REVERSE and REMAND; and Opinion Filed May 9, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-00593-CR

JOSE LOZANO, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F12-31495-M

MEMORANDUM OPINION

Before Justices Bridges, Lang-Miers, and Schenck
Opinion by Justice Lang-Miers

Appellant Jose Lozano appeals his conviction for murder. In four issues, he argues that the evidence is insufficient to support the conviction and the trial court erred by refusing to instruct the jury on the law of self-defense and the lesser included offense of manslaughter. We agree the jury charge contained reversible error. We reverse the trial court's judgment and remand to the trial court for a new trial.

BACKGROUND

In early December 2012, appellant arranged via text messages to buy marijuana from John Martinez. Martinez agreed to sell marijuana to appellant, and over the next few days, they texted back and forth about when Martinez would have the marijuana. On the day of the offense, Martinez picked up a friend after work to hang out for a while in Martinez's apartment. Martinez's girlfriend was also at the apartment. Martinez weighed the marijuana and put it in his

backpack. He left to meet appellant; his friend rode in the back seat and his girlfriend rode up front. Martinez and appellant agreed to meet at Corey Place, an apartment complex where Martinez used to live.

At Corey Place, appellant walked up to Martinez's car. Appellant thought he was going to get in Martinez's car, do the deal, and then get out. But Martinez asked appellant if he had a car to do the transaction in, and appellant said he did. Martinez got out of his car, got his backpack, and he and appellant walked away from Martinez's car. They walked toward the corner, but stopped on the sidewalk. Appellant said Martinez said, "Give me your shit." Appellant demonstrated for the detectives how Martinez had something under his shirt pointed at appellant. Martinez said, "Give me your bread." Appellant kept asking, "What the hell, man?" Martinez said, "Give me your money, bro, I ain't playin'." Appellant said he asked Martinez "what the hell you talkin' about," pulled a gun out of his pocket, and it went off. Appellant said the gun accidentally fired as he pulled it from his pocket because it had a "light trigger." Later in the interview, appellant said Martinez held "the backpack up like he was gonna shoot me" and demonstrated Martinez's movements for the detectives. Appellant told the detectives that Martinez "acted like he was gonna shoot me, man, what was I supposed to do?" He said after Martinez fell, he grabbed the backpack and ran. Appellant told the detectives that the backpack did not contain the amount of marijuana he had agreed to buy.

A resident of the apartment complex, who was walking a friend's dogs a distance away, heard the two talking loudly and assumed they were arguing. She did not hear what they said to each other, however, and she saw only appellant because her view of Martinez was blocked. The other witnesses, Martinez's girlfriend and friend, remained in the car and did not hear what appellant and Martinez said to each other. Martinez's friend said "all I really saw was half their body and up. It was dark. . . . I just saw his hand raise; and that's how I saw it." He said he

could not hear what they were saying as they walked away from the car or once they got on the sidewalk. He said, "They just stood still and they are facing each other. And they stand there for like 20, 40 seconds, nothing is going on. And then I just see a guy pick his hand up, which I think they are doing the transaction. And I just see like – I hear a ban[g] and a flash" and saw appellant take the backpack and start running.

Martinez's girlfriend testified that Martinez did not carry a gun. She said appellant shot Martinez in the back as Martinez was running toward the car. She also said she asked Martinez where he was hit, and he told her in the back. The detectives also told appellant that Martinez was shot in the back, the bullet exited the front, and appellant was lying about what happened. Appellant insisted that was not true because Martinez was facing him when he shot Martinez. No gun was found on or around Martinez. Martinez died later at the hospital. The medical examiner testified that the bullet entered Martinez's right chest, traveled front to back, right to left, and downward; he was not shot in the back.

The State charged appellant with capital murder, alleging that he murdered Martinez in the course of committing robbery. Appellant pleaded not guilty. At trial, the State and defense counsel spent considerable time in voir dire on the issue of self-defense. In the guilt/innocence phase, the State played appellant's recorded interview with the detectives and presented the testimony of those who were present when the offense occurred. Defense counsel cross-examined each on their ability to hear and see what transpired between appellant and Martinez.

