COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-15-00438-CR

GERALD DEMARSH — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM COUNTY CRIMINAL COURT NO. 1 OF DENTON COUNTY
TRIAL COURT NO. CR-2015-03735-A

MEMORANDUM OPINION[1]

I. INTRODUCTION

Appellant Gerald DeMarsh appeals his conviction for assault-family violence. In four points, DeMarsh argues that the trial court erred by not instructing the jury on the issues of defense of property and self-defense, that he received ineffective assistance of counsel at trial, and that his conviction is the product of prosecutorial vindictiveness. We will affirm.

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[1]*See* Tex. R. App. P. 47.4.

II. BACKGROUND

After police initially arrested and charged DeMarsh with assault using a deadly weapon, the State, by information, charged DeMarsh with assault-family violence and interference with an emergency phone call. After being declared indigent and after the trial court appointed him counsel, DeMarsh elected to have his trial before a jury.

At trial, Denton Police Department Patrol Officer Cherlynn Hurd testified that she was working as a 911 dispatch operator on March 13, 2015, when she received a call early in the morning from Eva Dorsett. Hurd described Dorsett as "[h]ysterical" and said that she could hear Dorsett saying, "get off of me, get off of me. Ma'am, please hurry up." During Hurd's testimony, the State introduced and played a copy of the 911 call for the jury

Denton Police Department Police Officer Kristen Johnson testified that he was also working as a 911 dispatcher on March 13, 2015, when he received a 911 call. This call was made by DeMarsh.[2] Johnson said that DeMarsh identified himself and said that he was calling to follow up on a previous report that he had filed for theft. Specifically, Johnson said that DeMarsh was reporting the theft of personal tools worth roughly $500. During Johnson's testimony, the State introduced and played a copy of the 911 call for the jury. Johnson said that during the entire call, a woman could be heard yelling in the background.

[2]The only indication in the record regarding which 911 call was placed first is DeMarsh's testimony that he made his call prior to Dorsett's.

Johnson averred that the woman's tone toward DeMarsh was insulting and that at times her yelling was loud. Johnson recalled how the woman had yelled "he's 83 and I'm 43."

Denton Police Department Police Officer Chris Shamp testified that he received a dispatch on the same day regarding a "domestic assault call" and that he proceeded to DeMarsh's apartment. Shamp said that the dispatcher had stated that DeMarsh had a firearm, so Shamp waited for backup prior to approaching the door. According to Shamp, DeMarsh opened the door and was agitated and breathing heavily. Shamp said that he made contact with Dorsett almost immediately. Shamp described Dorsett as upset and "a little disheveled in her clothing." Shamp also averred that Dorsett appeared to have "a small laceration, scratch mark to her shoulder area." Shamp averred that the laceration had "fresh blood on it" and that it appeared painful. He also averred that Dorsett told him that DeMarsh had caused the wound. While he testified, the State introduced and published pictures of Dorsett depicting the injury that Shamp had described. Shamp said that the pictures were consistent with what he saw that day.

Shamp said that Dorsett told him that DeMarsh had awoken her that morning asking her to have sex with him, that she declined, and that an argument ensued. Dorsett said that DeMarsh told her that he could have her arrested over tools that he said were stolen and that she needed to leave his apartment by ten o'clock that morning. By Shamp's account, Dorsett told him

that as she began to gather her things from the kitchen, DeMarsh came toward her, waving a gun and telling her that he could kill her at any time. DeMarsh also allegedly told Dorsett that because she was a convicted felon, he could have her sent back to prison. He also allegedly tried to prevent her from dialing 911.

Shamp described the apartment as having "some things knocked around, especially in the bathroom area." He also said that Dorsett's phone had damage on it consistent with her account that DeMarsh had grabbed it during a scuffle. Shamp averred that Dorsett's injuries, her disheveled look, and the condition of the apartment were all consistent with what Dorsett had reported to him. Shamp also said that he had previously investigated DeMarsh's February 18, 2015 theft report. He further averred that he knew the apartment to be DeMarsh's and that to his knowledge, Dorsett was not a signatory to the lease.

Patrol Officer Anthony Cunningham of the Denton Police Department also testified. Cunningham said that he also responded to the dispatch. According to Cunningham, after he and fellow officers knocked on DeMarsh's door, DeMarsh answered the door "exerted, like he was tired, and . . . out of breath." Cunningham said that DeMarsh had small blood stains on his shirt and pants. Cunningham said that DeMarsh had what appeared to be a scratch on his forearm. During Cunningham's testimony, the State introduced and published pictures that Cunningham averred were accurate depictions of DeMarsh's clothing and forearm on that day.

