Affirmed and Opinion Filed May 4, 2016

In The

Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00793-CR

JON RAY FINCH, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1361107-Q

MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Whitehill

A jury convicted appellant of murder for shooting his boss to death at the restaurant where they worked, and the trial court sentenced him to life imprisonment.

Appellant's six issues argue: (i) the evidence is insufficient to prove that he did not act in self-defense, (ii) the trial court erred by failing to limit the definitions of "knowingly" and "intentionally" in the charge's abstract portion, (iii) the charge should have included a "presumption of reasonableness" instruction, (iv) the charge should not have included "duty to retreat" language, (v) the charge should not have included a reasonable doubt instruction, and (vi) the trial court lacked jurisdiction due to the absence of written transfer orders.

As discussed below, we affirm because (i) the evidence is sufficient to support the conviction and persuade the jury that appellant did not act in self-defense, (ii-v) the charge was

proper on this record or appellant did not suffer egregious harm, and (v) as we have previously held, a written transfer order among Dallas County district courts is not required for the receiving court to have jurisdiction over the transferred case.

I. Background

Appellant was indicted for murder after he shot and killed his supervisor Antral Franklin, at a Williams Chicken restaurant. Although appellant claimed that he acted in self-defense when Franklin tried to choke him, the jury disagreed and found him guilty of murder. After appellant was sentenced to life imprisonment, he timely perfected this appeal.

II. Analysis

A. Issue One: Was the evidence sufficient to support appellant's conviction despite appellant's self-defense testimony?

1. Standard of Review and applicable law

Appellant's first issue argues that there was insufficient evidence to "disprove" self-defense beyond a reasonable doubt. The State, however, was not required to "disprove" self-defense. Because appellant raised the issue of self-defense, the State had to (i) prove the elements of the offense beyond a reasonable doubt and (ii) persuade the jury that appellant did not kill the complainant in self-defense. *See Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003).

A defendant has the burden of producing some evidence to support a self-defense claim. *Id.* Once the defendant does that, the State then has the burden of persuasion regarding the raised defense. *Id.* The burden of persuasion, however, does not require the State to produce additional evidence; it requires only that the State prove its case beyond a reasonable doubt. *Id.* A factfinder's determination of guilt implies a finding against the defensive theory. *Id.*

An individual is guilty of murder if he "intentionally" or "knowingly" causes the death of an individual. TEX. PENAL CODE ANN. § 19.02 (b) (1).

But a person is justified in using deadly force in self-defense: (1) if he would be justified in using force against the other under § 9.31; and (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary under certain statutorily described circumstances. TEX. PENAL CODE ANN. § 9.32 (a).

The actor's belief that deadly force was immediately necessary is presumed to be reasonable if, among other circumstances, the actor did not provoke the person against whom force was used. *Id*. at § 9.32(b). Using deadly force, however, is not justified if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was unlawfully carrying a weapon in violation of penal code § 46.02. *See* § 9.31(b)(5)(A).[1]

Self-defense is a fact issue determined by the factfinder. *Saxton v. State*, 804 S.W.2d 910, 913–14 (Tex. Crim. App. 1991).

In resolving the sufficiency of the evidence issue:

> We look not to whether the State presented evidence that refuted appellant's self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt.

Id. at 914; *Hernandez v. State*, 309 S.W.3d 661, 665 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Defensive evidence that is merely consistent with the physical evidence at the scene, however, will not render the State's evidence insufficient since the credibility determination regarding such evidence is solely within the jury's province and the jury is free to accept or reject the defensive evidence. *Saxton*, 804 S.W.2d at 914.

[1] Under § 46.02, an individual unlawfully carries a weapon if he intentionally, knowingly, or recklessly carries a handgun on or about his person and he is not on his own premises or premises under his control. TEX. PENAL CODE ANN. § 46.02(a)(1).

2. The trial evidence

On the day in question, Franklin went to the restaurant to prepare paperwork. Employees Richard Crockett and Robert Tate were also working that day. Appellant was scheduled to relieve Tate at 2:00 p.m.

