COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CASEY JAMES PERKINS, a/k/a JIMMY PERKINS	§	No. 08-19-00068-CR
Appellant,	§	Appeal from the
v.	§	120th Judicial District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20180D01802)

O P I N I O N

A jury convicted Casey James Perkins ("Appellant") of Aggravated Assault Causing Serious Bodily Injury with a Deadly Weapon under TEX.PENAL CODE ANN. § 22.02(b)(1). The jury sentenced him to incarceration for 22 years and assessed a $5,000.00 fine. On appeal, Appellant raises issues concerning: (1) double jeopardy; (2) the jury instructions for self-defense and defense of third-parties; and (3) ineffective assistance of counsel. Finding no reversible error on these grounds in the proceedings below, we affirm.

I. BACKGROUND

A grand jury indicted Appellant for the murder of Santiago Saenz and aggravated assault with a deadly weapon causing serious bodily injury. The indictment refers to an event on March 18, 2018, where Appellant struck Saenz with a golf club. Saenz died five days later as a

result of blunt force trauma.

The crime occurred at the home of Jose and Esperanza Perez, who are Appellant's grandparents. The decedent Saenz, who was Appellant's stepfather, had arrived that evening at the invitation of Sonia Saenz (Appellant's mother and the wife of the decedent). According to Sonia's testimony, Saenz came over that evening to help move her, and her belongings, to another residence. He parked his car outside the fence of the Perez property, and Sonia began taking her belongings out to the vehicle.

As she left a second load of her possessions on the sidewalk and walked back to the house, she heard glass shatter. She then walked briskly towards the car and saw Appellant and his girlfriend going back toward the house. She saw that Appellant had a "shiny object" in his hand. Saenz was still in his car at that point. Sonia then saw Saenz, seated in the car and holding his head. She got Saenz out of the car and sat him down until paramedics arrived.

At the scene, Appellant claimed that he struck the decedent in order to get him to leave. He told a responding officer that he had originally struck Saenz's car window with the golf club, prompting an argument between them, and that when Saenz turned away to walk towards the Perez home, Appellant struck him in the head with the golf club, causing the golf club to break into two pieces. The responding police officers, however, found no evidence that the Saenz tried to force his way into the Perez home, nor any evidence that he was carrying any type of weapon. They did find evidence, however, that Appellant struck the driver's side window of decedent's car, shattering the glass.

On the evening of the incident, Appellant initially did not express any fear of the decedent. When interviewed later that evening at the police station, Appellant told the police, that he first told Saenz, who was in a car parked outside the fenced yard of the house, to leave and wait for

Sonia at a nearby Walmart. When Saenz refused to leave, Appellant retrieved the golf club from the front porch, went to back out to car, and broke the driver's side window with the club. Appellant claimed that Saenz was right in front of the house at that time. He then claimed he struck Saenz because he was afraid for his relatives. He alleged that Saenz had previously threatened his family. He also claimed that Saenz was barred from approaching the family by a protective order, but that statement ultimately turned out to be false.

Saenz's relationship with Sonia was undeniably rocky, at times violent and unstable. They argued and would get into physical fights. The record contains substantial evidence that Saenz was a violent man, a drug user, a gang member, often carried a gun, and may have threatened his family in the past. The record does not contain, however, any evidence of threats decedent made or any resort to violence on his part on the night in question nor does it contain evidence that he had any weapon at the time of the attack.

After two days of testimony, the jury convicted Appellant of aggravated assault, but found him not guilty of murder. The jury then sentenced him to incarceration for 22 years and ordered he pay a fine of $5,000.00. This appeal follows.

II. DISCUSSION

A. Double Jeopardy

Appellant initially claims in his first issue that his conviction violated the double jeopardy clause of the Fifth Amendment. U.S. CONST. amend. V. Generally, the double jeopardy clause prevents the state from placing an individual in jeopardy twice for the same office. *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex.Crim.App. 2015).

Double jeopardy claims usually arise in one of three contexts: (1) a post-acquittal second prosecution for the same offense; (2) a subsequent prosecution for the same offense following a

conviction; and (3) multiple punishments for the same offense. *Evans v. State*, 299 S.W.3d 138, 140-41 (Tex.Crim.App. 2009); *Langs v. State*, 183 S.W.3d 680, 685 (Tex.Crim.App. 2006). Here, Appellant raises the third type of challenge, a multiple-punishments claim. Appellant argues that he was subjected to double jeopardy because he was indicted for both murder and aggravated assault and tried in a single trial, although convicted of only one offense.

