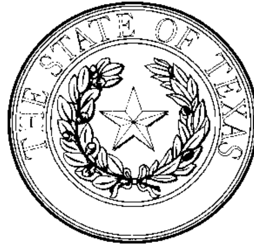
Opinion issued December 23, 2010



In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00743-CR

CANDY HILL HUGHES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1169973

MEMORANDUM OPINION

A jury found appellant, Candy Hill Hughes, guilty of the offense of murder.[1]

After finding true the allegations in two enhancement paragraphs that appellant had

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1 *See* TEX. PENAL CODE ANN. § 19.02 (Vernon 2003).

been twice previously convicted of felony offenses, the jury assessed his punishment at confinement for sixty years. In two points of error, appellant contends that the evidence is factually insufficient to support his conviction and the trial court erred in qualifying the issue of self-defense with an "explanation or discussion of differences" instruction.[2]

We affirm.

Background

Houston Police Department ("HPD") Officer B. Evans testified that shortly after midnight on June 5, 2008, he was dispatched to a neighborhood to investigate a possible homicide. Upon his arrival at the scene, he learned that emergency services personnel had taken the complainant, Michael Scott, to Ben Taub Hospital to be treated for gunshot injuries. While "canvassing" the scene, Evans spoke with Dean Marcus Seedanee and Didrick Dickson, who told Evans that they saw appellant shoot the complainant with a handgun.

After Officer Evans's initial investigation, he gave his information to HPD Officer B. Shorten, who testified that she developed a photographic lineup that included a photograph of appellant and five other men. When she presented the photographic lineup to Dickson and Seedanee, they both identified appellant as the man that they saw shoot the complainant.

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[2] *See* TEX. PENAL CODE ANN. § 9.31(b)(5) (Vernon Supp. 2010).

Harris County Medical Examiner Albert Chu, who performed an autopsy on the complainant's body, testified that the complainant suffered from a "gunshot entrance wound" on the "right side of his back" and an "exit wound" "above his left shoulder . . . next to his neck" which was a "life-threatening injury." Chu also observed a "gunshot entrance" and "exit wound" on the complainant's "left arm." He noted that the complainant had a .31 blood alcohol content at the time of death. Chu opined that the complainant's "cause of death was gunshot wound of the torso and left arm" and that the "manner of death" was "homicide."

Dickson testified that on June 5, 2008, he was "hanging out" with Seedanee outside of his grandmother's house and they decided to walk down the street to "Simon's house." Dickson noted that the complainant was present on the street along with a few other neighbors and their friends. He explained that he, Seedanee, and the complainant had grown up together and were "just like brothers." Dickson observed a conversation between the complainant and Wesley Brown, the son of Michelle Batiste, the appellant's girlfriend. Brown then approached Dickson about the conversation and it appeared to Dickson that Brown "didn't like what [the complainant had] said." Brown told Dickson that "[the complainant] said something, he be tripping."

After his conversation with Brown, Dickson followed Seedanee back to his grandmother's house, where Dickson sat in a chair in front of his car, and

Seedanee sat on the front of the car. After approximately ten minutes, the complainant joined them and stood in the street close to Seedanee. Shortly thereafter, Brown approached the group "from the passenger side of the car" and "stood silently." Dickson then saw appellant "coming down the street with his dog," and when appellant walked past the car, Dickson saw that he had his firearm "drawn." Appellant told the complainant "I'm tired of your shit," and he then "shot one time" in the direction of the complainant. After appellant fired the gun, Dickson "ran from his chair" and "through the yard." He heard appellant order Brown to "get the dog" and ask Dickson and Seedanee if "y'all want some of this, too?" Dickson explained that he did not hear anyone threaten appellant, the complainant did not have any time to react to appellant's statement, and he did not see the complainant with a firearm.

After appellant left the scene, Dickson, Seedanee, and "Ms. Pat" went to the complainant, who was "laying on the side of the car," and Dickson could hear the complainant "gurgling his blood." Less than a minute later, appellant drove his car down the street. He stopped his car at the scene, got out of the car, looked around the ground near the complainant, and then got back in his car and left the scene.