Before going to work that day, appellant called Clement Boston, a friend and former Williams Chicken employee, who was working for Taco Cabana. Appellant told Boston that he was having problems with Franklin and wanted to work for Taco Cabana.

When appellant did not arrive at work at 2:00 as scheduled, Franklin allowed Tate to leave and agreed to cover for him.

Appellant arrived between 3:00 and 3:15 p.m. When Franklin questioned him about being late, appellant said that he was tired from the previous night's shift. Franklin also asked him about football tickets that appellant had been selling and the proceeds from those sales. Appellant said that the tickets and proceeds were at his house, and wanted to go get them. But Franklin said no since appellant had arrived late for his shift.

Appellant told Crockett that he was tired of Franklin riding him and wanted to leave. Crockett tried to persuade him not to leave because Crockett was supposed to get off at 5:00, and he did not want to stay. Appellant left anyway.

At 3:48, appellant texted Boston and said, "im about to kill this n–-." Boston did not respond because he did not think appellant would do it.

Crockett saw appellant return to the restaurant and alerted Franklin. Since there would now be another person working, Franklin sent Crocket out to buy more napkins for the restaurant. As he left, Crockett passed appellant who said, "Don't come back in the store." When Crockett asked what he meant, appellant did not reply.

Crockett saw appellant raise his arms as he entered the restaurant. Then, he heard someone speaking loudly and a gunshot. Crockett ran for cover, and heard two more gunshots. He saw Franklin run out of the back door and appellant walk out the front door, get in his car, and drive away.

Crockett found Franklin collapsed outside and held his hand until EMS arrived. Franklin later died at the hospital.

Crockett testified that both he and Franklin knew that appellant carried a .38 caliber handgun. But Franklin did not allow appellant to bring the gun to the restaurant.

The 911 call about the shooting went out at 4:30 p.m. Eight minutes later, appellant called Boston and said that he told Franklin not to mess with his livelihood and shot him. According to Boston, appellant was calm while they were on the phone.

Afterwards, Boston stopped by the restaurant and noticed that the police were there. When they asked him whether he could contact appellant, Boston tried to call him. Although appellant did not answer, he did send a text, saying something like, "You turned me in?"

At 4:47, appellant sent a text to another individual and said, "I tried to shoot that bitch ass n-, but he took off running." A minute later, he texted the same number and said, "But busted his ass two times but didn't know if I hit him."

Three minutes after that, appellant texted Deshun Dye and said, "wfe I just when up to Williams to kill antrail but he took off runin i shoot at him two times bnt no if I hit him [sic]." Five minutes later, appellant texted Tish Finch: "baby, I just tried to kill my boss man sorry I f-d up please dnt be mad at me. 4real [sic]."

Appellant also testified at trial. According to him, he and Franklin had issues between them and he returned to the restaurant to "man up," settle the argument, and return the tickets. After appellant said that Franklin was either going to transfer him or fire him, Franklin got angry

and started choking him. Appellant pulled out his gun because Franklin had his thumbs on his throat and appellant felt like he had to defend himself. Appellant also said that Franklin had been physically aggressive with him in the past.

When asked to explain his text messages, appellant said that he was "angry," "upset," and "shocked." As to the handgun he carried, appellant said that Franklin let him carry it for safety on night shifts.

Appellant turned himself in to the police two days after the incident. He said he threw the gun off of the Martin Luther King bridge and waited to turn himself in because he was scared.

3. The jury rejected appellant's self-defense argument

Appellant's testimony was the only self-defense evidence, which the jury was free to believe or not. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991). And even had the jury believed some of appellant's version of events, it still could have found that he was not justified in his use of deadly force.

Moreover, Crockett's eyewitness testimony refuted appellant's story. And, appellant's text messages both before and after the shooting demonstrate both his intent and consciousness of guilt. *See e.g., Barcenes v. State*, 940 S.W.2d 739, 744–45 (Tex. App.—San Antonio 1997, pet ref'd) (post incident statements of accused can show consciousness of guilt).

