



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-16-00272-CR

MARKEITA RAYCHELL SMITH

APPELLANT

V.

THE STATE OF TEXAS

STATE

FROM COUNTY CRIMINAL COURT NO. 3 OF TARRANT COUNTY
TRIAL COURT NO. 1397367

MEMORANDUM OPINION¹

A jury convicted Markeita Raychell Smith of assault with bodily injury. The trial court sentenced her to a fine and 30 days in jail, suspended her sentence, and placed her on nine months' community supervision. Smith appeals this decision and argues that the court (1) abused its discretion by not including a jury instruction on apparent danger and (2) erred by reading back the complainant's

¹See Tex. R. App. P. 47.4.

testimony to the jury during its deliberation without proof of a disagreement about the requested testimony.

Background²

On December 31, 2014, Jeorgina Flores and Rita Dimas, along with Dimas's 14-month-old son, were shopping at a Charlotte Russe store inside the Parks Mall in Arlington, Texas. While there, they encountered Smith blocking an aisle and talking on her cell phone. They said "excuse me" twice and then went around her. After they passed her, Smith accused Dimas and Flores of running over her feet with their cart. Although Dimas and Flores apologized to Smith, Smith "wasn't having it" and said, "Come over here and slap me bitch." This sparked a verbal confrontation that led to Smith's knocking off Flores's hat; the situation then escalated into a fight between the two. By Smith's own admission, Flores got the better of the fight. After patrons stopped the fight, Flores went back to Dimas but soon returned to the scene of the scuffle to retrieve her hat. Smith—who was still in the vicinity—then tried to kick Flores and threw a shoe at her that missed Flores but struck another child in the store. Store employees asked Smith to leave.

Meanwhile, Flores and Dimas had independently decided to go elsewhere and were already outside Charlotte Russe's front door when Smith burst out

²Although Smith strongly contested the State's evidence at trial, for purposes of our evidentiary summary, we present the facts in the light most favorable to the verdict. See *Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016).

running. Using a store-display stiletto-heeled shoe as her weapon, Smith attacked Dimas from behind while Dimas was holding her son. Smith first struck the back of Dimas's head with the stiletto and then, after Dimas had put her son down and had turned around, again struck Dimas with the heel but this time in the forehead, gouging a large hole. After Smith fled the scene, Flores called 911 to notify the police and to request medical help for Dimas.

Discussion

I. Charge Error

At the trial's conclusion, the court included a self-defense instruction in the jury charge but did not include Smith's requested separate instruction for apparent danger.³ Smith timely objected to that omission.

In Smith's first issue, she contends that the trial court erred by not including the apparent-danger instruction within the jury charge. We disagree.

A. Standard of Review

"[A]ll alleged jury-charge error must be considered on appellate review regardless of preservation in the trial court." *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). In our review of a jury charge, we first determine

³Smith had asked that the self-defense instruction include language advising the jury that they could find Smith not guilty if they believed that she had a "reasonable expectation or fear of bodily injury from the use of unlawful force at the hands of Rita Dimas," and that Smith reasonably believed that "the use of force on her part was immediately necessary to protect herself against Rita Dimas[']s use or attempted use of unlawful force."

whether error occurred; if not, our analysis ends. *Id.* If error occurred, whether it was preserved then determines the degree of harm required for reversal. *Id.*

B. Analysis

We addressed a similar issue several years ago, stating:

Texas courts have held that when a defendant claims self-defense, his rights are fully preserved (and the concept of “apparent danger” is properly presented) when a jury charge (1) states that a defendant’s conduct is justified if he reasonably believed that the deceased was using or attempting to use unlawful deadly force against the defendant, and (2) correctly defines “reasonable belief.”

Bundy v. State, 280 S.W.3d 425, 430 (Tex. App.—Fort Worth 2009, pet. ref’d) (citing *Valentine v. State*, 587 S.W.2d 399, 400–01 (Tex. Crim. App. [Panel Op.] 1979)); *see also* *Lowe v. State*, 211 S.W.3d 821, 824–25 (Tex. App.—Texarkana 2006, pet. ref’d) (stating that the requirements also apply to cases not involving death of the victim).

Here, the trial court instructed the jury that “[a] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force.” This phrasing satisfies the first requirement. *See Valentine*, 587 S.W.2d at 400–01; *Bundy*, 280 S.W.3d at 430. The trial court also satisfied the second requirement by properly defining “reasonable belief” as being “a belief that would be held by an ordinary and prudent person in the same circumstances as the defendant.” *See Valentine*, 587 S.W.2d at 401; *Bundy*,

280 S.W.3d at 430. Because both requirements were met, error has not been shown. We overrule Smith’s first issue and turn to her second.