Seedanee testified that on June 5, 2008, he was present and witnessed the shooting. Although his testimony is consistent with that of Dickson, Seedanee did not see the complainant and Brown engage in conversation. He noted that after he

and Dickson sat down in front of the home of Dickson's grandmother, the complainant joined them. "[R]ight after" Brown then approached the group, appellant "walked up . . . with his dog." Appellant raised a firearm, told the complainant "I'm tired of your shit," and he fired shots "right toward" the complainant. When appellant "raised" the firearm, it was "in front of [Seedanee's] face," so he "rolled off the car" and ran down the driveway. Seedanee explained that the complainant did not say anything, and did not have any time to react to appellant. Also, Seedanee did not see the complainant with a firearm. After appellant left the scene, Seedanee returned with Dickson and "Ms. Pat" to the complainant, who was on the ground and bleeding. Shortly after, appellant "pulled up" in his car, got out of the car, walked over the complainant's body, and then "jumped back in his car and screeched out."

Appellant testified that on "seven or eight" previous occasions, he had come across the complainant who was armed with a "gun or pistol," and the complainant was usually "drunk." He noted that when the complainant started drinking, he "wanted to wave all his guns." Appellant explained that he and the complainant "had [had] several arguments" in which the complainant "pulled his gun a few times." On June 5, 2008, as he was walking his dog, appellant saw Brown and the complainant "exchanging words." He then called Brown over towards him, and Brown told him "what was going on." Appellant explained that this was the only

time that he discussed with Brown the conversation that Brown had had with the complainant and that Brown had not returned home prior to appellant's walk. After speaking with Brown, appellant then "asked [the complainant] if he had anything that he was having a problem with[,] with [Brown] to refer to [appellant] or Michelle." The complainant, who was "very" intoxicated, told appellant that "he didn't have to tell me anything," "got kind of belligerent," and began "cursing and things." The complainant then "started jumping around and reaching under his shirt." Based on his prior experiences with the complainant, appellant believed that the complainant was going to shoot him, and, after the complainant "reached under his shirt," appellant "pulled [his] gun and [] shot him." Appellant admitted to unlawfully carrying a firearm, but explained that he was carrying it because he was "new to the neighborhood" and "a lot of things happen in this world today," so he was "just trying to protect" himself. After appellant "fired three shots," he "walked away," got into his car, and drove away. He noted that he stopped his car to speak to Fuquawanda, Michelle Batista's daughter, but denied that he stopped to look at the complainant's body. Appellant then left town for two months because he did not think that he "would stand a chance" if he contacted the police.

On cross-examination, appellant admitted that he had given to Officer Shorten a prior statement in which he explained the shooting. In his statement, appellant noted that Brown came to his house after the initial argument with the

complainant. Appellant and Brown had a "conversation," and during the conversation, the complainant came into appellant's yard "waving a gun." After the complainant left appellant's yard and appellant and Brown continued their conversation, appellant retrieved his firearm and walked down the street to where the complainant, Dickson, and Seedanee were located in order to discuss some issues. He wanted to speak to the complainant because he was "upset" and was "having differences" with the complainant about Brown. Appellant then "spoke back and forth" with the complainant and told him that he was "tired" shortly before shooting the complainant.

Michelle Batiste testified that the complainant often brandished firearms and was often intoxicated. She noted that appellant and the complainant had prior altercations. On one occasion, the complainant "lifted his shirt up and showed that he had a pistol" and said, "You don't want to fuck with me." She explained that the complainant had a reputation for "packing a gun."

HPD Officer J. Marcus testified that prior to the shooting, on July 10, 2006, he had been dispatched to a "shooting in progress." When he arrived on the scene, he saw the complainant with an A-K 47 rifle standing in the middle of the roadway.

Fuquawanda, Michelle Batiste's daughter, testified that the complainant was intoxicated every day and that he had a reputation for carrying a firearm every day.

Factual Sufficiency

In his first point of error, appellant argues that the evidence is factually insufficient to support his conviction because the evidence that he acted in self-defense "was so strong that the jury's rejection of the defense was contrary to the great weight and preponderance of the evidence."

We now review the factual sufficiency of the evidence under the same appellate standard of review as that for legal sufficiency. *Ervin v. State*, No. 01-10-00054-CR, 2010 WL 4619329, at *2–4 (Tex. App.—Houston [1st Dist.] November 10, 2010, no pet. h.) (citing *Brooks v. State*, 323 S.W.3d 893, 912, 925–26 (Tex. Crim. App. 2010)) (holding *Jackson v. Virginia* standard "is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt"). Under this standard, we are to examine "the evidence in the light most favorable to the prosecution" and determine whether "a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 442 U.S. 307, 318–19, 99 S. Ct. 2781, 2788–89 (1979). Evidence is insufficient when the "only proper verdict" is acquittal. *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982).

