating. During trial, the complainant testified that at approximately 9:15 p.m. on July 31, 2007, the complainant and Roulhac went out to dinner. Forty-five minutes later, Roulhac and the complainant were on the way home when they saw appellant in his vehicle on the side of the road. Appellant began following them in his vehicle. Eventually, the complainant stopped and appellant pulled his vehicle up next to the complainant's. According to the complainant, appellant got out of his car and walked toward the complainant's car. The complainant rolled down his window and asked appellant what he was doing. Appellant admitted he was following them. The complainant got out of his vehicle and got into an argument with appellant about why appellant was following them. The complainant testified appellant lunged at his throat. Before appellant could reach him, the complainant threw appellant onto the ground and kneed him at least two times. The complainant allowed appellant to get up and both men got back into their respective vehicles. On cross-examination, the complainant admitted that after he allowed appellant to get up from the ground, he grabbed appellant by the throat and warned him not to mess around with him anymore. The complainant and Roulhac drove back to Roulhac's house where the complainant was living at the time.

According to the complainant, when they arrived at Roulhac's house they saw appellant parked in front of her house. The complainant continued driving because, he testified, he knew that appellant was carrying a gun. The complainant and Roulhac discussed getting a motel room for the night to avoid appellant. Eventually, they decided to drive by appellant's mother's home to determine if he was there. Appellant's vehicle was not at his mother's house. Roulhac and the complainant continued to drive around until approximately 1 a.m., when they decided to go home because they were tired.

As they were walking into the house from the driveway, the complainant heard a shot. The complainant walked across the street to determine where the shot came from.

A second shot was fired, hitting the complainant in the leg. The complainant looked toward where he thought the shot had come from and saw appellant getting out of the bushes across the street. Appellant then fired a third shot, hitting the complainant in his other leg. Appellant walked across the street to where the complainant was laying on the ground and shot the complainant two more times in his abdomen. Appellant hit the complainant in the head with his gun and walked off. An ambulance took the complainant to the hospital. The complainant suffered extensive injuries from the bullet wounds.

After the complainant finished testifying, the State called Roulhac. Roulhac's testimony was substantially similar to the complainant's; however, Roulhac testified that after the initial encounter with appellant they did not go back by her house and see appellant parked outside.

After the State rested its case, appellant took the stand. Appellant testified he was not following the complainant and Roulhac after they finished eating. Instead, appellant testified the complainant and Roulhac pulled their vehicle up next to his. Appellant explained that at first he only saw the complainant in the vehicle, so he got out of his vehicle to confront him. But upon getting out of his vehicle, appellant noticed Roulhac was also in the vehicle. Appellant testified he turned around and walked away from the vehicle. According to appellant, after turning away from the complainant's vehicle, the complainant got out of his vehicle and began pushing appellant. The complainant brought appellant to the ground by pressing all of his body weight against appellant. Appellant testified he was in great pain, to the point where he felt like he "was dying". Appellant explained he believed the complainant's intent was to kill appellant, and would have, if Roulhac had not requested the complainant leave appellant alone.

After the roadside altercation concluded, appellant testified that he drove to his friend's house; however, she was not home so appellant tried to locate other local friends. Appellant was unable to contact other friends because, he testified, he repeatedly saw the complainant drive by. At this point, appellant had taken a gun out of his vehicle and was

carrying it on his person. Appellant told the jury that eventually he gave up on trying to get help and found himself sitting outside Roulhac's house.

Eventually, appellant saw the complainant and Roulhac drive into Roulhac's driveway. Appellant testified that he immediately went toward the complainant because he "saw the devil". Appellant told the jury that instead of seeing the complainant's face he saw the devil's face. Appellant testified that he began shooting at "it" (the devil/ the complainant) until he heard his gun making click noises, indicating he was out of bullets. After seeing the complainant struggling on the ground "like a snake", appellant decided he needed to turn himself in at the police station. Appellant testified that while he was driving to the police station, police vehicles with their sirens and lights on began following him. Appellant did not pull over because he believed it would be too dangerous. He thought he would be safer if he just drove to the police station because a relative of his had been killed when he stopped for police on the side of the road.

