Affirmed as Modified and Opinion Filed May 18, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00908-CR

OZUMBA ONWUGHALU LNUK-X, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1261486-R

MEMORANDUM OPINION

Before Justices Bridges, Evans, and Richter[1]
Opinion by Justice Bridges

A jury convicted appellant Ozumba Onwughalu Lnuk-X for aggravated assault with a deadly weapon and sentenced him to five years' imprisonment. He raises eight issues on appeal. He first challenges the sufficiency of the evidence to support his conviction because no rational trier of fact could have found against his self-defense claim. In two issues, he contends the trial court abused its discretion by allowing impermissible hearsay. In another issue, he asserts the trial court erred by sustaining the State's objection to his proper voir dire examination. In his remaining issues, he asks the Court to reform the judgment. As modified, we affirm the trial court's judgment.

[1] The Hon. Martin Richter, Retired Justice, sitting by assignment.

Background

On the evening of October 17, 2012, appellant was waiting for a bus to go home after shopping at Aldi grocery store. Because it was a high-crime neighborhood, he carried concealed handguns.[2] He was sixty-six years old at the time and in poor health.

The events that subsequently transpired vary greatly between appellant, two eye witnesses, and the complaining witness. We begin with appellant's version of events.

Appellant was the only person at the bus stop when he noticed another man at the nearby car wash. Appellant saw the man throw a brick down and then walk towards him. The man was later identified as Robert Tyler, the complainant.

According to appellant, Tyler walked up and got right in his face. Appellant told Tyler not to get in his face and asked him what he was doing. Appellant did not want any trouble and told Tyler to leave him alone. Tyler did not verbally respond but started repeatedly hitting appellant in the face. According to appellant, Tyler busted his lip, knocked his teeth loose, and knocked his glasses off. Tyler then kicked appellant between the legs and briefly stopped before hitting appellant several more times. One of the blows caused him to fall backwards, knock over the nearby trashcan, and lose his cellphone from his pocket. Appellant said Tyler then hit him several more times.

While still on the ground, appellant pulled a gun from his pocket and shot towards the "silhouette of his body." Without his glasses, appellant could not see well but he shot "center mass." Appellant said he feared for his life and felt Tyler was trying to kill him.

After the shooting, appellant could not find his cell phone so he walked to the nearby Aldi. He saw a security officer inside and told the security officer he shot a person and needed to notify police.

[2] Appellant had a concealed handgun license.

Officer Kyle Kelly received the shooting dispatch and responded to the location. When he arrived at the bus stop, he did not see anyone; however, across the street at an apartment complex, he saw Tyler collapsed on the sidewalk with two gunshot wounds to his back. Officer Kelly did not see any blood on the front of Tyler's body.

Officer Kelly also received a call from dispatch that a man had entered Aldi and said he shot someone. He immediately went to the store and detained appellant. Officer Kelly found two handguns inside appellant's back pack. Later inspection of one of the handguns confirmed two bullets had been fired from it. Appellant also had a fully loaded clip on his belt. As they were walking out of the store, appellant said "something to the story of, 'The guy hit me in the face and I shot him.'" Officer Kelly observed appellant's busted lip and a little bleeding, but he did not see any other visible injuries. Appellant did not complain of any other injuries besides his lip. Based on his investigation, Officer Kelly did not believe appellant acted in self-defense; however, he acknowledged appellant did not attempt to flee and cooperated with officers.

Detective Richard Lopez interviewed Gerardo Narvaiz and Tracy Goodwin, both witnesses to the crime. Narvaiz lived on the twelfth floor of the apartment complex across the street. He had "a bird's eye view of everything" from his window. On the night of the incident, he was talking to his daughter on the phone and heard yelling from across the street in front of the bus stop. He described it as "a ruckus . . . arguing back and forth and cussing." He did not know if the two men had previously fought, but he said it "almost seemed like it but I didn't see them swing or anything like that." He saw Tyler put his hands up like "either I'm done or I give up" and turned around and walked away. Narvaiz then saw appellant shoot Tyler one time. He said appellant then took two steps and fired two more shots at Tyler's back. Narvaiz had no doubt appellant was walking towards Tyler, and Tyler had his back turned the whole time during the shooting. Narvais called 9-1-1 and told the operator someone had been shot in the back.