Therefore, on this record, we conclude the evidence is sufficient to support appellant's conviction for murder over his claim of self-defense. We thus resolve appellant's first issue against him.

B. Issues Two, Three, Four, and Five: Was there charge error and, if so, was appellant egregiously harmed?

Appellant's second, third, fourth, and fifth issues complain that the trial court erred by submitting and refusing various jury charge instructions. For the reasons discussed below, we reject appellant's issues.

1. 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). When reviewing a jury charge, we first determine whether error occurred; if error did not occur, our analysis ends. *Id*. If error occurred, whether it was preserved determines the degree of harm required for reversal. *Id*.

Here, there was no objection to the charge in the court below. Unpreserved charge error warrants reversal only when the error resulted in egregious harm. *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

Errors that result in egregious harm are those "that affect the very basis of the case, deprive the defendant of a valuable right, vitally affect the defensive theory, or make a case for conviction clearly and significantly more persuasive." *Taylor v. State*, 332 S.W.3d 483, 490 (Tex. Crim. App. 2011).

The egregious harm inquiry is fact specific and must be performed on a case-by-case basis. *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013). In making an egregious harm determination, we consider (i) the entire jury charge, (ii) the state of the evidence, including the contested issues and weight of probative evidence, (iii) the argument of counsel,

and (iv) any other relevant information revealed by the trial record as a whole. *See Almanza*, 686 S.W.2d at 171.

2. Was appellant harmed by including the statutory definitions of knowing and intentional in the abstract portion of the charge for a result of conduct offense?

Appellant argues that the trial court erred by not limiting the culpable mental states definitions to the conduct element. We agree.

Whether intentionally or knowingly committed, murder is a "result of conduct" offense. *See Cook v. State*, 884 S.W.2d 485, 490 (Tex. Crim. App. 1994). This means that the culpable mental state relates to the conduct's result, i.e., causing the death and not its nature. *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003). Therefore, a charge that contains the full statutory definitions of "knowing" and "intentional," that is, it refers to both the "nature of conduct" and the "result of conduct" is erroneous.[2] *See id*. at 491.

The court's charge for a result oriented offense such as murder, should not allow a jury to convict a person based solely on a finding that the accused knowingly or intentionally engaged in conduct that happened to cause death. *See generally, Green v. State*, 891 S.W.2d 289, 294 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (charge erroneously included references to conduct and not to the result of that conduct).

Here, the charge's abstract portion contained the full statutory definitions of intentional and knowing as they appear in penal code § 6.03(a) and (b). Accordingly, that portion of the charge instructed the jury that they could do that which the law does not permit—find appellant

[2] The penal code provides: "A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." TEX. PENAL CODE ANN. § 6.03(a), and "A person acts knowingly, or with knowledge, with respect to the nature of his conduct or the result of his conduct when he is aware but consciously disregards a substantial and justifiable risk that the circumstances exist or the result will occur…." TEX. PENAL CODE ANN. § 6.03(b).

guilty of murder based only on his conduct. Thus, the trial court erred in submitting the charge's abstract portion to the jury. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015).

Appellant next argues that the erroneous instruction misled the jury as to the mens rea component of the crime and "egregious harm is evident." We disagree.

In determining whether the error egregiously harmed appellant, we first consider the entire jury charge. *See Almanza*, 686 S.W.2d at 171. Our analysis includes the degree to which the charge's application paragraph limited the culpable mental states to the prohibited result. *Patrick v. State*, 906 S.W.2d 481, 492 (Tex. Crim. App. 1995). The application paragraph is the charge's "heart and soul" because it specifies the factual circumstances under which the jury should convict or acquit. *See Vasquez v. State*, 389 S.W.3d 361, 367 (Tex. Crim. App. 2012); *see also Yzaguirre v. Stat*e, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013) (application paragraph is the part of the charge that authorizes a conviction).