II. Article 36.28 Error

During deliberations, the jury sent several notes to the court. The first note requested Dimas’s testimony. The court replied by asking for a more specific request. The jury then responded, “Request Rita Dimas’[s] testimony as she left the store. The actions that led to putting down her baby under the State’s direct.” Smith objected, with her counsel’s stating, “I will object to the fact that this court has not required a dispute of fact.” The judge then read portions of Dimas’s testimony to the jury without first requiring that the jury indicate an internal disagreement about some particular factual issue.⁴ The trial court also opted to skip over certain parts of that testimony, selecting what to read and what to omit.

In her second issue, Smith argues that the trial court abused its discretion when it read Dimas’s testimony to the jury without first requiring a factual dispute within the jury room. She also argues that the court commented on the weight of the evidence by picking which testimony to emphasize to the jury. The State concedes trial-court error but argues that the error was harmless.

⁴In a third note, the jury requested “Markeita defen[s]e testimony from time she was told to leave the store to the time they started fighting” and “Rita defen[s]e testimony of the above time frame also.” The trial court located that testimony and sent it in to the jury, noting at the bottom of the jury’s final note that “[t]he bailiff has brought you the requested testimony.”

A. Standard of Review

Article 36.28 of the Texas Code of Criminal Procedure provides:

In the trial of a criminal case in a court of record, if the jury disagree as to the statement of any witness they may, upon applying to the court, have read to them from the court reporter's notes that part of such witness testimony or the particular point in dispute

Tex. Code Crim. Proc. Ann. art. 36.28 (West 2006). The jurors' request that testimony be provided during deliberations "must reflect that the jurors disagree about a specified part of testimony." *Howell v. State*, 175 S.W.3d 786, 790 (Tex. Crim. App. 2005).

A trial judge's decision about whether a factual dispute exists among jurors is reviewed for an abuse of discretion. *Id.* Discretion is abused when the trial court's "decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree." *Id.* If so, the next step is to conduct a harm analysis. *DeGraff v. State*, 934 S.W.2d 687, 688 (Tex. Crim. App. 1996).

B. Analysis

We agree with Smith and the State that the trial court abused its discretion by reading testimony to the jury without first requiring a disagreement. Because the court's abuse of discretion is clear, we will analyze whether the error was harmful. *Id.* at 688.

1. Categorizing the error: constitutional or not?

We begin by examining whether the harm was caused by a constitutional or nonconstitutional error. Tex R. App. P. 44.2; *Thomas v. State*, 505 S.W.3d

916, 924–25 (Tex. Crim. App. 2016). Smith does not claim that the error is constitutional, and we agree. See *Thomas*, 505 S.W.3d at 925. We thus apply the standard under rule 44.2(b) for assessing harm from “other error.” *Id.* If that kind of error “does not affect substantial rights,” then it must be disregarded. Tex. R. App. P. 44.2(b).

2. Factors in determining if Smith’s substantial rights were affected

A substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury’s verdict. *Thomas*, 505 S.W.3d at 926 (citing *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). Conversely, an error does not affect a substantial right if we have “fair assurance that the error did not influence the jury, or had but a slight effect.” *Solomon v. State*, 49 S.W.3d 356, 365 (Tex. Crim. App. 2001) (quoting *Reese v. State*, 33 S.W.3d 238, 243 (Tex. Crim. App. 2000)).

In making this determination, we review the record as a whole, including any testimony or physical evidence admitted for the jury’s consideration, the nature of the evidence supporting the verdict, and the character of the alleged error and how it might be considered in connection with other evidence in the case. *Thomas*, 505 S.W.3d at 927; *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). We may also consider the jury instructions, the State’s theory and any defensive theories, any emphasis of the error on the State’s part, closing arguments, and even voir dire, if applicable. *Motilla*, 78 S.W.3d at 355–56.

3. Examining the entire record

Here, the defense's case was built on asserting that Smith acted in self-defense during the fight outside the store, after which she retreated to avoid harm from Dimas and Flores. The jury-requested testimony from Dimas conflicted with the defense's theory but did not conflict in any meaningful way with other evidence. In particular, Dimas's testimony did not conflict with Yaritza Martinez's testimony.