Goodwin lived on the third floor of the apartment complex. On the night of the incident, he sent a friend to get beer. He was looking out his window at the time because he wondered what was taking his friend so long. He first saw Tyler sitting at the bus stop but did not notice anything unusual. He knew Tyler from living in the same complex for about a year. Goodwin stepped away from the window but upon his return, he saw a man at the bus stop standing directly in front of Tyler with his back turned to him. Goodwin left the window again and the next time he looked out, about a minute later, he saw Tyler walking away with his hands up "as if he was saying he didn't want no problems, or whatever." He then saw fire coming from appellant's hand. He said Tyler was ten to fifteen feet away from appellant when appellant shot him.

Unlike Narvais, Goodwin never heard the men arguing. However, he described Tyler as "just a nice guy" and could not imagine him causing trouble.

Goodwin went downstairs and stayed with Tyler until the ambulance arrived. During that time, Tyler told Goodwin he walked away because he did not want any problems.

Tyler testified he lived across the street from the bus stop at the apartment complex. He vaguely remembered someone sitting at the bus stop and getting into an argument; however, he could not remember details of the argument. He remembered walking away because he felt threatened. He claimed he walked away with his hands in the air saying, "Don't shoot." He then felt a stinging sensation in his back from bullets hitting him.

Appellant shot Tyler three times. The bullets damaged Tyler's liver, upper colon, spleen, pancreas, diaphragm, and upper small intestine. He required several surgeries, remained in a coma for seventeen days, and stayed in the hospital for two months. At the time of trial, he still had one bullet in his side and had undergone several more surgeries.

At the conclusion of the guilt-innocence phase, the trial court instructed the jury on aggravated assault and self-defense. The jury rejected self-defense and found appellant guilty of aggravated assault. The jury sentenced appellant to five years' imprisonment.

Sufficiency of the Evidence

In his first issue, appellant challenges the sufficiency of the evidence to support his conviction because no rational juror could have found against his self-defense claim. The State responds the physical evidence and eye witness testimony disprove his defense.

The issue of self-defense is a fact issue to be determined by the jury, and a jury's guilty verdict is an implicit rejection of the self-defense claim. *Harrod v. State*, 203 S.W.3d 622, 627 (Tex. App.—Dallas 2006, no pet.). The defendant has the burden of producing some evidence to support his self-defense claim. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). If the defendant produces some evidence, the State has "the burden of persuasion to disprove the raised defense." *Id*. But this does not require the production of any additional evidence; instead, "it requires only that the State prove its case beyond a reasonable doubt." *Id*. Therefore, in reviewing a sufficiency challenge regarding a self-defense claim, we do not look to whether the State presented evidence that refuted self-defense. Rather, we determine after viewing all the evidence in the light most favorable to the verdict, whether any rational trier of fact (1) would have found the essential elements of the offense beyond a reasonable doubt, and (2) would have found against the appellant on the self-defense issue beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991); *see also Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013); *Harrod*, 203 S.W.3d at 627.

Our duty is to ensure that the evidence presented supports the jury's verdict, and the State has presented a legally sufficient case of the offense charged. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). We must bear in mind that the jury heard the evidence and

observed the demeanor of the witnesses. *See Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). We give deference to the jury to determine the credibility of the evidence, to resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences from the evidence. *Id*.

Appellant was charged with intentionally, knowingly, and recklessly causing bodily injury to Tyler by shooting him with a firearm. Appellant does not argue that any element of the aggravated assault was not proven by the State. In fact, he admitted shooting Tyler. Instead, he argues no rational jury could have found against him on his self-defense claim. Therefore, we consider whether a rational jury could have rejected his self-defense claim.

It is a defense under the penal code that the conduct at issue was justified. TEX. PENAL CODE ANN. § 9.02 (West 2011). A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. *Id*. § 9.31(a). "Reasonable belief" means "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. *Id*. § 1.07(42). The use of force against another is not justified in response to verbal provocation alone. *Id*. § 9.31(b)(1).

