In The

Court of Appeals

Ninth District of Texas at Beaumont

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NO. 09-08-00323-CR

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JACK WILLIE DOTSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 1A District Court
Jasper County, Texas
Trial Cause No. 10187 JD

MEMORANDUM OPINION

Jack Willie Dotson appeals his murder conviction. Dotson's complaints concern whether the jury was sufficiently instructed on his claim of self-defense and whether the prosecutor, during his opening statement, made an impermissible comment on Dotson's right not to testify at trial. Dotson also asserts that a juror engaged in an ex parte conversation with the trial judge. Finding no reversible error, we affirm.

Background

Jack Willie Dotson and James McClelland were friends. In December of 2005, Dotson and McClelland were riding around in McClelland's truck. As was his custom during

the hunting season, McClelland carried a loaded rifle placed between the driver's and passenger's seats with the barrel pointing up.

Dotson testified that on the day McClelland died, he and McClelland had been drinking. Dotson also testified that McClelland often became angry with him, and on the day of McClelland's death, McClelland cursed and belittled him. According to Dotson, during their exchange, McClelland threatened him and reached for the rifle; instead, Dotson got the rifle and shot McClelland in the head. After exiting the truck, Dotson shot McClelland a second time in the chest and then left with the rifle.

The police arrested Dotson later that day. Dotson gave the police a recorded statement.[1] Following a jury trial, Dotson was convicted of McClelland's murder and the jury recommended that he receive a life sentence. Subsequently, the trial court sentenced Dotson to life in prison. In three issues, Dotson appeals.

Self-Defense Instruction

In his first issue, Dotson asserts that the trial court's instructions on self-defense failed to "clearly instruct the jury that they must determine whether [Dotson's] actions were justified under the circumstances from [Dotson's] point of view at the time he acted." In our opinion, the manner in which the trial court chose to instruct the jury on Dotson's claim of self-defense did not deprive him of a fair trial.

[1]The record on appeal contains the transcript of the recorded statement; the actual recording was admitted into evidence at trial without objection.

The trial court instructed the jury that it could "consider all relevant facts and circumstances surrounding the killing," and "the previous relationship existing between" Dotson and McClelland, "together with all relevant facts and circumstances going to show the condition of the mind of [Dotson] at the time of the offense[.]" The self-defense instruction followed this preliminary instruction, and it provided:

> You are instructed that a person is justified in using deadly force against another if:
>
> > (1) that person would be justified in using force against another;
> > (2) if a reasonable person in the actor's situation would not have retreated; and
> > (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
> >
> > > (a) to protect himself against the other's use or attempted use of unlawful deadly force; or
> > > (b) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.
>
> You are instructed that a person is justified in using force against another 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. The use of force against another is not justified in response to verbal provocation alone.

The trial court's charge defined "[r]easonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." The application paragraph of the charge also provided as follows:

> You are instructed that if you find that the Defendant was justified in using deadly force or if you have a reasonable doubt as to whether or not the

> Defendant was acting in self-defense on said occasion and under the circumstances, you must acquit the Defendant and find him not guilty.

Neither the State nor Dotson made any objections to the charge. While Dotson argues on appeal that additional instructions on self-defense were "essential" to a fair trial, Dotson did not request additional instructions on self-defense at the time of trial.

We review claims of jury charge error under a two-pronged test. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985); *see also Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009). First, we determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exits, we then evaluate the harm caused by the error. *Id.* The degree of harm required for reversal depends on whether the appellant preserved the error in the trial court. *Id.* When error is not preserved by a timely objection in the trial court, as Dotson acknowledges occurred in this case, an unobjected-to charge requires reversal only if it resulted in "egregious harm." *Id.* at 743-44; *Almanza*, 686 S.W.2d at 171.

"Harm is egregious if it deprives the appellant of a 'fair and impartial trial.'" *Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008), *cert. denied,* 129 S.Ct. 1037, 173 L.Ed.2d 471, 77 U.S.L.W. 3431 (2009) (footnote omitted); *see also Almanza*, 686 S.W.2d at 171. In *Valentine v. State*, the Texas Court of Criminal Appeals held that a defendant's claim of self-defense, which arose from his belief that he was in "apparent danger," was properly presented to the jury when the charge instructed that the defendant's conduct would be justified if he reasonably believed that the deceased was using or attempted to use

unlawful deadly force against the defendant at the time of the offense and the charge correctly defined the term "reasonable belief." 587 S.W.2d 399, 401 (Tex. Crim. App. 1979); *see also Bundy v. State*, 280 S.W.3d 425, 429-30 (Tex. App.–Fort Worth 2009, pet. ref'd); *Lowe v. State*, 211 S.W.3d 821, 824-25 (Tex. App.–Texarkana 2006, pet. ref'd). Here, as in *Valentine*, the trial court's charge contains the standards and definitions relating to self-defense, deadly force, and reasonable belief, as defined by the Penal Code. *See* TEX. PEN. CODE ANN. §§ 1.07(a)(42), 9.31, 9.32 (Vernon Supp. 2009); *Valentine*, 587 S.W.2d at 401. The charge, as submitted, preserved Dotson's right to have the jury consider his claim of self-defense. Because there was no error with respect to the trial court's instruction on Dotson's claim of self-defense, we overrule Dotson's first issue. *See Ngo*, 175 S.W.3d at 743.