When a defendant faces multiple convictions or punishments in a single trial, the role of the double-jeopardy guarantee "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Ex parte Aubin*, 537 S.W.3d 39, 43 (Tex.Crim.App. 2017), *quoting Brown v. Ohio*, 432 U.S. 161, 165 (1977). Clearly, "the State has the right to prosecute and *obtain jury verdicts* on two offenses in a single trial, even if the offenses are the same for double jeopardy purposes." *Aubin*, 537 S.W.3d at 43 (emphasis original); *see also Evans* 299 S.W.3d at 141 (stating that "the State may seek a multiple-count indictment based on violations of different statutes, even when such violations are established by a single act; but the defendant may be convicted and sentenced for only one offense"). If actually convicted of both offenses, the court should assess the punishment for only the more serious offense. *Evans* 299 S.W.3d at 141; *Bigon v. State*, 252 S.W.3d 360, 372-73 (Tex.Crim.App. 2008).

Here, even if the offenses for aggravated assault and murder were the same for double jeopardy purposes, the State may seek a multiple-count indictment for "the same" offenses without violating a defendant's rights, so long as the defendant does not suffer multiple convictions or punishments. *See Evans* 299 S.W.3d at 141; *Ex parte Chapa*, No. 03-18-00104-CR, 2018 WL 3999741, at *5 (Tex.App.--Austin Aug. 22, 2018, pet. ref'd) (mem. op., not designated for publication). Moreover, Appellant was convicted and sentenced for only one of them. The double

jeopardy protections of the Constitution simply do not apply here, where the defendant suffered punishment only once for the offense he committed. We overrule Issue One.

B. The Self-Defense/Defense of Third Parties Charge

Appellant raises two issues regarding the jury charge on self-defense. Because we believe they are somewhat duplicative of each other, we address them together.

1. Standard of review

When raised by the evidence and requested by the defendant, the trial court is required to charge the jury on the law applicable to the case, including the elements of the offense charged, all statutory defenses, affirmative defenses, and justifications. *See* TEX.CODE CRIM.PROC.ANN. art. 36.14 (setting forth requirements for the jury charge); *Walters v. State*, 247 S.W.3d 204, 208-09 (Tex.Crim.App. 2007); *see also Dinkins v. State*, 894 S.W.2d 330, 339 (Tex.Crim.App. 1995) (en banc) (the charge must contain an accurate statement of the law and must set out all the essential elements of the offense).

If the trial court charges the jury on a defensive issue but fails to do so correctly, the resulting charge error is subject to review under the two-prong test set forth in *Almanza v. State. See Vega v. State*, 394 S.W.3d 514, 519 (Tex.Crim.App. 2013), *citing Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985) (en banc) (op. on reh'g); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex.Crim.App. 2005) (en banc). The first prong requires us to determine whether error exists. *Ngo*, 175 S.W.3d at 743.

If no error is found, then the analysis ends; however, if charge error is found, the error is analyzed for harm under the second prong. *See Almanza*, 686 S.W.2d at 171. The amount of harm necessary to warrant a reversal depends on whether the accused objected to the jury charge, and thereby preserved the error. *Ngo*, 175 S.W.3d at 743; *Almanza*, 686 S.W.2d at 171. If the error

was preserved by a timely objection, we review the record to determine if the error caused the accused "some harm." *Ngo*, 175 S.W.3d at 743; *Almanza*, 686 S.W.2d at 171.

However, if no objection was lodged, as Appellant concedes here, we review the unpreserved jury-charge error for egregious harm. *Almanza*, 686 S.W.2d at 171. Egregious harm is actual, rather than theoretical harm, and must be of such a nature that it affected the very basis of the case, deprived the accused of a fair and impartial trial, or otherwise vitally affected the accused's defensive theory at trial. *See Villarreal v. State*, 453 S.W.3d 429, 433 (Tex.Crim.App. 2015); *Cosio v. State*, 353 S.W.3d 766, 777 (Tex.Crim.App. 2011). "Egregious harm is a 'high and difficult standard' to meet, and such a determination must be 'borne out by the trial record.'" *Villarreal*, 453 S.W.3d at 433, *quoting Reeves v. State*, 420 S.W.3d 812, 816 (Tex.Crim.App. 2013). In making an egregious harm determination, we examine: (1) the entire charge; (2) the state of the evidence, including contested issues and the weight of the evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *See Allen v. State*, 253 S.W.3d 260, 264 (Tex.Crim.App. 2008).