Appellant admits that "in isolation," the fact that he shot Tyler in the back "would seem fatal" to his self-defense claim, but encourages the Court to consider the circumstances as a whole and to specifically consider (1) he could not see clearly because his glasses were knocked off and (2) it was reasonable for him to believe that Tyler was coming back a third time to attack him rather than walking away from the confrontation. The jury considered this evidence and rejected it. *See Lee v. State*, 259 S.W.3d 785, 792–93 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) (noting jury is the judge of witness credibility and may choose to believe the testimony of witnesses that support the State's theory rather than the defendant's theory of self-defense).

The jury heard testimony that Tyler was at least ten feet away from appellant when appellant shot him in the back. Tyler testified he was walking away with his hands in the air saying, "Don't shoot," which discredits appellant's argument that he believed Tyler would return to attack him. Further, Officer Kelly testified appellant said he shot Tyler because Tyler hit him in the face, not because Tyler viciously attacked him or because he feared Tyler was going to continue assaulting him. Tyler never brandished a weapon and no weapons were found on his person. Appellant could not explain why he did not walk away after Tyler first approached him and stood in his face.

The jury also could have determined appellant was not credible. Narvaiz saw appellant take two steps and fire two more shots at Tyler, which contradicted appellant's claim he was on the ground when he shot Tyler. Appellant provided no explanation for the eye witness testimony other than to assert they both lied and "told some whoppers." Despite appellant testifying that Tyler repeatedly beat him in the face and kicked him in the head to the point he felt like he was going to pass out and vomit, police photographs taken after the incident showed a slight busted lip with a little blood trickling down. The jury could have concluded any scuffle that occurred was not as violent as appellant claimed and based on his physical injuries, it was unreasonable to believe shooting Tyler was immediately necessary to protect himself against Tyler's use or attempted use of unlawful force. TEX. PENAL CODE ANN. § 9.31(a).

After reviewing the evidence in the light most favorable to the verdict, we conclude a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against appellant on the self-defense issue beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914; *see, e.g., Kirk v. State*, 421 S.W.3d 772, 781 (Tex. App.—Fort Worth 2014, pet. ref'd.) (holding evidence sufficient for jury to find against appellant on self-defense because appellant shot victim in the back of ear when he was falling to the

ground or already on the ground). Accordingly, we conclude the evidence is sufficient to support appellant's conviction for aggravated assault. We overrule appellant's first issue.

Voir Dire

In his second issue, appellant argues the trial court abused its discretion by sustaining the State's objection during voir dire, which limited his questioning of potential jurors regarding self-defense. The State responds that although self-defense is a proper line of questioning during voir dire, appellant's self-defense question was not in proper form. Alternatively, the State argues any error was harmless because appellant asked the question again in proper form, received answers, and ended his inquiry.

We review a trial court's ruling regarding the limitation of voir dire questioning for an abuse of discretion. *Barajas v. State*, 93 S.W.3d 46, 38 (Tex. Crim. App. 2002). The reviewing court's focus is whether appellant proffered a proper question regarding a proper area of inquiry. *Hernandez v. State*, 390 S.W.3d 310, 315 (Tex. Crim. App. 2012). A trial court has discretion to restrict voir dire questions that are confusing, misleading, vague and broad, or are improper commitment questions. *Id*. Where the trial court does not place an absolute limitation on the substance of an appellant's voir dire question, but merely limits a question due to its form, the appellant must attempt to rephrase the question or risk waiver of the alleged voir dire restriction. *Id*.

The State posed hypotheticals to the potential jurors regarding when it would be reasonable to shoot someone in self-defense. Defense counsel also asked self-defense questions. The State objected twice to the form of defense counsel's questions regarding self-defense because counsel worded the questions as "a subjective standard" rather than a "reasonableness standard." The trial court sustained the objections. Defense counsel then rephrased his question as follows:

> [DEFENSE COUNSEL]: What do you think a reasonable person would do in that situation. I don't want to get too much into everything, but it's just based on what you hear, what do you think is a reasonable person would do when you look at all the circumstances, okay?
>
> And I'm just asking if everybody can [d]o that. If you can do that, I want to know, and if you can't do that, I really need to know now. Is there a situation where somebody can't do that?
>
> That's all I have for voir dire today. . . . I have enough information from you today to decide what I need to do.