When a defendant asserts a claim of self-defense, the State has the ultimate burden of persuasion.[3] *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2007). The burden of persuasion does not require the production of evidence; it requires only that the State prove its case beyond a reasonable doubt. *Id.* at 594. When a jury finds a defendant guilty, there is an implicit finding against the defensive theory. *Id.* When reviewing the sufficiency of the evidence concerning the jury's rejection of self-defense, we look to whether any rational jury could have found against the defendant on the self-defense issue beyond a reasonable doubt. *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991); *Lee v. State*, 259 S.W.3d 785, 791 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd). Accordingly, we now review the factual sufficiency of the evidence of a rejection of a self-defense claim under the *Jackson v. Virginia* standard. *See Ervin*, 2010 WL 4619329, at *2.

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual or intends to cause serious bodily injury and commits an act clearly dangerous to human life. TEX. PENAL CODE ANN. § 19.02(b)(1), (2) (Vernon 2003). However, one may use force against

[3] Self-defense is classified as a "defense," as opposed to an "affirmative defense." *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2007). Therefore, the defendant bears the burden of production, which requires that the defendant produce some evidence that supports the defense. *Id.* Once the defendant produces that evidence, the State then bears the burden of persuasion to disprove the raised defense. *Id.*

another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *Id.* § 9.31 (Vernon Supp. 2010). This includes using deadly force against the other if a reasonable person in the actor's situation would not have retreated and when and to the degree that "he reasonably believes" the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force. *Id.* § 9.32(a).

In support of his factual sufficiency challenge, appellant emphasizes the evidence contrary to the verdict. He notes that "there was testimony from numerous witnesses that [the complainant] often engaged in threatening displays of weapons when he was irritated or displeased with someone." He asserts that the complainant was often intoxicated "and this led to his brandishing of weapons." Appellant points to the fact that the complainant had a .31 blood alcohol content at the time of his death and asserts that this evidence "buttressed his claim" that he was acting in self-defense. Appellant did testify that at the time he approached the complainant, he was "jumping around" and appeared to lift his shirt, as if he was going to pull out a firearm. Appellant believed that the complainant was going to shoot him, and he, in fear of his life and safety, pulled out his firearm and shot the complainant. Appellant then walked home, got into his car, and drove away.

However, we are now only to examine "the evidence in the light most favorable to the prosecution." *Ervin*, 2010 WL 4619329, at * 2. Here, Dickson and Seedanee testified that earlier in the evening, Brown and the complainant had exchanged words. Later, when appellant approached the complainant, he stated, "I'm tired of your shit" and then shot the complainant. They explained that the complainant did not have time to react to appellant, and they did not see the complainant in possession of a firearm. After the shooting, appellant drove his car to the scene of the shooting, got out, looked over the complainant's body, and then drove away.

The issue of self-defense is a fact issue to be determined by the jury, which is free to accept or reject the defensive issue. *Saxton*, 804 S.W.2d at 913–14; *Lee*, 259 S.W.3d at 791. The fact finder is the sole judge of the weight and credibility of the evidence. *Brown v. State*, 270 S.W.3d 564, 568 (Tex. Crim. App. 2008). Therefore, the jury could have chosen to believe the testimony of Dickson and Seedanee who testified as to facts showing that appellant did not act in response to an immediate threat, but rather approached the situation with the intent to shoot the complainant. *See id*.

Moreover, the jury could have reasonably believed that appellant, while seeking an explanation from or a discussion with the complainant concerning their differences, was unlawfully carrying a weapon. *See* TEX. PENAL CODE

ANN. § 9.31(b)(5)(9). The State presented evidence that appellant had previously told Officer Shorten that after he had seen Brown and the complainant having a conversation, he retrieved his firearm and he approached the complainant because he was "upset" and was "having differences" with him concerning Brown. When he confronted the complainant, he was unlawfully in possession of a firearm. *See Id.* § 46.02 (Vernon Supp. 2010).