2. The jury charge

The jury charge provided abstract definitions of self-defense that track the relevant statutory language of TEX.PENAL CODE ANN. §§ 9.31, 9.32. The charge did not provide an abstract definition of defense of a third person pursuant to Section 9.33 of the Penal Code, but Appellant has not complained of that omission. Count II of the application paragraphs in the charge contains the aggravated assault charge and includes this instruction on self-defense:

> But you further find from the evidence, or have a reasonable doubt thereof, that [Appellant] reasonably believed or is presumed to have reasonably believed as viewed from his standpoint alone that the force, when and to the degree used, if it was, was immediately necessary to protect himself or another person against the use or attempted use of unlawful force by the said [Santiago], you will find [Appellant] not guilty, and say by your verdict "not guilty . . . ."

> You are further instructed, however, that if you believe from the evidence beyond a reasonable doubt that at the time and place in question, [Santiago], was not using or attempting to use unlawful force on [Appellant] or another person, or if you believe beyond a reasonable doubt that the State has proven that the facts giving rise to the presumption of reasonable belief that force was immediately necessary do not exist, then you will find against [Appellant] on his plea of self-defense, and say by your verdict "guilty . . . ."

These same instructions were contained in the murder count. During closing arguments, defense counsel repeatedly informed the jury that the self-defense instructions applied to both the murder and the aggravated-assault counts.

3. Appellant's claim

In his second issue, Appellant complains that the jury charge was ". . . erroneous and incomplete" because it failed to ". . . illustrate that the self-defense or justification defense applie[d] to both counts equally." In his third issue, Appellant complains that the charge failed to apply the law to the facts of this particular case.

4. Application

The trial court's charge contained a set of general instructions and definitions on the issue of self-defense. The application section of the aggravated assault charge contained specific instructions on self-defense and defense of third parties. Contrary to Appellant's claim in his second issue, the application section of the murder count contained a virtually identical instructions on self-defense and defense of third persons. Further, in closing argument, Appellant clearly argued his defensive theories applied to both counts. We summarily reject Appellant's claim that the charge failed to apply the defenses to both counts equally.

In his third issue, Appellant also argues that the jury instructions failed to properly apply the law to the facts and thus misled the jury on the issue of self-defense. He correctly notes that the jury charge may not simply incorporate the allegations of the charging instrument; it must also fully instruct the jury on the law applicable to the case and to apply that law to the facts presented.

Gray v. State, 152 S.W.3d 125, 127 (Tex.Crim.App. 2004). The charge must make clear to the jury the circumstances under which they should convict and the circumstances under which they should acquit the defendant. *Id*. at 127-28; *Martinez v. State*, No. 08-17-00165-CR, 2019 WL 4127261, at *16 (Tex.App.--El Paso Aug. 30, 2019, no pet.) (not designated for publication).

Again, we find no error in the trial court's charge on this issue. Appellant does not specify the particular instruction the trial court should have given. The charge as given does specifically identify the person who believed that force was immediately necessary to protect himself or others (Appellant) and the person using or attempting to use the unlawful force (Saenz). While Appellant does not specifically identify his complaint with the charge, this Court has approved wording which is substantially similar to the wording here. *Bautista v. State*, No. 08-15-00362-CR, 2018 WL 4907821, at *6 (Tex.App.--El Paso Oct. 10, 2018, no pet.) (not designated for publication).

Even if there were error in the charge (which we do not find), Appellant failed to object to the charge on the grounds asserted here. That failure would require an additional finding of "egregious harm" to the defendant in order to justify reversal. *Ngo*, 175 S.W.3d at 744. We find no such harm here. The trial court charged the jury on self-defense and defense of third parties. Appellant argued those defenses on both counts. We reject out of hand his contention that the self-defense portions of the charge must have confused the jury because the jury acquitted the Appellant of murder but convicted him of aggravated assault using the same fact pattern. That argument overlooks other reasonable explanations for the verdict. The jury could have found that the State failed to prove the intent elements for murder, yet believed the State met the elements of an aggravated assault. *See State v. Ramos*, 479 S.W.3d 500, 508-09 (Tex.App.--El Paso 2015, no pet.) (jury finding of not guilty on murder charge, but guilt on aggravated assault by threat, was not proof that jury based verdict on self-defense). We also conclude on a review of the entire

record that the jury had an ample basis to reject his self-defense claim. The State presented evidence of Appellant's inconsistent stories regarding why he struck the decedent. The State also presented testimony that the decedent was unarmed, nor immediately threatening any of the third parties which Appellant claims he was defending.