Although self-defense was a proper issue for both sides to discuss, the trial court did not abuse its discretion by sustaining the State's objections when appellant did not ask his questions in proper form. Rather, by asking, "What do *you* think about someone's life being in danger?" and also stating "it has to be reasonable to *you*," counsel did not ask potential jurors to consider a person's "reasonable belief" as defined by the penal code. TEX. PENAL CODE ANN. § 1.07(a)(42) ("a belief that would be held by an ordinary and prudent man in the same circumstances as the actor').

However, even if we concluded the trial court erred, appellant cannot show he was harmed. The trial court did not prohibit counsel from asking any questions regarding self-defense or reasonable relief. *See, e.g., Easley v. State*, 424 S.W.3d 535, 542 (Tex. Crim. App. 2014) (applying rule 44.2(b) harm analysis and concluding no harm when counsel was denied his preferred method of discussing criminal burdens of proof but was not precluded from discussing and explaining the beyond-a-reasonable-doubt standard). In fact, the record shows counsel restated his question, properly phrased as "What do you think a reasonable person would do in that situation[?]" Moreover, at the conclusion of voir dire, he said he had enough information "to decide what I need to do," indicating he was satisfied with his questioning of the panel. Accordingly, we overrule appellant's second issue.

Hearsay

In his third and fourth issues, appellant argues the trial court abused its discretion by allowing inadmissible hearsay testimony from Officer Kelly and Detective Lopez. He complains the witnesses should not have been allowed to testify that Tyler was at least ten feet away, with his back turned, when appellant shot him.

After reviewing the record, even if the officers' statements were impermissible hearsay, appellant cannot prove he was harmed. The erroneous admission of evidence is non-constitutional error. *Garcia v. State,* 126 S.W.3d 921, 927 (Tex. Crim. App. 2004). Under the rule, an appellate court may not reverse for non-constitutional error if the court, after examining the record as a whole, has fair assurance the error did not have a substantial and injurious effect or influence in determining the jury's verdict. *Id*.

Narvaiz and Goodwin both testified they saw Tyler walking away from the bus stop when appellant shot him. Goodwin testified Tyler was ten to fifteen feet away when it happened. It was undisputed that Tyler was shot in the back. Given that the challenged hearsay was cumulative of other properly admitted testimony, we conclude that any error in its admission was harmless. *See Brooks v. State*, 990 S.W.2d 278, 287 (Tex. Crim. App. 1999) ("[A]ny error in admitting the evidence was harmless in light of other properly admitted evidence proving the same fact."); *see also Madden v. State*, No. 2-08-007-CR, 2009 WL 2857269, at *3 (Tex. App.—Fort Worth Sept. 3, 2009, pet. ref'd) (mem. op., not designated for publication) (no error in admission of hearsay when same detailed evidence came in through complainant testimony). We overrule appellant's third and fourth issues.

Reformation of the Judgment

In his last four issues, appellant argues the judgment is incorrect because it states (1) he pleaded guilty; (2) he waived his right to a jury trial; (3) the State offered a plea bargain of "5

years Institutional Division, TDCJ"; and (4) Jason Fine represented the State. The State agrees the judgment should be reformed. The State further asks the Court to reform the judgment to reflect the jury set punishment.

This Court has the authority to correct and reform the judgment of the lower court to make the record "speak the truth" when it has the necessary information to do so. *Smith v. State*, 176 S.W.3d 907, 921 (Tex. App—Dallas 2005, pet. ref'd); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd); *see* TEX. R. APP. P. 43.2(b). Accordingly, we sustain appellant's issues and reform the judgment to reflect appellant pleaded not guilty, appellant had a jury trial, there was no plea bargain, and the jury assessed punishment. The judgment should also be reformed to remove Jason Fine as the attorney for the State and replace Leighton D'Antoni and Bree West in his place.

Conclusion

As modified, we affirm the trial court's judgment.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

Do Not Publish
TEX. R. APP. P. 47
150908F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

OZUMBA ONWUGHALU LNUK-X,
Appellant

No. 05-15-00908-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 265th Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1261486-R.
Opinion delivered by Justice Bridges.
Justices Evans and Richter participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect appellant (1) pleaded not guilty, (2) had a jury trial, (3) there was no plea bargain, (4) the jury assessed punishment, and (5) Leighton D'Antoni and Bree West were the attorneys for the State.

As modified, the judgment of the trial court is **AFFIRMED**.

Judgment entered May 18, 2016.