DISCUSSION

I. Batson Challenge

In his first point of error, appellant contends the trial court committed reversible error when it overruled his *Batson* challenge. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Specifically, appellant argues the State used one of its peremptory strikes to discharge venire member five because of his race.

A. Applicable Law

In *Batson*, the moving party must first make a prima facie case showing the striking party exercised its peremptory challenge on the basis of race. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 1770, 131 L. Ed. 2d 834 (1995); *Contreras v. State*, 56 S.W.3d 274, 278 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *see also* Code Crim. Proc. Ann. art. 35.261(Vernon 2009). The burden then shifts to the striking party to provide a race-neutral explanation for the strike. *Purkett*, 514 U.S. at 767, 115 S. Ct. at 1770–71. If the striking party articulates a race-neutral explanation, the moving party is given an opportunity to respond, since that party has the ultimate burden of proving

purposeful discrimination. *Id.*; *Wamget v. State*, 67 S.W.3d 851, 858 (Tex. Crim. App. 2001). Finally, the trial court must determine whether the moving party met the burden of proving purposeful discrimination. *Purkett*, 514 U.S. at 767, 115 S. Ct. at 1770–71. The best evidence will often be the demeanor of the attorney who exercises the strike. *Hernandez v. New York*, 500 U.S. 352, 365, 111 S. Ct. 1859, 1869, 114 L. Ed. 2d 395 (1991). We apply a clearly erroneous standard of review to the trial court's decision and will reverse only if we are left with a definite and firm conviction an error has been committed. *Hill v. State*, 827 S.W.2d 860, 865–66 (Tex. Crim. App. 1992); *Contreas*, 56 S.W.3d at 278.

B. Analysis

The State used a peremptory strike to remove venire member five, Charles Lee, from the jury panel. Lee was the single African-American venire member remaining after the two other African-American venire members had been stricken for cause. Appellant lodged a *Batson* challenge to the State's peremptory strike of Lee. The State gave two reasons for its peremptory strike of Lee: (1) Lee was the only possible juror remaining, after challenges for cause and the State's nine other peremptory strikes had been used, who had not cited retribution as the most important punishment theory; and (2) Lee expressed great interest in probation. The trial court found the State's basis for the strike race-neutral and overruled appellant's *Batson* objection.

Appellant contends the State's first stated race-neutral reason is not supported by the record. The State explained that it struck Lee because he was the only remaining venire member who had not selected retribution as what he considered the most important punishment theory. The records reflects Lee was not the only remaining venire member who had not selected retribution. After the challenges for cause and the nine other peremptory strikes were used, there were at least four other venire members who had not selected retribution as the most important punishment theory.

As the party making the *Batson* challenge, appellant had the burden to show that the explanation given was merely a pretext for discrimination. *Johnson v. State*, 68

S.W.3d 644, 649 (Tex. Crim. App. 2002) (citing *Ford v. State*, 1 S.W.3d 691, 693–94 (Tex. Crim. App. 1999)). It is not enough merely to show that a proffered explanation turns out to be incorrect. *Id*. Furthermore, a party's failure to offer any real rebuttal to a proffered race neutral explanation can be fatal to his claim. *Id*. (citing *Chamberlain v. State*, 998 S.W.2d 230, 236 (Tex. Crim. App. 1999)). All appellant has proven on appeal is the reason given was incorrect; this is not equal to proving the reason given was a pretext for a racially motivated strike. *Ford*, 1 S.W.3d at 694. Appellant did not meet his burden of persuasion to successfully challenge the State's peremptory strikes at trial. *Id*.