Where the application paragraph correctly instructs the jury, an error in the abstract instruction is not egregious. *Medina v. State*, 7 S.W.3d 633, 640 (Tex. Crim. App. 1999); *Pierce v. State*, No. 05-12-01211-CR, 2013 WL 6196275, at * 7 (Tex. App.—Dallas Nov. 25, 2013, no pet.).

With regard to the second *Almanza* factor, the "state of the evidence," *Almanza*, 686 S.W.2d at 171, we note that the case centered on whether appellant acted in self-defense rather than whether he intended to kill Franklin.

The third *Almanza* factor is the arguments of counsel. *Almanza*, 686 S.W.2d at 171. Neither party's jury argument addressed appellant's mental state, so this factor weighs against a finding of harm.

Finally, *Almanza* instructs that we should consider any other relevant information in the record. *Almanza*, 686 S.W.2d at 171. We have reviewed the record and find no additional relevant information affecting our decision.

Based on the foregoing, we conclude that the erroneous mental state instruction did not cause appellant to suffer egregious harm. We therefore resolve appellant's second issue against him.

3. Did the evidence support an instruction that appellant's deadly force was presumed reasonable?

Appellant's third issue argues that he was egregiously harmed by the trial court's failure to instruct the jury on the presumption of reasonableness regarding his use of deadly force as penal code § 2.05 (b)(1) requires. The State responds that there was no credible evidence to support that instruction, or alternatively, appellant was not egregiously harmed by its absence.

The trial court instructed the jury on the law of self-defense, including the use of deadly force. *See* TEX. PENAL CODE ANN. §§ 9.31, 9.32(a). Specifically, the instruction stated:

> A person is justified in using deadly force against another if he would be justified in using force against the other person in the first place, as above set out, and when and to the degree he reasonably believes that such deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force . . . .

The trial court, however, did not instruct the jury under § 9.32(b), which creates a presumption that the actor's belief that deadly force was immediately necessary was reasonable if certain criteria are met. TEX. PENAL CODE ANN. § 9.32(b)[3].

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[3] § 9.32(b) provides in pertinent part: The actor's belief . . . that the deadly force was immediately necessary . . . is presumed to be reasonable if the actor:

(1) knew or had reason to believe that the person against whom the deadly force was used:

(A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by Subsection (a)(2)(B);

The statutory presumption favoring a defendant must be submitted to the jury "if there is sufficient evidence of the facts giving rise to the presumption . . . unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact." *Id.* § 2.05(b)(1); *Morales v. State*, 357 S.W.3d 1, 7 (Tex. Crim. App. 2011). Appellant, however, does not identify any facts that purportedly support the presumption.

Moreover, appellant was not entitled to the presumption if he (i) provoked Franklin or (ii) was engaged in criminal activity when deadly force was used. *See* TEX. PENAL CODE ANN. § 9.32(b); *Villareal v. State*, 453 S.W.3d 429, 435 (Tex. Crim. App. 2015).

Here, the evidence supports a finding beyond a reasonable doubt that appellant was engaged in criminal activity. Specifically, appellant admitted that he was a convicted felon, always carried a gun, and had the gun with him when he entered the restaurant. A convicted felon is prohibited from possessing a firearm. TEX. PENAL CODE ANN. § 46.04(a). Thus, the undisputed evidence establishes that appellant was engaged in criminal activity and therefore not entitled to the presumption. We resolve appellant's third issue against him.

4. Did including of an outdated duty to retreat instruction cause appellant egregious harm?

Appellant's fourth issue challenges the court's charge on the duty to retreat. The charge included a general duty to retreat instruction in both the abstract and application paragraphs. The general duty to retreat language, however, was statutorily removed in 2007 and is deemed an improper comment on the weight of the evidence. *Morales v. State*, 357 S.W.3d 1, 6 (Tex. Crim.

(2) did not provoke the person against whom the force was used; and

(3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used . . . . *Id.*

App. 2011).[4] We therefore consider whether erroneously including this language caused appellant egregious harm.