After reviewing all of the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense of murder beyond a reasonable doubt. *See Ervin*, 2010 WL 4619329, at *2. Accordingly, we hold that the evidence is sufficient to support the jury's finding of guilt and rejection of appellant's claim of self-defense.

We overrule appellant's first point of error.

Self-Defense Jury Charge

In his second point of error, appellant argues that the trial court erred in qualifying the issue of self-defense by instructing the jury that his use of deadly force against the complainant was not justified if he sought an explanation from or a discussion with the complainant while unlawfully carrying a weapon because there is no evidence that appellant sought out the complainant for such an explanation or discussion.

In analyzing this issue, we must first decide whether jury charge error exists. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003). If error exists, reversal is required only when a defendant has properly objected to the charge and there was "some harm" suffered by the defendant, that is, "the error appearing from the record was calculated to injure the rights of defendant." TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 2009); *Abdnor v. State*, 871 S.W.2d 726, 731–32 (Tex. Crim. App. 1994).

The trial court instructed the jury in pertinent part,

> You are further instructed as part of the law of this case, and as a qualification of the law on self-defense, that the use of force by a defendant against another is not justified if the defendant sought an explanation from or discussion with the other person concerning the defendant's differences with the other person while the defendant was carrying a weapon in violation of the law.

Appellant objected to this portion of the charge on the ground that there is not "enough evidence in the record to support that limitation on his right of self-defense." The trial court overruled the objection.

As noted above, "[t]he use of force against another 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 [] carrying a

weapon in violation of [Texas Penal Code section] 46.02."[4] TEX. PENAL CODE ANN. § 9.31(b)(5)(a). Such a limiting instruction on the right to self-defense is proper when (1) self-defense is an issue, (2) there is evidence that the defendant sought an explanation from or discussion with the victim concerning their differences, and (3) the defendant was unlawfully carrying a handgun. *See Lee*, 259 S.W.3d at 789–90 (holding that trial court did not err in instructing jury on defendant's seeking discussion with victim when defendant approached victim and, stated, "You robbed me. You not going to rob me no more," before shooting victim); *Bumguardner v. State*, 963 S.W.2d 171, 175 (Tex. App.—Waco 1998, pet. ref'd) (holding that evidence raised issue that defendant sought explanation from victim where issue of self-defense was submitted to jury and State proved that defendant had differences with victim, demanded to know location of his wife, and yelled at victim while unlawfully carrying weapon); *see also Hernandez v. State*, 309 S.W.3d 661, 664–65 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd) (applying subsection 9.31(b)(5) limiting instruction where defendant sought out victim to discuss victim's differences with third person). If there is evidence raising the issue, the charge should include an instruction on an "explanation from or discussion of differences." *Lee*, 259 S.W.3d at 790.

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4 Texas Penal Code section 46.02 provides, "A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club." TEX. PENAL CODE ANN. § 46.02(a) (Vernon Supp. 2010).

Here, appellant testified that when he was walking his dog, he saw an argument between the complainant and Brown. Appellant then approached the complainant about the situation and advised him that he should direct his concerns to appellant or Batiste. Although appellant testified that he thought the complainant was going to shoot him, he admitted that he was unlawfully carrying a handgun when he approached the complainant. Moreover, he admitted that he previously told Officer Shorten that after he had seen Brown and the complainant having a discussion, he retrieved his firearm and he approached the complainant because he was "upset" and "having differences" with him concerning Brown.

Dickson testified that appellant approached the complainant after a confrontation arose between the complainant and Brown. Dickson and Seedanee both testified that appellant approached the complainant, stated, "I'm tired of your shit," and then shot the complainant.

Appellant's testimony that he approached the complainant and advised him to come to him or Batiste if he had a problem with Brown, his prior statement to Officer Shorten, and the witness testimony about appellant's remarks made to the complainant before the shooting constitute evidence that appellant sought an explanation from or a discussion with the complainant about their differences. Further, appellant admitted that he was unlawfully carrying a firearm at the time he approached the complainant.

Accordingly, we hold that the trial court did not err in qualifying the issue of self-defense with an "explanation from or discussion of differences" instruction pursuant to section 9.31(b)(5)(a).

We overrule appellant's second point of error.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Alcala, and Higley.

Do not publish. TEX. R. APP. P. 47.2(b).