In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-16-00156-CR

TILTON JOSHUA ISAIAH MAPPS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 8th District Court
Hopkins County, Texas
Trial Court No. 1524810

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

On trial for murdering Jonathan Trahern Young with a firearm, Tilton Joshua Isaiah Mapps defended by denying that he shot Young and testifying that he was not even present at Young's shooting. Now convicted by the jury and assessed a sentence of ninety-nine years' imprisonment, Mapps appeals on the bases that the trial court erred in refusing to submit an instruction on self-defense and in accommodating a juror's desire to alter the standard juror's oath due to her religious reasons. We affirm the judgment of the trial court, because (1) Mapps was not entitled to an instruction on self-defense, and (2) Mapps failed to preserve his complaint about the juror's oath.

(1) Mapps Was Not Entitled to an Instruction on Self-Defense

"We review claims of jury charge error under the two-pronged test set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g)." *Graves v. State*, 452 S.W.3d 907, 910 (Tex. App.—Texarkana 2014, pet. ref'd). "We first determine whether error exists." *Id.* (citing *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005)). "If error exists, we then evaluate the harm caused by that error." *Id.* "If there is no error, our analysis ends." *Id.* (citing *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012)).

Mapps requested an instruction on self-defense. In denying the request, the trial court stated that self-defense could not be invoked because Mapps did not adhere to the "confession and avoidance doctrine." Under the confession and avoidance doctrine, "a defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense including the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct." *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007). The

requirement of confession and avoidance before invocation of self-defense trumps the general rule that a defense is supported by the evidence if there is evidence from any source on each element of the defense. *See Juarez v. State*, 308 S.W.3d 398, 405 (Tex. Crim. App. 2010).[1] Where a defendant denies an element of a charged offense, he is not entitled to submission of a self-defense issue in the charge because he has "mounted a defensive theory based on trial strategy designed to negate only a specific element of the charged offense." *Id.* at 403.

Mapps testified in his own defense during guilt/innocence and claimed that he did not shoot Young and was not present at the scene of his shooting. Where, as here, a defendant "did not admit the act but contended he was not even present when it was committed, he was not entitled to a self-defense instruction." *Wallace*, 75 S.W.3d at 587. Accordingly, the trial court did not err in refusing to submit Mapps' requested instruction on self-defense.

We overrule this point of error.

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[1]Self-defense is included in Chapter 9 of the Texas Penal Code, entitled, "Justification Excluding Criminal Responsibility," along with necessity, public duty, and protection of life and health. *Wallace v. State*, 75 S.W.3d 576, 587 (Tex. App.—Texarkana 2002), *aff'd*, 106 S.W.3d 103 (Tex. Crim. App. 2003). In discussing the application of the confession and avoidance doctrine to the defense of necessity, the Texas Court of Criminal Appeals wrote:

> The confession and avoidance doctrine's requirement that a defendant admit to the conduct conflicts with [Texas Penal Code] Section 2.03(c)'s general rule that a defense is supported by the evidence if there is evidence from any source on each element of the defense. However, this conflict does not disturb our determination that Section 9.22 embraces the confession and avoidance doctrine. When interpreting statutes that are in pari materia and construed together, both are given effect with the special governing over the general in the event of a conflict. In this instance, Section 9.22's admission requirement governs the specific defensive issue of necessity and therefore trumps Section 2.03(c)'s general rule.

Juarez, 308 S.W.3d at 405.

(2) Mapps Failed to Preserve His Complaint about the Juror's Oath

We turn to Mapps' complaint concerning a juror's hesitance to take the oath required by Article 35.22 of the Texas Code of Criminal Procedure. That provides:

> When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God."

TEX. CODE CRIM. PROC. ANN. art. 35.22 (West 2006).

The trial court met in chambers with counsel and the hesitant juror, Lydia Sifuentes. In the recorded conference, Sifuentes informed the trial judge that she could serve on the jury, but that her religious beliefs prevented her from taking the Article 35.22 oath. However, Sifuentes agreed to sign a document, which we refer to as "the confirmation," stating, "In lieu of taking an oath, which would violate my religious convictions to do so, I hereby confirm for the court that I will render a verdict in this case according to the evidence admitted in the case, the law given by the court, and nothing else." *See Craig v. State*, 480 S.W.2d 680, 684 (Tex. Crim. App. 1972) ("[I]t is constitutionally permissible that jurors be allowed to affirm instead of being sworn.").

Mapps lodged no objection to this procedure. Thus, the State argues that Mapps' complaint is not preserved for our review because he failed to call this matter to the trial court's attention by objection or other means. We agree.[2]

[2]Mapps also argues that he was deprived of the right to a duly-sworn, twelve-person jury. The State contends that Sifuentes agreed to the trial court's alteration of the oath for Sifuentes, failed to request the appointment of an alternate in her place, and thus, waived the right to a twelve-person jury. Our conclusion regarding preservation of error and the discussion of the record moots Mapps' argument.

"There is little doubt that a complete failure to administer the jury oath renders the jury's verdict a nullity and is reversible error," which can be raised for the first time on appeal. *Brown v. State*, 220 S.W.3d 552, 554 (Tex. App.—Texarkana 2007, no pet.) (citing *White v. State*, 629 S.W.2d 701, 704 (Tex. Crim. App. 1981)). However, this is not a case that involves the complete failure to administer the jury oath. The record in this case establishes that Sifuentes was present and took an oath that was administered before voir dire. The record further shows that, after Sifuentes signed the confirmation, the trial court administered a "second oath" to the jury panel, en masse. Because it appears that Sifuentes was present and took the second oath, we cannot conclude that there was a complete failure to administer the jury oath such as to render the verdict a nullity.

Mapps was required to preserve the error he now complains of on appeal in accordance with the requirements of Rule 33.1 of the Texas Rules of Appellate Procedure.[3] *See* TEX. R. APP. P. 33.1. Because Mapps failed to preserve this issue for our review, we overrule this point of error.[4]

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[3]Our holding that preservation was required in the trial court on this matter is bolstered by the language of Rule 44.2(c) of the Texas Rules of Appellate Procedure, which states, "Unless the following matters were disputed in the trial court, or unless the record affirmatively shows the contrary, the court of appeals must presume: . . . (2) that the jury was properly impaneled and sworn." TEX. R. APP. P. 44.2(c).

[4]*See Maxwell v. State*, No. AP-74309, 2004 WL 3094649, at *12 (Tex. Crim. App. Nov. 17, 2004) (not designated for publication) (finding that defendant was required to object to any variance in the Article 35.22 oath in order to preserve error since there was not a complete failure to administer the oath). Although this unpublished case has no precedential value, we may take guidance from it "as an aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: December 27, 2016
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