Considering the charge as a whole, we note that although the charge included improper pre-2007 language, it later twice included the correct, current statutory language. Specifically, immediately following the abstract paragraph referencing the pre-2007 duty to retreat, the charge further instructed:

> A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time deadly force is used, *is not required to retreat before using deadly force to defend himself.*
>
> If you find from the evidence that the defendant was such a person, or you have a reasonable doubt thereof, in determining whether the defendant reasonably believed that the use of deadly force was necessary, *you may not consider whether the defendant failed to retreat.*

(Emphasis added). Thus, correct statements of the law followed the erroneous statement, adding a slight mitigating effect to the offending language.

Significantly, the state of the evidence was such that the duty to retreat was not at issue. Neither party discussed the concept throughout the entire trial, including closing argument. Thus, it is unlikely that the jury considered such a duty when deciding the case. *See Angton v. State*, No. 05-14-01038-CR, 2015 WL 6781454, at *6 (Tex. App.—Dallas 2015, pet. ref'd).

Although the better practice is to exclude the old statutory definitions from the charge altogether, under these circumstances, we do not conclude appellant suffered egregious harm. We thus resolve appellant's fourth issue against him.

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[4] Prior to the 2007 amendment to the penal code, the use of deadly force was justified only "if a reasonable person in the actor's situation would not have retreated." *See Whitney v. State*, 396 S.W.3d 696, 702 (Tex. App.—Fort Worth 2013, pet. ref'd). This language was deleted, and the 2007 amendment added new language.

5. Did the charge impermissibly instruct the jury on reasonable doubt?

Appellant's fifth issue asserts that the trial court erred by allegedly including a reasonable doubt definition in the jury charge. The instruction in question read: "It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all 'reasonable doubt' concerning the defendant's guilt."

We rejected this argument in *O'Canas v. State*, 140 S.W.3d 695, 700–02 (Tex. App.–Dallas 2003, pet. ref'd). In that case, we held that the instruction "simply states the legally correct proposition that the prosecution's burden is to establish proof beyond a reasonable doubt and not all possible doubt." *Id*. at 702. Appellant acknowledges our prior decision, but contends that the instruction is really a definition, and *Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000) prohibits defining reasonable doubt. We disagree.

The *O'Canas* instruction was identical to the instruction here. And the court of criminal appeals has since held that the trial court does not abuse its discretion by giving this instruction. *See Mays v. State*, 318 S.W.3d 368, 389 (Tex. Crim. App. 2010) (citing *Woods v. State,* 152 S.W.3d 105, 114–115 (Tex. Crim. App. 2004). Furthermore, although it is better practice to not define the term, courts may or may not define reasonable doubt. *Id.*

We therefore conclude that the instruction did not impermissibly define reasonable doubt and the trial court did not err by including it in the jury charge. *O'Canas*, 140 S.W.3d at 700–02. We thus decide appellant's fifth issue against him.

C. Issue Six: Does the absence of a transfer order establish that the court lacked jurisdiction?

Finally, appellant argues that the trial court lacked jurisdiction because (i) the case was originally presented for indictment in a different trial court and (ii) there were no written orders transferring the case to the court that tried the case and rendered judgment.

If a defendant fails to file a plea to the jurisdiction, he waives any right to complain that a transfer order does not appear in the record. *See Garcia v. State*, 901 S.W.2d 731, 733 (Tex. App.—Houston [14th Dist.] 1995, pet ref'd). There was no such plea here.

Moreover, even had appellant's complaint been preserved for our review, we have repeatedly rejected this argument. *See Bourque v. Stat*e, 156 S.W.3d 675, 678–79 (Tex. App.—Dallas 2005, pet. ref'd); *Carson v. State*, No. 05–14–00376–CR, 2015 WL 3549779, at *6 (Tex. App.—Dallas June 8, 2015, pet. ref'd) (mem. op., not designated for publication). We do so again today and decide appellant's sixth issue against him.

III. Conclusion

Having resolved all of appellant's issue against him, we affirm the trial court's judgment.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

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JUDGMENT

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Opinion delivered by Justice Whitehill. Justices Lang and Brown participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered May 4, 2016.