In the Court of Criminal Appeals of Texas

No. PD-0242-19

WILLIAM ROGERS,

Appellant

v.

THE STATE OF TEXAS

On Appellant's Petition for Discretionary Review
From the Thirteenth Court of Appeals
Refugio County

YEARY, J., filed a concurring opinion.

I agree with the Court that Appellant was entitled to an instruction on self-defense. But I disagree with the way the Court goes about addressing the error because it highlights a concern that is not

properly mixed with the question at issue. I am also concerned that it will lead to confusion of the issues by courts and practitioners.

In addition to examining the evidence that may have raised the issue of self-defense, the Court dwells mightily on a different error: the trial court's purported interference with Appellant's presentation of relevant and otherwise—at least potentially—admissible evidence. I understand that the Court may be bothered by the fact that the trial court seems to have prevented Appellant from presenting a complete defense. But that is not the issue in this case.

In our role as caretakers of the jurisprudence of our state, we should address issues as directly and as clearly as possible, without burdening our explanations with extraneous concerns. As much as a trial court's prevention of the proper presentation of a defense might contribute to a defendant's inability to secure a defensive instruction, what ultimately matters in assessing error in the denial of such an instruction is *only* what evidence was actually presented for the fact-finder's consideration. This is true even though preventing the presentation of a defense might constitute independent reversible error. And the fact that it might constitute independent reversible error counsels in favor of addressing *that* potential error *separately*.

Our Texas Penal Code provides that "[t]he issue of the existence of a defense is not submitted to the jury *unless evidence is admitted* supporting the defense." TEX. PENAL CODE § 2.03(c) (emphasis added). This is not a theoretical pronouncement. It is *only* the *admitted* evidence that may be considered in determining whether an instruction on a defense was properly given or denied, not evidence that perhaps *ought*

to have been admitted, or even evidence that a trial court might have improperly excluded.

The Court does say: "While *we need not consider* the Bill of Exception in this case, we mention it to highlight the actions of the trial judge, which prevented Appellant from putting on a complete defense." Majority Opinion at 6 (emphasis added). But, on the next page of the Court's opinion, under the heading saying that Appellant was entitled to defensive instructions, the Court's opinion still says: "The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution guarantee the accused in a criminal prosecution the right to a meaningful opportunity to present a complete defense." *Id*. at 7 (internal quotation marks deleted). And later, the Court's opinion says: "[T]he trial court placed an embargo on the defensive issues, and in doing so, prevented Appellant from presenting his defense at every step of the proceedings—during voir dire, opening statements, while testifying, while attempting to create a bill of exception, and while requesting the self-defense charge." *Id.* at 19. None of this is germane to the question we granted for review.

Appellant did not argue to this Court on discretionary review that the trial court did not permit him to present a complete defense. We granted review of this case only to determine whether the court of appeals erred by concluding that the trial court did not err to refuse to instruct the jury on defensive issues. We should stick to that question.

Because the Court insists on weighing in on whether the trial court erred by preventing Appellant from presenting a complete defense, I cannot join its opinion. But, after examining all of the evidence in this

case that was admitted for the jury's consideration, I conclude—like the Court—that Appellant was entitled to an instruction on self-defense. The trial court erred to refuse it. And the Court of Appeals erred by failing to recognize that fact.

With these additional thoughts, I respectfully concur in the Court's judgment.

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