Denial of Dotson's Motion for Mistrial

Based on the prosecutor's opening statement, in issue two, Dotson complains that the trial court erred in denying his motion for mistrial. Specifically, Dotson asserts that the prosecutor impermissibly commented on Dotson's decision not to testify and that the prosecutor's comment caused the jury to refuse to consider Dotson's claim of self-defense.

At an early stage during his opening statement, the prosecutor stated:

> As we talked about in voir dire, the law says all a person has got to do to give an instruction of deadly force is to claim that they were acting in self-defense; and that's the claim he's going to make. I know that when y'all listen to this case as a whole, including the photographs . . . . And also [the] statement. Some might deem it a confession that Mr. Dotson made to the deputies out there at the sheriff's office. That's recorded. I believe it was captured in a

> way that actually allows me to play it for the jury, whether or not the defendant testifies or not. I'll play it in this case because when everything is said and done what you're going to find for a man who claims self-defense who in order to pursue self-defense and deadly force is going to have to tell you just how in fear he was of Mr. McClelland, that right then and there Mr. McClelland was going to kill him and that he's going to tell you that that was his reason --

At that point, Dotson's counsel interrupted, and in the bench conference that followed, he objected to the prosecutor's statement, asserting that the prosecutor had commented on Dotson's right not to testify. He then moved for a mistrial. Dotson's counsel also claimed that the prosecutor was mistaken that Dotson was required to testify to receive a self-defense instruction. The prosecutor responded by asserting that his comment was not directed at whether Dotson was going to testify at trial; instead, the prosecutor stated that the comments related to Dotson's admissible recorded statement and the fact that Dotson bore the burden of proof with respect to his self-defense claim.

The trial court denied Dotson's motion for mistrial but offered to re-instruct the jury regarding a defendant's right not to testify. When the jury returned, the trial court again instructed the jury that a defendant in Texas does not have to testify and instructed the jury to refrain from making any inferences if the defendant chose not to testify.

A defendant has a right not to testify at his trial under the Texas and United States Constitutions, as well as Texas statutory law. U.S. CONST. amend. V; TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. art. 38.08 (Vernon 2005). A prosecutor's comment amounts to an impermissible comment on a defendant's failure to testify only if, when

viewed from a jury's standpoint, the comment is manifestly intended to be, or is of such character that a typical jury would naturally and necessarily take it to be, a comment on the defendant's failure to testify. *Cruz v. State*, 225 S.W.3d 546, 548 (Tex. Crim. App. 2007); *Bustamante v. State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001). "In applying this standard, the context in which the comment was made must be analyzed to determine whether the language used was of such character." *Cruz*, 225 S.W.3d at 548 (quoting *Bustamante*, 48 S.W.3d at 765). No particular words or phrases determine whether a jury argument is impermissible. *Cruz*, 225 S.W.3d at 549. Rather, when evaluating the comments on a case-by-case basis, it is "the entirety of the prosecutor's statements, taken in the context in which the words were used and heard by the jury." *Id.*

We conclude that the prosecutor's comments during opening statement are not an impermissible comment on Dotson's failure to testify at trial. The challenged comments relate to Dotson's recorded statement made to police shortly after the shooting, and also, to what Dotson was required to prove to receive a self-defense instruction. Moreover, the prosecutor did not claim that Dotson was required to testify to assert a claim of self-defense.

The arguable error in this case is similar to the arguments that were raised in *Cruz*. In *Cruz*, the Court of Criminal Appeals addressed whether the prosecutor, during final argument, had commented on the defendant's failure to testify. 225 S.W.3d at 549-50. After examining the context of the prosecutor's argument, the Court of Criminal Appeals concluded that "the prosecutor's statements to the jury referred to the appellant's own written

statement which had been admitted into evidence and were therefore not a comment on the appellant's failure to testify." *Id*. Similarly, in this case, the context of the prosecutor's statement reveals that it relates to Dotson's recorded statement.

Additionally, we are not persuaded by Dotson's argument that the prosecutor's comments led the jury to believe that Dotson had to testify to raise a claim of self-defense. We have previously noted that the jury was properly instructed on Dotson's self-defense claim. Generally, we presume the jury followed the trial court's instructions. *Resendiz v. State*, 112 S.W.3d 541, 546 (Tex. Crim. App. 2003) (citing *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998)). Nothing in the record suggests that the jury disregarded the trial court's instructions on Dotson's claim of self-defense. We conclude that the trial court did not abuse its discretion by denying Dotson's motion for mistrial. *See Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007) (explaining abuse of discretion standard in the context of an appellate review of a motion for mistrial). We overrule Dotson's second issue.