At the charge conference, the trial court agreed to give an instruction on the lesser included offense of murder. Appellant asked for an instruction on the lesser included offense of manslaughter, but the trial court denied that instruction. Appellant also asked for a jury instruction on the law of self-defense. The State argued that appellant was not entitled to an instruction on self-defense because he was engaged in criminal activity other than a Class C

misdemeanor at the time of the offense. *See* TEX. PENAL CODE ANN. § 9.31(a)(3) (West 2011). The trial court agreed with the State and denied the self-defense instruction. The jury convicted appellant of murder and assessed punishment at 80 years in prison. Appellant timely appealed the conviction.

DISCUSSION

Appellant's first and fourth issues relate to the issue of self-defense. In issue four, appellant argues that the trial court abused its discretion by refusing to instruct the jury on the law of self-defense, the error caused him some harm, and he is entitled to a new trial. In issue one, appellant argues that a hypothetically correct jury charge would have included an instruction on the law of self-defense, the evidence is insufficient to disprove his claim of self-defense, and he is entitled to a judgment of acquittal. We address the claim of jury charge error first.

Issue Four – Jury Charge Error

When reviewing complaints of error in the jury charge, we first determine whether there is error. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, then we determine whether appellant was harmed by the error. *Id*. Because appellant preserved his complaint in the trial court by requesting a self-defense instruction, the test for harm is whether the error was calculated to injure appellant's rights, that is, whether appellant suffered "some harm" from the error. *Id.*

Section 9.32(a) of the Texas Penal Code states that a person is justified in using deadly force against another if the person would be justified in using force under section 9.31 and when and to the degree the person reasonably believes the deadly force is immediately necessary to protect the person against another's use or attempted use of unlawful deadly force. TEX. PENAL CODE ANN. § 9.32(a). Whether a defendant is entitled to a jury instruction on the law of self-defense depends on whether the defensive issue is raised by the evidence. *See Barrios v. State*,

389 S.W.3d 382, 393 (Tex. App.—Texarkana 2012, pet. ref'd). When the evidence raises the issue of self-defense, the trial court is required to give a requested instruction on the defensive issue regardless of whether the evidence is weak, strong, unimpeached, or contradicted. *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *see also Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

The State argued below that appellant was not entitled to a self-defense instruction because he was engaged in criminal activity at the time of the offense. *See* TEX. PENAL CODE ANN. §§ 9.31(a)(3), 9.32(b). This was also the basis on which the trial court denied appellant's request to include an instruction on self-defense. We conclude that this was error.

If a defendant was engaged in unlawful activity at the time he used deadly force against another, then the defendant would not be entitled to the presumption that his use of deadly force was reasonable. *See* TEX. PENAL CODE ANN. §§ 9.31(a)(3), 9.32(b); *see also Villarreal v. State*, 453 S.W.3d 429, 431–33, 439–40 (Tex. Crim. App. 2015); *Barrios*, 389 S.W.3d at 393 (whether defendant entitled to instruction on self-defense and instruction on presumption of reasonableness are two separate inquiries). But engaging in unlawful activity at the time the deadly force was used does not bar an instruction on self-defense if there is evidence to support giving the instruction. *See Villarreal*, 453 S.W.3d at 431–33, 439–40; *see also Barrios*, 389 S.W.3d at 393.

The State appears to concede that the basis the trial court gave for denying the instruction on the law of self-defense was erroneous, but argues that the trial court did not abuse its discretion by denying the instruction because there is no evidence to support appellant's claim that he acted in self-defense. We disagree.

Appellant's recorded interview with the detectives was played for the jury. In the interview, appellant told the detectives that he met Martinez to buy marijuana. Appellant said

Martinez demanded appellant's money and threatened to shoot him. He said Martinez attempted to rob him and "acted like he was gonna shoot me . . . ." He asked the detectives "what was I supposed to do?"