Cunningham recalled that DeMarsh said that he got the scratch while trying to wrestle Dorsett's cellphone from her. Cunningham said that DeMarsh explained that he believed he was justified in taking the phone from Dorsett because he thought that it was his, given that he was paying the bill for it, even though he had given it to Dorsett for her personal use.

Cunningham also said that DeMarsh explained that he had allowed Dorsett to live with him because he felt sorry for her because she was homeless and that eventually their relationship evolved into an exchange of sex in lieu of Dorsett paying rent. DeMarsh also told Cunningham that the argument with Dorsett was over his missing tools. Cunningham said that after his discussion with DeMarsh and after Shamp discussed the incident with Dorsett, he placed DeMarsh under arrest.

Dorsett testified that she called 911 on that day because DeMarsh "had pulled out his 9-millimeter gun" and that he had called her a "black bitch." According to Dorsett, DeMarsh had told her that she had to move out and that she was in the kitchen attempting to gather her food when he pulled the gun on her. From there, Dorsett said that she fled toward the bathroom as she dialed 911 and that as she attempted to shut the bathroom door, DeMarsh kicked the door open. Dorsett said that DeMarsh then "wrestled [her] down to the ground in the bathroom trying to get the phone" from her. Dorsett said that at one point, DeMarsh had his knee in her back and that this position caused her pain. She said that DeMarsh also inflicted scratches to her neck and back which also

caused her pain. Dorsett averred that the pictures the State had introduced and published accurately depicted the scratches she sustained that day. Dorsett testified that her having sex with DeMarsh was their "payment arrangement." She also averred that even though she knew that DeMarsh had reported that she had stolen some of his tools, she had not.

Sergeant Daniel Scott Jenkins with the Denton Police Department testified that he also responded to the dispatch. According to Jenkins, when he arrived, Dorsett was upset, looked disheveled, and displayed "visible abrasions." Jenkins said that DeMarsh was "red-faced and angry and . . . yelling" when officers entered the apartment. Jenkins said that DeMarsh also appeared "slightly disheveled" and that there was blood on his shirt and pants. Jenkins averred that DeMarsh admitted to grabbing Dorsett with both hands and forcing her to the ground. Jenkins said that DeMarsh also admitted to trying to take the phone from Dorsett as she called 911. Jenkins averred, however, that DeMarsh denied having a sexual relationship with Dorsett. Jenkins further averred that when officers arrived, DeMarsh's firearm was in a combination safe. Jenkins said that based on his initial investigation upon arriving at the apartment, DeMarsh had assaulted Dorsett and also interrupted her attempt to call 911.

Investigator Elisa Howell of the Denton Police Department testified that she interviewed Dorsett at the police station shortly after police responded to her 911 call. Howell said that she also photographed Dorsett during the interview. Howell averred that these photographs, which the State introduced and

published to the jury during her testimony, were accurate depictions of how Dorsett appeared the day police responded to the 911 call. Before the pictures were displayed to the jury, Howell described how Dorsett had abrasions on her chin and clavicle.

DeMarsh testified in his defense. According to DeMarsh, he allowed Dorsett to live with him because he felt sorry for her, but he said that things turned sour between the two when DeMarsh suspected that Dorsett had stolen some of his tools. DeMarsh averred that the reason Dorsett called 911 on March 13 was that she was attempting to "cover up" that he was trying to have her arrested for stealing his tools. DeMarsh said that Dorsett's statements that he had his gun out was a lie and that the entire time during her 911 call, his "gun was in the safe." By DeMarsh's account, during her 911 call, Dorsett would "stick her tongue out and stick her middle finger up" at him, all the while calling him a "senile and crazy old man." DeMarsh said that as she was on the phone, Dorsett was "lying about [him] pulling the pistol on her and then just deliberately standing there agitating [him]." DeMarsh said that the reason he tried to take the phone from her was because she was "lying like hell about [him] having the gun" and that he wanted to talk to the dispatcher to clear the issue up. DeMarsh said that Dorsett's 911 call came much later than his on that morning. He also averred that Dorsett never attacked him, and DeMarsh admitted that he had "scuffle[d]" with Dorsett but that it was "a little one" that she had provoked. DeMarsh averred that it was possible that he had scratched Dorsett.

The jury returned a verdict of not guilty to the charge of interference with an emergency phone call and a verdict of guilty to the charge of assault-family violence. Based on the jury's verdict and a plea bargain with the State regarding punishment, the trial court sentenced DeMarsh to 250 days in jail and a $200 fine, and in accordance with the plea bargain, the trial court suspended imposition of the sentence and placed DeMarsh on community supervision for eighteen months.

