Opinion issued May 26, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00140-CR

DAMIEN DOUGLAS HARRIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 428th District Court
Hays County, Texas
Trial Court Case No. CR-17-0781-D

CONCURRING OPINION

When it is undisputed that a defendant is engaged in criminal activity at the time of a shooting, the presumption of reasonableness does not apply. The trial court erred by including the presumption of reasonableness in the jury instructions in this case. The court then compounded its error by refusing to answer the jury's question

during deliberations with a clarifying instruction to eliminate the confusion caused by including the presumption in the jury charge. Because I would hold that the trial court erred both by including the presumption in the jury charge and by refusing to give the jury a clarifying instruction on the presumption, I respectfully concur.

Under Texas law, when there is no dispute that a defendant was engaged in criminal activity at the time of a shooting, the defendant is not entitled to an instruction on the presumption of reasonableness. *Lee v. State*, 415 S.W.3d 915, 925 (Tex. App.—Texarkana 2013, pet. ref'd) ("Although a few witnesses supported the self-defense theory, all of the eyewitnesses to the shooting claimed that Lee was actively distributing drugs that day; thus, she would not be entitled to the presumption of reasonableness."). The Fourteenth Court of Appeals has held that when "evidence conclusively established that appellant was engaged in criminal activity at the time he used deadly force," the presumption of reasonableness instruction is "not the law applicable to the case." *Reyna v. State*, 597 S.W.3d 604, 607 (Tex. App.—Houston [14th Dist.] 2020, no pet.).

Because it was undisputed that Harris was engaged in criminal activity at the time of the shooting, the presumption of reasonableness instruction was not the law applicable to the case. *See id.* There was no reason to include this instruction in the jury charge. Nevertheless, the State insisted upon including the presumption in the

jury charge over the defense's objection. During voir dire, the following exchange occurred regarding the reasonableness presumption:

> State: Okay. The law additionally states that reasonable belief is presumed if a person whose force was used against was attempting to commit a burglary, kidnapping, sexual assault, robbery or murder; or the person using force to not provoke the person whose force was used against; or the person using force was not engaging in any criminal activity. If any one of those things is proven false, in other words, if there was criminal activity, or the person claiming self-defense did provoke it, or the person whose self-defense was used against was not engaged in those listed crimes, that belief is not presumed reasonable and you've got to evaluate it on its own merits.
>
> If any of those things are proven false, why do you think, Ms. Bell [a venireperson], it should be more difficult to claim self-defense in that you had a reasonable belief—
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> Court: Counsel approach.
>
> Defense: At this time may we approach?
>
> (At the Bench)
>
> Court: Is this the issue you were talking about before? What's your specific objection?
>
> Defense: We're objecting—we're stipulating that he doesn't get the presumption, so it's a misuse of the law. The Constitution is to protect the Defendant, so he's misusing the presumption. It's a right for the accused and not the State to use in the adverse against him. He's basically using his Constitutional rights against him.
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> State: And, Your Honor, we're at the very beginning stages. All I'm talking about is the law generally. I'm not talking about the specific facts. There is no evidentiary stipulation on record at this point. I don't think there can be. So I think I'm still entitled to talk about the law generally, which is what I'm doing.

Defense: Your Honor, if I may? The Defendant is the only one that can waive the right. We are waiving his right to the presumption of reasonableness. I'm saying that on the record. I've stipulated to the record. There's no reason for us to discuss this.

Court: I'm going to overrule the objection, but I'm going to give them an instruction related to evidence and the law. And the Defense's objection is noted.

The State continued by explaining that it would be "harder" for someone to prove self-defense if that person was engaged in criminal activity at the time of a shooting, a questionable statement that was challenged by the defense:

State: Ms. Bell, I think I left off with you. Why might the legislature have decided—the legislature decided that it should be harder to claim self-defense if I'm engaged in criminal activity? What do you think was going on there?

Defense: I'm going to object, Your Honor, as to a misstatement of the law. It's not harder to prove self-defense.

State: Well, it is in the sense that you don't get the presumption of reasonableness.

Court: Sustained.

The trial court erred by including the presumption of reasonableness instruction in the jury charge. "When it comes to jury instructions, trial courts are required to instruct the jury on the law applicable to the case." *Williams v. State*, — S.W.3d —, No. PD-0477-19, 2021 WL 2132167, at *5 (Tex. Crim. App. May 26, 2021) (internal quotation marks omitted); *see Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007) ("The trial judge has an absolute *sua sponte* duty to prepare

a jury charge that accurately sets out the law applicable to the specific offense charged."). The presumption of reasonableness did not apply to the case, given the undisputed evidence that Harris was engaged in an illegal drug deal at the time of the shooting. *See Reyna*, 597 S.W.3d at 607. The State impermissibly requested the instruction in order to make obtaining an acquittal "harder" than it would be under a jury charge that accurately stated the law.

"[I]f a defendant complains on appeal about an erroneous instruction (or lack of a proper instruction) regarding an area of the law that is considered the law applicable to the case, the objection (or lack thereof) determines the applicable standard for assessing harm." *Williams*, 2021 WL 2132167 at *5. "If a proper objection was made at trial to an error in the jury charge, reviewing courts determine whether the error caused the defendant some harm." *Id.* Defense counsel objected to the inclusion of the instruction in the jury charge,[1] so Harris was only required to demonstrate "some harm" in order to obtain reversal.

Harm is evident in the jury's question sent during deliberations: "Does the admitted commission of a crime, sale of a controlled substance, negate the basis of

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[1] Both the majority and the dissent state that Harris did not properly object to inclusion of the presumption of reasonableness instruction in the jury charge. However, all that is required to preserve error is a timely objection stating the complaint with sufficient specificity to alert the trial court to the complaint and a ruling on the objection. *See* TEX. R. APP. P. 33.1(a). As quoted above, Harris timely objected to inclusion of the presumption and the trial court overruled the objection. Thus, Harris preserved error on this issue.

a claim of self-defense[?]" This question reveals that the jury focused on the presumption of reasonableness instruction—which was not applicable law—and struggled with how to apply it to the case at hand. This is precisely the result intended by the State when it requested an inapplicable instruction to make it "harder" for Harris to prove self-defense, and it is precisely the result defense counsel sought to avoid by objecting to the presumption during void dire. A simple one word instruction—"no"—in response to the jury's question would have eliminated the confusion, and defense counsel requested as much. I agree with the majority that the trial court's failure to give this clarifying instruction constitutes egregious harm. But the trial court's inclusion of inapplicable law in the charge created the problem in the first place and also harmed Harris. I would reverse on this basis as well. Therefore, I concur.

April L. Farris
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Farris.

Radack, C.J., dissenting.

Farris, J., concurring.

Publish. TEX. R. APP. P. 47.2(b).