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

O P I N I O N

This is an appeal from a conviction for murder. Damien Douglas Harris fatally

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* Per the Texas Supreme Court's docket-equalization powers, this appeal was transferred from the Third Court of Appeals to this court on January 24, 2020. *See* TEX. GOV'T CODE § 73.001; Order Regarding Transfer of Cases from Courts of Appeals, Misc. Docket No. 19-9120 (Tex. Dec. 20, 2019). We are unaware of any conflict between its precedent and ours. *See* TEX. R. APP. P. 41.3.

shot Terrence Valentine after a drug deal went awry. At trial, the defense maintained Harris killed Valentine in self-defense. The jury disagreed, finding Harris guilty.

Harris challenges his conviction on three grounds. First, he argues the evidence is legally insufficient because the State did not prove he did not shoot Valentine in self-defense. Second, Harris argues the trial court erred in refusing to answer the jury's question about the charge's instruction as to when a defendant's belief that deadly force was immediately necessary is presumed to be reasonable. Third, he argues the trial court erred in denying his new-trial motion, in which he asserted the charge should not have included an instruction on the presumption.

We hold that the evidence is legally sufficient to support Harris's conviction. However, under the circumstances of this case, the trial court reversibly erred in refusing to answer the jury's question about the charge's instruction as to when a defendant's belief that deadly force was immediately necessary is presumed to be reasonable. We therefore reverse Harris's conviction and remand for a new trial.

BACKGROUND

A grand jury indicted Harris for the offense of murder, alleging that he intentionally and knowingly caused Valentine's death by shooting him with a firearm. Harris pleaded not guilty, and the charged offense was tried to a jury.

Five people were present when Harris shot Valentine: Devin Bethea and Harris, who were there to sell prescription cough syrup; Valentine and Joseph

Massey, who were there to buy the syrup; and Ty-Zay Wilson, who introduced the buyers to the sellers and rented the apartment where they met. Of these five, Massey and Wilson testified. Valentine was dead. Harris exercised his right not to testify. No one called Bethea to testify, possibly because he was facing his own charge for the misdemeanor offense of failing to report a felony—Valentine's murder.

Wilson's Testimony

Wilson previously was enrolled at Blinn College and later transferred to Texas State University. Valentine had been Wilson's roommate at Blinn for about two-and-half years. Bethea had been Wilson's roommate at Texas State for a year.

Wilson remained in contact with both Valentine and Bethea afterward. Wilson put Valentine in touch with Bethea, who had prescription cough syrup—promethazine with codeine—for sale. Valentine was interested in buying it.

Wilson agreed to let the parties buy and sell the cough syrup at his apartment. Wilson said the transaction had four participants: Bethea and Harris as sellers and Valentine and Massey as buyers. Wilson disclaimed any role in the sale.

Valentine arrived with Massey, whom Wilson did not know. Valentine and Massey counted their money while Wilson played a video game. Wilson noticed Valentine had a pistol in his lap. Wilson indicated that Valentine was paranoid. Valentine asked about Bethea, stating that if Bethea tried to rob him, Valentine

would just take the cough syrup. Wilson tried to reassure Valentine that he had nothing to worry about because Bethea was not the kind of guy who would do so.

Bethea and Harris later arrived at Wilson's apartment. When they arrived, Harris was carrying a cardboard box containing the prescription cough syrup.

Valentine and Massey and Bethea and Harris met in Wilson's kitchen. Wilson went to his room and then returned to the kitchen. When Wilson returned, Bethea and Harris were counting money. Valentine and Massey were standing nearby.

Wilson then heard either Bethea or Harris say that Valentine and Massey were short. At this point, Massey asked Valentine where the rest of the money was. Valentine replied that he had the rest of the money in his wallet. But Harris responded by packing up the cough syrup and stating there would be no sale.