Moreover, the State's second race-neutral reason is supported by the record. The record reflects Lee explained he thought probation is something "you should definitely consider". The State argues these statements reflect that Lee has a soft-stance on punishment, and therefore its basis for striking Lee was not discriminatory. We agree. Having offered an explanation void of any racially discriminatory intent on its face, the State met its burden of articulating a race-neutral explanation. Appellant failed to rebut the State's race-neutral explanation. Accordingly, the trial court did not err in overruling appellant's *Batson* challenge.

For the above reasons we overrule appellant's first issue.

II. Jury Charge

In his second issue, appellant contends the trial court erred by limiting his claim of self-defense in the jury charge. The jury charge included an instruction on self-defense and the following limitation to self-defense:

> [w]hile a Defendant has the right to seek an explanation from or discussion with another concerning a difference with the other person, the use of force against another is not justified if the Defendant sought an explanation from or discussion with another concerning a difference with the other person while the Defendant was unlawfully carrying a handgun.

See Tex. Penal Code Ann. § 9.31(b)(5) (Vernon 2003). Appellant failed to object to this instruction at trial.

A. Standard of Review

When reviewing charge errors, an appellate court must first determine whether error actually exists in the charge. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). Only if the court finds error do we proceed to the second step that requires examination of harm resulting from the error. *Id.*

If an error in a jury charge was the subject of a timely objection in the trial court, then reversal is required if the error is calculated to injure the rights of the defendant, which means no more than there must be *some* harm to the accused from the error. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless. *Id.* On the other hand, if no proper objection was made at trial, as in this case, and the accused claims the error was fundamental he will obtain reversal only if the error is so egregious and created such harm that he has not had a fair and impartial trial—egregious harm. *Id.*

B. Applicable Law

A defendant is entitled to an instruction on every defensive issue raised by the evidence. *Elmore v. State*, 257 S.W.3d 257, 259 (Tex. App.—Houston [1st Dist.] 2008, no pet.). A defensive issue may be raised solely by the defendant's testimony. *Id.* In determining whether the defendant's testimony raises an issue of self-defense, the truth of the defendant's testimony is not at issue. *Id.* Ordinarily, issues like provocation or whether the defendant carried a gun to a discussion are fact issues, and they are included in the jury's charge as limitations to self-defense. *Id.*

A charge limiting a defendant's right to self-defense under section 9.31(b)(5) is properly given when (1) self-defense is an issue; (2) there are facts in evidence that show the defendant sought an explanation from or discussion with the victim concerning their differences; and (3) the defendant was unlawfully carrying a weapon. *Bumguardner v. State*, 963 S.W.2d 171, 175 (Tex. App.—Waco 1998, pet. ref'd). Here, appellant raised the issue of self-defense by his testimony and the trial court submitted an instruction on

self-defense to the jury. Additionally, the trial court submitted an instruction on whether appellant was unlawfully carrying a weapon. Therefore, we must determine whether the evidence shows appellant sought an explanation or discussion with the complainant concerning their differences.

C. Analysis

Appellant, Roulhac, and the complainant all testified there was an altercation between appellant and the complainant at approximately 10 p.m. Additionally, there was testimony presented demonstrating a long-standing feud between appellant and complainant over Roulhac. The complainant and Roulhac testified that a few hours after the roadside altercation they returned home to discover appellant hiding in the bushes across from Roulhac's home with a gun. Additionally, appellant himself testified that he found himself outside Roulhac's house sometime after the fight. The evidence of the dispute between appellant and the complainant and appellant's presence at Roulhac's house later in the evening could lead a reasonable juror to conclude appellant was at Roulhac's house to discuss with the complainant their differences over Roulhac. Accordingly, the evidence raised the issue of whether appellant was at Roulhac's house seeking an explanation while unlawfully carrying a handgun. *See Elmore*, 257 S.W.3d at 257–58 (seeking an explanation instruction proper where long-standing feud existed between neighbor and the armed defendant confronted neighbor because of damaged grass). Thus, the trial court did not err in including this in the jury charge. Appellant's second issue is overruled.

CONCLUSION

Having overruled both of appellant's issues, we affirm the judgment of the trial court.

John S. Anderson
Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

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