Martinez, a Charlotte Russe employee, testified that after the initial scuffle between Smith and Flores, Smith grabbed a stiletto from inside the store and then ran out in pursuit of the two women. Martinez described Smith as enraged. According to Martinez, Smith hit Dimas from behind while Dimas was holding her child. When Dimas turned to face Smith, Smith firmly planted the stiletto into Dimas's forehead.⁵ When asked if either Dimas or Flores was "the aggressor toward the defendant" outside the store, Martinez replied "no"; she also stated that Smith's attack looked intentional. Although certainly damaging, Martinez's testimony was not the only evidence that conflicted with Smith's defensive theory.

The outside-the-store surveillance video does little to support Smith's position. Unfortunately, because the store's entrance is off screen, the video does not show what happened when Smith first exited the store. The video does,

⁵The shoe in question had a four-and-a-half-inch heel.

however, show Smith backing away in a combative posture (or “post[ing] up” as Martinez described it, meaning “let’s fight, let’s do it”), stiletto in hand, facing the direction from which both Dimas and Flores later appear. Dimas briefly pursues Smith but stops. Because the video does not show Smith striking Dimas, by this point in the video Dimas is already injured.⁶

In contrast, Flores—despite having at some point picked up Dimas’s child—pursues Smith far more energetically. As Flores and the child move behind a column, the video loses sight of them, but when Flores emerges from the other side of the column, she no longer has the child and tries to engage Smith.⁷ A security officer and others in the crowd then prevent Smith and Flores from striking each other.

The video confirms that Dimas and Flores were there with a small child. It further confirms that Smith was the only person armed with a weapon—the stiletto. Finally, it shows Smith did not try to escape but remained within sight of both Dimas and Flores.

To believe Smith’s version of the events and after viewing the video, the jury would have had to believe that two women with a small child picked a fight with a stiletto-wielding woman. The jury also would have had to come up with some explanation for Smith’s remaining within sight of Dimas and Flores rather

⁶Dimas testified that the video starts after Smith struck her.

⁷Flores said she set Dimas’s son down.

than using the opportunity shown in the video to make her escape from their alleged aggressions. In contrast, to believe the State's version the jury had to believe that Smith had just unleashed, off camera, an unprovoked and violent attack on Dimas, that Smith separated herself from Dimas and Flores to avoid their anticipated retaliation (Smith acknowledged that she had gotten her "hiney kicked" in the store earlier), that Flores—with a small child and weaponless—pursued Smith out of anger and outrage rather than out of a predatory desire to bully Smith, and that the security officer and various bystanders intervened—on Smith's behalf—before Flores and, to a lesser extent, Dimas could retaliate.⁸

Although the video is open to contrary interpretations, especially in conjunction with Martinez's testimony it is far more consistent with the latter scenario than the former.

Smith's later conduct also fits with her being the aggressor. Smith left the scene before the police arrived, not staying to file a complaint against Dimas and Flores. Nor did she stay there to explain to the police that she had struck Dimas in self-defense. In short, unlike Dimas and Flores, who remained at the scene, Smith did not behave like a victim.

To the extent Smith argues that certain portions of Dimas's testimony read to the jury were nonresponsive and were comments on the weight of the evidence, trial counsel did not object on that basis. See *Neal v. State*,

⁸Flores, after seeing Smith assault Dimas, admitted she was angry and "riled up."

108 S.W.3d 577, 579 n.2 (Tex. App.—Amarillo 2003, no pet.). Even if this argument was preserved, though, we note that the court also provided part of Smith’s own testimony—the portion in which Smith testified about what happened after she left the store—to the jury in response to its third note. By committing the same error (of not requiring a factual disagreement) to Smith’s benefit, the trial court gave neither side an unfair advantage. *Cf. DeGraff v. State*, 944 S.W.2d 504, 507–08 (Tex. App.—Houston [14th Dist.] 1997) (holding that reading back only State’s witness’s testimony bolstered the prosecution’s case and was thus harmful), *aff’d*, 962 S.W.2d 596 (Tex. Crim. App. 1998).

Having reviewed the entire record, we hold that the error was not harmful. The State’s case did not rest exclusively, or even largely, on Dimas’s requested testimony. Any harm from Dimas’s testimony provided in response to jury note two was balanced by the court’s erroneously providing Smith’s counterbalancing testimony in response to jury note three. After considering the entire record, we have fair assurance that the error did not influence the jury or had only a slight effect; hence, the error was harmless. *See Thomas*, 505 S.W.3d at 927. We overrule this issue.

Conclusion

Having overruled both of Smith’s issues, we affirm the trial court’s judgment.

/s/ Elizabeth Kerr
ELIZABETH KERR
JUSTICE

PANEL: WALKER, MEIER, and KERR, JJ.

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

DELIVERED: July 13, 2017