When Harris tried to leave with the cough syrup, Valentine "bum rushed" him. Valentine pressed his body into Harris, who either was knocked backward as a result of Valentine's physical contact or backed up on his own. At this point, Harris and Valentine both reached into their respective waistbands to draw pistols. Wilson testified that Harris and Valentine did so at "literally almost the same time."

Wilson did not know who drew their pistol first because when Harris and Valentine reached into their respective waistbands, Wilson turned around and fled from the apartment. As Wilson was fleeing, he heard two gunshots fired behind him. Wilson stated that there was a momentary beat or pause between the two shots.

Wilson did not call the police after reaching safety. He did not return to his apartment until after the police arrived on the scene. Even then, he did not go inside.

Weeks later, Wilson viewed a photo line-up. Wilson identified Harris.

On cross-examination, defense counsel asked Wilson if he had previously told a detective that Valentine intended to rob Bethea and Harris all along. Wilson denied that Valentine ever said so before the transaction fell through. Wilson insisted he did not know anything was amiss until either Bethea or Harris said that the money was short. But Wilson acknowledged that he became concerned when Valentine voiced his intent to take the cough syrup by force if the deal went sideways. In retrospect, knowing the money was short, he understood why Valentine was paranoid.

Wilson agreed that Valentine was a big man. Valentine had played football at Blinn College. He stood about 6 feet tall and weighed around 300 pounds. When a detective investigating the shooting asked Wilson whether he thought Harris had shot Valentine in self-defense, Wilson said he thought Harris had defended himself. But Wilson conceded that he did "not really" understand the law of self-defense.

The State granted immunity to Wilson in exchange for his testimony. But the subject of Wilson's immunity deal was not broached in front of the jury.

Massey's Testimony

Massey had been close friends with Valentine for years and was living with him at the time of the shooting. According to Massey, Valentine invited him on a

trip to meet a friend in San Marcos, where Wilson resided. But Massey testified he did not know they were going to meet Wilson or that Valentine was going there to buy prescription cough syrup before they arrived at Wilson's apartment.

Massey said Valentine had a large sum of money. But Massey denied that he knew Valentine had a firearm in his possession on the day of the shooting.

When Valentine and Massey arrived at Wilson's apartment, Massey learned that Valentine's money was counterfeit and Valentine intended to use this counterfeit money to buy promethazine. Massey was familiar with counterfeit money, as he had used counterfeit money to buy things in the past. But Massey denied knowing Valentine intended to take the cough syrup if the deal went awry.

Massey did not know Wilson. Nor did Massey know Bethea or Harris.

When Bethea and Harris arrived, Harris was carrying a box. They came into the apartment, and Harris sat the box down on the kitchen island. Bethea and Harris then spoke with Valentine about cough syrup. Massey denied he was involved.

Either Bethea or Harris opened the box, which contained bottles. Massey said the bottles appeared to contain prescription cough syrup. Valentine gave Bethea and Harris the counterfeit money, and Bethea and Harris began counting the money.

Massey first knew the deal had gone wrong when Harris looked up and made eye contact. According to Massey, Harris had an angry expression on his face,

presumably having discovered that Valentine's money was counterfeit. Harris then picked up the box of bottles and began walking toward the apartment's front door.

Valentine grabbed Harris by his shirt collar and pushed him up against a wall. At this point, the two were standing face-to-face. Harris reached for his pistol and shot Valentine. Massey said he did not see Valentine reach for a pistol at any time.

But Massey does not appear to have witnessed the actual shooting. He testified that he ducked behind the kitchen island as Harris reached for his pistol. Massey heard a single gunshot while he was behind the island. Massey then fled upstairs.

Massey returned downstairs a short while later. When Massey returned, he saw Valentine lying facedown on the floor. Valentine had been shot in "the face area," and there was a lot of blood. A small pistol lay next to Valentine. No one else remained in the apartment. Bethea, Harris, and Wilson had all apparently left.

Massey called 911. He also tried to render first aid to Valentine.