Two days after the trial court entered its judgment, DeMarsh's court-appointed trial counsel filed a motion to withdraw, which the trial court granted. That same day, DeMarsh filed his notice of appeal, which appears to have been filed by court-appointed appellate counsel. The next day, the trial court, citing issues of conflict, substituted a different appellate counsel. Despite having appellate counsel, DeMarsh began to file numerous letters and documents in this court, many of which indicated that DeMarsh wished to represent himself. We abated this appeal back to the trial court to determine whether DeMarsh wished to proceed pro se.

At the abatement hearing, DeMarsh expressed his frustrations with original trial counsel and stated that his experience with his trial counsel prompted his desire to represent himself. Specifically, DeMarsh complained that there were "a lot of things that needed to be brought up" during trial that he felt had not been addressed, and he believed that his trial counsel failed to adequately question Dorsett. DeMarsh also stated that he was "sick of lawyers and the dirty dealing."

Nonetheless, after the trial court inquired further, DeMarsh stated that he wished to continue this appeal with court-appointed appellate counsel. The trial court entered an order accordingly, and this appeal resumed.

Again, despite having appellate counsel, DeMarsh continued to file numerous letters and documents in this court, indicating that he wished to represent himself in this appeal. This court again abated this case back to the trial court. During the second abatement hearing, DeMarsh stated that he wanted to represent himself and that he was tired of "a bunch of secondhand representation." As the trial court inquired further, DeMarsh persisted that he wanted to represent himself. Because appellate counsel had already finished an appellate brief for DeMarsh, the trial court ordered that counsel file the brief in this court on that day, and then the next day the trial court ordered that DeMarsh would represent himself. This appeal continued.

III. DISCUSSION

A. Jury Instructions

In his first two issues, which appear in the brief filed by DeMarsh's court-appointed attorney prior to the trial court ordering that DeMarsh could proceed pro se, DeMarsh argues that the trial court erred by not including in its charge to the jury instructions on the defense of property and self-defense. At trial, DeMarsh did not request an instruction regarding defense of property but he did request, and the trial court denied, an instruction on the law of self-defense.

1. No Request for Instruction on the Defense of Property

The trial court has no duty to instruct the jury *sua sponte* on unrequested traditional defenses and defensive issues because they are not "law applicable to the case"; thus, failure to request an instruction on such issues or to object to their exclusion results in their forfeiture on appeal, and we do not engage in an *Almanza* egregious-harm review. Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007); Tex. R. App. P. 33.1; *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 160–64 (Tex. Crim. App. 1995) (op. on reh'g); *see Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). Because DeMarsh did not request an instruction on the defense of property, he has forfeited this court's review of the issue. We overrule DeMarsh's first issue.

2. No Evidence of Self-Defense

A defendant 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. Tex. Penal Code Ann. § 9.31(a) (West 2011). But a defendant is not justified in using force "in response to verbal provocation alone." *Id.* § 9.31(b)(1).

A defendant has the burden of producing sufficient evidence at trial that raises the issue of self-defense to have that issue submitted to the jury. *See Davis v. State*, 268 S.W.3d 683, 693 (Tex. App.—Fort Worth 2008, pet. ref'd); *Hill v. State*, 99 S.W.3d 248, 250–51 (Tex. App.—Fort Worth 2003, pet. ref'd) (explaining that if there is evidence supporting a self-defense theory, an

instruction to the jury is required whether such "evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense"). If the evidence, as viewed in the light most favorable to the defendant, does not support self-defense, an instruction is not required. *See Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999); *Davis*, 268 S.W.3d at 693.

DeMarsh argues that he was entitled to an instruction on self-defense, and he points to his testimony wherein he stated that he was "trying to defend" himself against Dorsett. But in the context in which his statement was made, it is clear that DeMarsh was not referring to defending himself against any force used by Dorsett that he immediately needed to protect himself from; rather, DeMarsh's statement that he was trying to "defend" himself was made in the context that he was trying to keep Dorsett from reporting to police what DeMarsh said were "lies" that he was waving a gun. Indeed, DeMarsh specifically testified that Dorsett "wasn't attacking" him when he attempted, by force, to take the phone away from her. *See Clifton v. State*, 21 S.W.3d 906, 907 (Tex. App.—Fort Worth 2000, pet. ref'd) ("After carefully reviewing the record, we conclude that the evidence at trial was insufficient to raise the issue of self-defense because there was no evidence that Appellant used force to counter force."). Because there is no evidence that DeMarsh was acting in self-defense, the trial court did not err by declining his request that the jury be instructed on self-defense. *Davis*, 268 S.W.3d at 693. We overrule DeMarsh's second point.