Juror's Communication With Judge

In his third issue, Dotson asserts that the trial court deprived him of a fair trial "by failing to report an ex parte communication from a juror."[2] Specifically, Dotson contends

[2]The State argues that Dotson's complaint regarding the unnamed juror's communication with the trial judge is not properly before this Court because it was not specifically raised in his earlier original motion for new trial or in his supplemental motion for new trial, and asserts that raising it at the hearing on his motion for new trial makes it untimely. As long as a trial court retains authority to rule on a timely filed original motion for new trial, the court may allow amendments to that motion and rule on that amendment

that he should receive a new trial because an unnamed female juror told the trial judge that she had realized after the trial started that she knew one of the family members.

In an affidavit given by the trial judge, which was later admitted into evidence at the hearing on Dotson's motion for new trial, the judge acknowledged that one of the female jurors had approached him and had stated that she "knew someone remotely connected to one of the families involved."[3] The judge's affidavit further states that he inquired into the impartiality of the juror. After doing so, he concluded that the juror's acquaintance with one of the family members "did not raise any issue of [j]ury impropriety," and he left the juror on the panel without mentioning the conversation to either party.

Appellate courts generally review a trial court's ruling on a motion for new trial under an abuse of discretion standard. *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006); *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004).

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if the State does not object. *State v. Moore*, 225 S.W.3d 556, 569 (Tex. Crim. App. 2007). Dotson timely filed both his original motion for new trial as well as his supplemental motion. *See* TEX. R. APP. P. 21.4. While it is arguable that Dotson's supplemental motion addressed the ex parte communication even though Dotson mistakenly named another juror as the person who had approached the trial judge, the State stipulated to the evidence on the issue and did not object to its admissibility at the hearing on the motion for new trial. Thus, even if we were to determine that the issue was not raised in Dotson's supplemental motion for new trial, evidence concerning the ex parte contact by the unknown juror with the trial court was admitted during the hearing without objection. Therefore, the trial court had the right to consider whether to grant a new trial based on the contact that occurred between the unnamed juror and the trial judge. *See Moore*, 225 S.W.3d at 569. Because it appears that the trial court considered it, Dotson's third issue is also properly before this court.

[3]The trial judge could not recall the name of the female juror who approached him with this information or whether the juror had specified whether her acquaintance was with a member of the deceased's family or Dotson's family.

> We do not substitute our judgment for that of the trial court, but rather we decide whether the trial court's decision was arbitrary or unreasonable. We must view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against that losing party. Thus, a trial court abuses its discretion in denying a motion for new trial only when no reasonable view of the record could support the trial court's ruling.

Charles, 146 S.W.3d at 208 (footnotes omitted). Dotson, as the movant, bore the burden of proof at the hearing on his motion for new trial. *See Patrick v. State*, 906 S.W.2d 481, 498 (Tex. Crim. App. 1995).

Dotson argues that all communication between the trial judge and the jury must be in writing, in open court, and in the presence of the defendant, if possible; Dotson then concludes that the conversation between the trial judge and the unnamed juror violated article 36.27 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.27 (Vernon 2006). Dotson adds that the juror's ex parte contact with the judge deprived him of his fundamental right to a fair trial by an impartial jury under the United States and Texas Constitutions. *See* U.S. CONST. amends. V, XIV; TEX. CONST. art. 1, § 10.

Even if we assume that the communication violated article 36.27, an issue we expressly do not reach, Dotson fails to demonstrate that he was prejudiced by the ex parte contact based on the conversation that was proven to have occurred. *See generally Alba v. State*, 905 S.W.2d 581, 587 (Tex. Crim. App. 1995) (holding that presumption of harm arising from a conversation between a juror and an unauthorized person is rebuttable); *see also Johnson v. State*, 169 S.W.3d 223, 235-36 (Tex. Crim. App. 2005) (providing laundry

list of structural errors, which does not include a complaint about a juror's ex parte contact with trial judge involving the juror's ability to be impartial). The only evidence concerning the juror's conversation with the judge consists of the trial judge's affidavit. The judge's affidavit reflects that when questioned, the juror told the trial judge that her knowledge of the family member would not affect her ability to be fair and impartial. The record simply does not reflect that the trial court left a partial juror on the panel.

Based on an abuse of discretion standard, we hold the trial court did not err in denying Dotson's motion for new trial. *See Charles*, 146 S.W.3d at 208. We overrule Dotson's third issue and affirm the trial court's judgment.

AFFIRMED.

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HOLLIS HORTON
Justice

Submitted on August 6, 2009
Opinion Delivered December 30, 2009
Do Not Publish

Before Gaultney, Kreger, and Horton, JJ.