Before the police arrived, Massey picked up the pistol and placed it behind a nearby air conditioning unit outside. He agreed he was trying to hide the pistol. He also hid the counterfeit money. He did not want the police to see the pistol or money. In addition, Massey took Valentine's cell phone and put it in one of his own pockets.

Weeks later, Massey viewed a photo line-up. Massey identified Harris.

On cross-examination, defense counsel confronted Massey with a text message he sent to Valentine the day before the shooting. Massey wrote: "I forgot

that lick tomorrow." Massey testified that the term *lick* means "any exchange from hand to hand that involves money." He admitted that a "lick can be a robbery." But Massey denied that he and Valentine planned to rob Bethea and Harris, even as a contingency plan in the event that the spuriousness of their money was discovered.

Defense counsel also confronted Massey with prior videotaped interviews Massey gave to a detective. In one interview, Massey admitted he knew he and Valentine were traveling to San Marcos for "a drug thing" before they arrived. Massey also admitted that he "was trying to get some" cough syrup for himself.

During cross-examination, Massey admitted he put Valentine in touch with the person who supplied Valentine with the counterfeit money. But Massey only admitted this after being confronted with a prior statement he had made.

The State granted immunity to Massey in exchange for his testimony. Massey testified he had been prepared to testify without an immunity deal, which was brokered only after defense counsel suggested he could face criminal charges.

Other Witnesses

The jury heard from several other witnesses, none of whom were eyewitnesses to the aborted drug deal or shooting. These other witnesses included Valentine's mother, a medical doctor employed by the Travis County Medical Examiner's Office, several peace officers with the San Marcos Police Department who responded to the shooting, two investigating detectives, a crime-scene evidence

supervisor, a forensic scientist employed by the Texas Department of Public Safety, and a forensic scientist and crime-scene analyst who testified as a defense expert.

Valentine's mother testified her son had played football in high school both as a defensive and offensive tackle. He was an inch or two under six feet tall.

Dr. Leisha Wood was the medical examiner who autopsied Valentine's body. She testified Valentine "had a gunshot wound on the posterior left side of the head." The gunshot wound was located about four inches below the top of his head. Based on the autopsy, Wood concluded the bullet had ricocheted inside his skull. The trajectory of the bullet "was left to right, slightly back to the front, and upward." Wood testified Valentine had been shot a single time, which was fatal and likely would have immediately incapacitated Valentine. Wood examined Valentine's body for other injuries but did not see any other signs of injury on his body that would indicate Valentine had been in a fight or struggle before he was shot. Wood classified Valentine's cause of death as homicide. But she agreed that homicide is not the same thing as murder. By homicide, Wood meant only that he had died at another's hands. For medical examiners, this classification is not a legal determination of guilt.

On cross-examination, Wood agreed there were five bullet holes in the hooded sweatshirt Valentine was wearing despite there being just one gunshot wound. Wood further agreed that these holes indicated the sweatshirt was not pulled smoothly over Valentine's head when he was shot. When asked whether this bunching could be

consistent with a fight or physical struggle, Wood answered, "It could be." Wood also agreed that the absence of other injuries did not exclude the possibility that Valentine had been involved in a fight or struggle before he was shot and killed.

When Wood said the gunshot wound likely immediately incapacitated Valentine, she meant he would have had no motor skills afterward. Wood agreed it was very unlikely that Valentine returned fire after being shot in this case. But she also acknowledged Valentine still could have had involuntary body movements, like muscle contractions, though she did not know how common this would be. For an involuntary movement to result in Valentine firing his own pistol, however, his finger already would have to have been on the trigger when he was shot by Harris. Wood agreed the likelihood of shooting a pistol in this involuntary manner would be pretty low. Wood also testified there are "rare exceptions" when "somebody receiving a head wound like that" would not be immediately incapacitated.

When peace officers arrived at Wilson's apartment, only Massey remained there. Wilson had fled and did not return until later. Bethea and Harris had fled.