We do not decide whether appellant's claim of self-defense is strong or credible, only that there is some evidence such that the trial court should have included a self-defense instruction in the jury charge. *See Smith v. State*, 676 S.W.2d 584, 586–87 (Tex. Crim. App. 1984). We conclude that there was some evidence of self-defense presented in appellant's statements to the detectives. Consequently, the trial court abused its discretion by refusing to include an instruction on the law of self-defense in the jury charge.

Because appellant objected to the erroneous jury charge, he is entitled to a reversal if the record shows he suffered some actual harm from the error. *See Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). When performing a harm analysis, we consider the jury charge as a whole, the arguments of counsel, the entirety of the evidence, and any other relevant information in the record. *Id.*

The State charged appellant with capital murder; the jury convicted him of the lesser included offense of murder. The instruction on murder gave the jury two options: (1) appellant intentionally or knowingly caused Martinez's death by shooting him with a firearm, or (2) appellant intentionally caused Martinez serious bodily injury and committed an act clearly dangerous to human life. It was undisputed that appellant shot Martinez, but appellant's entire case was that he did so in self-defense. The jury found that appellant murdered Martinez, but we do not know upon which of the two options the jury's verdict rested. Both the State and defense counsel conducted voir dire on the issue of self-defense, but the charge did not include any defensive issues. The jury saw and heard appellant's recorded statement in which he claimed he shot Martinez in self-defense. When defense counsel tried to argue self-defense in closing, the

State objected. The State's fact witnesses did not contradict appellant's statements because they testified that they did not hear what appellant and Martinez said to each other, and none was able to describe what happened that led appellant to shoot Martinez. And Martinez's girlfriend and the detectives who interviewed appellant insisted that appellant shot Martinez in the back, which, as the detectives learned later, was not true. Without the self-defense instruction, the jury had no option but to find appellant guilty. *See Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013).

We conclude that appellant suffered some actual harm from the trial court's refusal to instruct the jury on the law of self-defense. We resolve issue four in appellant's favor.

Issue One – Sufficiency of Evidence to Disprove Self-Defense

Appellant also argues that the State failed to disprove his claim of self-defense and, as a result, the evidence is insufficient to support the conviction. Appellant contends that because the jury should have been instructed on the law of self-defense, and the State did not satisfy its burden of persuasion on his claim of self-defense, we should reverse his conviction and render a judgment of acquittal. We disagree.

Whether a person acted in self-defense is a fact issue for the jury to decide. *See Saxton v. State*, 804 S.W.2d 910, 912 n.3 (Tex. Crim. App. 1991). On appeal, we do not independently weigh the evidence or judge the credibility of the witnesses. *See Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). Instead, our task is to ensure that the jury reached a rational decision based on the evidence. *See id*. But here, the jury did not have the option of considering whether appellant acted in self-defense, and so there is nothing for us to review. Consequently, appellant's remedy is a new trial, not a rendition of a judgment of acquittal. We resolve issue one against appellant.

In issues two and three, appellant makes similar arguments with regard to the trial court's refusal to charge the jury on the lesser included offense of manslaughter. Because appellant would not be entitled to a greater remedy if we resolved those issues in his favor, we do not need to decide issues two and three.

State's Cross-Point

Because of our disposition of issue four, we do not reach the State's cross-point in which it asks us to modify the judgment to reflect that appellant pleaded true to the enhancement paragraph.

CONCLUSION

We reverse the trial court's judgment and remand to the trial court for a new trial.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

JOSE LOZANO, Appellant

No. 05-14-00593-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 194th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F12-31495-M.
Opinion delivered by Justice Lang-Miers.
Justices Bridges and Schenck participating.

Based on the Court's opinion of this date, the judgment of the trial court is **REVERSED** and the cause is **REMANDED** for a new trial.

Judgment entered this 9th day of May, 2016.