Simply put, the trial court charged the jury on Appellant's defensive issues and Appellant argued them. The jury, however, did not find that to be a basis for acquittal. Based upon our review of the entire record, we find no basis for concluding Appellant received less than a fair trial. Because we find no egregious error warranting reversal, we deny Issues Two and Three.

C. Ineffective Assistance of Counsel

Finally, in his fourth issue, Appellant claims that his trial counsel rendered ineffective assistance because counsel failed to request a severance or separate trial of the two charges against him.

The Sixth Amendment to the United States Constitution and Section Ten of Article 1 of the Texas Constitution entitle a criminal defendant to representation by effective, competent counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex.Crim.App. 2011), *citing* U.S. CONST. amend. VI and Tex. Const. art. 1, § 10; *Gonzalez v. State*, No. 08-19-00062-CR, 2020 WL 7585890, at *7 (Tex.App.--El Paso Dec. 22, 2020) (not designated for publication). In order to prevail here, Appellant must demonstrate: "(1) the attorney's performance was deficient, and that (2) the deficient performance deprived him of a fair trial." *Gonzalez*, 2020 WL 7585890, at *7. The failure to meet both prongs of this test is fatal to an ineffective assistance claim. *Id*.

Appellant must show that his counsel's performance fell below an objective standard of reasonableness. *Thompson v. State*, 9 S.W.3d 808, 812 (Tex.Crim.App. 1999). In other words,

"he must show that counsel's actions do not meet the objective norms for professional conduct of trial counsel." *Gonzalez*, 2020 WL 7585890, at *7; *Mitchell v. State*, 68 S.W.3d 640, 642 (Tex.Crim.App. 2002) (en banc). We presume that counsel's representation fell within the broad range of reasonable and professional assistance. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex.Crim.App. 2001). To sustain a claim of ineffective assistance, we must find a firm foundation of counsel's failure in the record. *Gonzalez*, 2020 WL 7585890, at *7. Absent direct evidence of counsel's motivation for the challenged decision, we will presume counsel made a strategic decision where one can be imagined. *Garcia v. State*, 57 S.W.3d 436, 440-41 (Tex.Crim.App. 2001). Appellant must overcome the presumption that the challenged action might be considered a "sound trial strategy." *Jackson v. State*, 877 S.W.2d 768, 771 (Tex.Crim.App. 1994) (en banc), *quoting Strickland*, 466 U.S. at 689.

The State may consolidate separate criminal charges against a defendant when they arise from a single criminal episode. TEX.PENAL CODE ANN. § 3.02; *Werner v. State*, 412 S.W.3d 542, 546 (Tex.Crim.App. 2013). On the other hand, Appellant had the right to seek severance of these charges. TEX.PENAL CODE ANN. § 3.04(a). Had Appellant done so, however, he would have potentially subjected himself to consecutive sentences had he been convicted in both trials. *Id*. § 3.04(b); *Werner*, 412 S.W.3d at 547. Here, Appellant's counsel could have easily made the strategic decision not to seek severance either because counsel was worried about the possibility of consecutive sentences or because counsel wanted to avoid giving the State two chances to obtain a guilty verdict. *See Adekeye v. State*, 437 S.W.3d 62, 72 (Tex.App.--Houston [14th Dist.] 2014, pet. ref'd). Given the operative presumptions, we cannot say that the decision of trial counsel not to request severance or separate trials constituted a clear error or lacked a strategic purpose. We

therefore need not reach the question of whether this decision prejudiced Appellant or deprived him of a fair trial. Appellant's fourth issue is overruled.

III. CONCLUSION

For the reasons stated above, we affirm Appellant's conviction and the judgment of the trial court.

JEFF ALLEY, Justice

February 26, 2021

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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