One of the peace officers who responded to the scene after the shooting testified there were two shell casings near Valentine's body. The casings were from bullets of different calibers, which could not have been fired from the same pistol. Officers found a pistol matching one of these calibers behind the air conditioning unit. The officers also found the counterfeit money hidden underneath a mattress.

A few days after the shooting, Detective M. Casillas searched Wilson's apartment to find the second bullet that had been fired. During this search, Casillas found a blemish in a couch leg. The floor near this couch leg was also blemished. The second bullet—the one shot from Valentine's pistol—was in the couch leg.

Casillas stated he made this search of Wilson's apartment based on witness interviews. Wilson told Casillas and the lead investigator, Detective D. Templeton, that both Valentine and Harris had pistols at the time of the shooting. But based on Wilson's interview, Casillas understood Harris to have reached for his pistol first.

Templeton also testified about the interviews of Wilson and Massey. Templeton said Wilson indicated that Valentine pushed Harris—whose identity Wilson did not yet know—up against a wall and reached for his pistol, possibly in response to Harris having drawn his own pistol from his waistband. Templeton also learned of Bethea's involvement from Wilson during this interview. Templeton located Bethea afterward, but Bethea did not cooperate with the investigation.

Based on an examination of Bethea's phone or phone records, Templeton learned that Bethea and Harris interacted many times near the timeframe of the shooting. Templeton then showed a photo line-up to Wilson and Massey. Both identified Harris as the person who had accompanied Bethea and shot Valentine.

Templeton testified he was familiar with the term *lick*. According to Templeton, this term signifies a robbery or a burglary. Finally, Templeton testified that promethazine is a prescription-only cough syrup, which comes in bottles.

Sean Daniel, a forensic scientist with the Texas Department of Public Safety, removed the bullet from the couch leg. Based on his testing and examination, Daniel determined this bullet was fired from Valentine's pistol. Daniel also testified that the two bullets fired in this case could not have been shot from the same pistol.

Daniel also testified that he performed a "drop test analysis" on Valentine's pistol. The purpose of this analysis is to determine whether a pistol can accidentally discharge if it is dropped. Valentine's pistol did not do so when Daniel tested it. Based on this testing, Daniel agreed that one would have to apply full pressure to the trigger for the pistol to fire. According to Daniel, one would have to apply "a little over five pounds" of pressure on the trigger of Valentine's pistol to make it fire.

Tammy Barnette, a forensic scientist and crime-scene analyst who previously worked for the Houston Forensic Science Center, testified for the defense. She analyzed the trajectory of the bullet fired from Valentine's pistol. Barnette concluded the bullet fired from his pistol hit the floor and then ricocheted into the couch leg.

On cross-examination, Barnette agreed that Valentine was shot in the back of the head. She also agreed that Valentine's hooded sweatshirt appeared to have been pulled up over his head because there was a hole through the sweatshirt's hood.

Jury Charge and Charge Conference

In the charge, the trial court instructed the jury on self-defense. The instructions identified circumstances under which a defendant's belief that deadly force was immediately necessary is presumed to be reasonable. *See* TEX. PENAL CODE § 9.32(b). Among other things, this instruction informed the jury that to qualify for the presumption, the defendant must not have been engaged in criminal activity, other than minor traffic violations, when he used deadly force. *See id.*

The parties had an opportunity to review the trial court's proposed charge before it was given to the jury. The trial court held a charge conference after both sides rested. Neither side objected to the jury charge's self-defense instructions.

Jury's Question about the Charge

While deliberating as to whether Harris was guilty, the jury sent a note asking the trial court about the charge's instruction on the presumption of reasonableness. Apparently, the jury was confused by the instruction's provision that the presumption of reasonableness does not apply when a defendant is engaged in criminal activity, because the jury asked, "[D]oes the admitted commission of a crime, sale of a controlled substance, negate the basis of a claim of self-defense?"