B. Trial Counsel's Performance

In his pro se reply brief, and what we are interpreting to be his third issue, DeMarsh argues that his court-appointed trial lawyer "did not defend" him. DeMarsh provides this court with neither argument nor authority demonstrating how his trial counsel failed to defend him. *See Kindley v. State*, 879 S.W.2d 261, 264 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (reasoning that a pro se appellant "like any appellant represented by counsel, must present specific points of error [that] are supported by argument, authority and the record"). But even if we interpret DeMarsh's complaint as one of ineffective assistance of counsel, this case demonstrates the "inadequacies inherent in evaluating ineffective assistance claims on direct appeal." *Patterson v. State*, 46 S.W.3d 294, 306 (Tex. App.—Fort Worth 2001, no pet.). Indeed, DeMarsh did not file a motion for new trial below alleging ineffective assistance of counsel and thus did not afford the trial court the opportunity to hold a hearing and inquire into the reasons for trial counsel's acts or omissions. Consequently, we cannot determine whether counsel's actions were grounded in sound trial strategy because the record is silent as to possible trial strategies, and we will not speculate on the reasons for those strategies. *See id.*; *see also Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011) ("[C]laims of ineffective assistance of counsel are generally not successful on direct appeal and are more appropriately urged in a hearing on an application for a writ of habeas corpus."); *see also Hill v. State*, 303 S.W.3d 863, 878 (Tex. App.—Fort Worth 2009, pet. ref'd) ("A reviewing court will rarely be in a

position on direct appeal to fairly evaluate the merits of an ineffective assistance claim."). We overrule DeMarsh's third issue.

C. Vindictive Prosecution

In what we are interpreting as his fourth issue from his pro se reply brief, DeMarsh argues that this court should "dismiss the prejudice and vindictive charges" against him, which he alleges were brought against him as "vengeance" by the district attorney. Like in his third issue, DeMarsh provides this court with neither argument nor authority demonstrating how the State acted vindictively in bringing this assault-family violence charge against him. *See Kindley*, 879 S.W.2d at 264. He also does not point to any facts in the record which would demonstrate his claim. It is not our obligation to devise argument and uncover authority for him, and the fact that he is appealing pro se does not relieve him of the duty to comply with the rules of appellate procedure. *See Henry v. State*, 948 S.W.2d 338, 340 (Tex. App.—Dallas 1997, no pet.) (reasoning that a pro se appellant's brief must comply with the rules of appellate procedure); *see also Tong v. State*, 25 S.W.3d 707, 710 (Tex. Crim. App. 2000), *cert. denied*, 532 U.S. 1053 (2001) ("In failing to provide any relevant authority . . . we find the issue to be inadequately briefed.").

Furthermore, even if we interpret these statements as constituting a claim of vindictive prosecution, we must presume that a criminal prosecution is undertaken in good faith and in nondiscriminatory fashion to fulfill the State's duty to bring violators to justice. *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App.

2004). Only in limited circumstances will the presumption that a prosecution is undertaken in good faith give way to either a rebuttable presumption of prosecutorial vindictiveness or proof of actual vindictiveness. *Id.*

When a defendant claims that a rebuttable presumption of prosecutorial vindictiveness exists, he must establish that he was convicted, he appealed and obtained a new trial, and that the State thereafter filed a greater charge or additional enhancements. *Id.* at 173–74. Those facts do not exist in this case. Here, DeMarsh has never been granted a new trial.

When a defendant claims actual vindictiveness, a defendant must prove, with objective evidence, that the prosecutor's charging decision was a "direct and unjustifiable penalty" that resulted "solely from the defendant's exercise of a protected legal right." *Id.* at 174 (*citing United States v. Goodwin*, 457 U.S. 368, 379–80 & n.11, 384 & n.19, 102 S. Ct. 2485, 2492, 2494 (1982)). DeMarsh has pointed to no objective evidence, and we find none in the record, that the district attorney's decision to charge him with assault-family violence was a direct and unjustifiable penalty that resulted from him having exercised a protected legal right. We overrule DeMarsh's fourth issue.

IV. CONCLUSION

Having overruled all of DeMarsh's issues on appeal, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: LIVINGSTON, C.J.; MEIER and SUDDERTH, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: February 9, 2017