Defense counsel asked the trial court to answer the jury's question in the negative. Instead, the trial court answered by referring the jury to the instructions

already contained in the charge and advising the jury to continue its deliberations in accord with these instructions. The jury did so and eventually reached a verdict.

Jury Verdict and Judgment

The jury found Harris guilty of murder as charged in the indictment and assessed his punishment at 20 years of imprisonment. The jury did not assess a fine. The trial court entered a judgment of conviction in accord with the jury's verdict.

Motion for New Trial

Harris moved for a new trial. As grounds for new trial, he asserted the trial court failed to properly answer the jury's question about the presumption of reasonableness. He also asserted that the presumption of reasonableness was inapplicable on the facts of this case and should not have been included in the charge.

Nothing in the record shows that Harris's new-trial motion was set for hearing or heard. The motion was denied by operation of law. *See* TEX. R. APP. P. 21.8(c).

DISCUSSION

Because Harris's legal-sufficiency challenge would afford him the greatest relief if meritorious, acquittal as opposed to a new trial, we address it first. *See Finley v. State*, 529 S.W.3d 198, 202 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (reviewing court will first address issues that, if sustained, require reversal and rendition of judgment before turning to issues that would require remand).

I. Legal Sufficiency

Harris challenges the legal sufficiency of the evidence, arguing the evidence is insufficient to show the State proved beyond a reasonable doubt that he did not shoot Valentine in self-defense. In particular, Harris argues that the evidence shows Valentine, who was large in stature, intended to cheat or rob Harris in a drug deal and physically accosted Harris when he discovered the deception and tried to leave. Harris further argues that Valentine reached for his pistol and fired first.

A. Standard of review

When self-defense is at issue, the evidence is legally sufficient if a rational jury could find the essential elements of the offense beyond a reasonable doubt and also could find against the appellant on the self-defense issue beyond a reasonable doubt. *Braughton v. State*, 569 S.W.3d 592, 609 (Tex. Crim. App. 2018).

In a legal-sufficiency review, we consider all the admitted evidence and view it in the light most favorable to the verdict. *Harrell v. State*, 620 S.W.3d 910, 913–14 (Tex. Crim. App. 2021). This standard recognizes it is the jury's prerogative to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* at 914. An inference is a conclusion reached by considering other facts and deducing a logical consequence from them. *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013). The jury may draw inferences from the evidence as long as each inference is supported by the evidence.

Carter v. State, 620 S.W.3d 147, 150 (Tex. Crim. App. 2021). If the evidence supports reasonable but conflicting inferences, we presume the jury resolved the conflict in favor of its verdict. *Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016). But a jury's verdict cannot rest on speculation—mere theorizing or guessing about the possible meaning of the evidence presented, as opposed to reasonable inferences that can be drawn from the evidence. *Anderson*, 416 S.W.3d at 888.

Each fact need not point directly and independently to guilt, so long as the cumulative force of all the incriminating circumstances suffices to support the jury's verdict. *Walker v. State*, 594 S.W.3d 330, 335 (Tex. Crim. App. 2020). Thus, in our review, we must not use a divide-and-conquer strategy, evaluating individual bits of evidence in isolation, because this approach does not consider the cumulative force of the evidence. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015).

The law does not require a particular type of evidence. *Johnson v. State*, 560 S.W.3d 224, 226 (Tex. Crim. App. 2018). Direct and circumstantial evidence are equally probative. *Id.* Circumstantial evidence alone can be legally sufficient. *Id.*

In an appeal like this one, in which the appellant challenges both the sufficiency of the evidence and matters relating to the jury charge, we evaluate the evidence without reference to any alleged charge error. We do so because our review of evidentiary sufficiency does not turn on how the jury was charged. *Walker*, 594 S.W.3d at 335. We review whether the evidence supports the elements of the charged

offense as they would be set out in a hypothetically correct jury charge. *Id.* at 335–36. A hypothetically correct jury charge is one that accurately states the applicable law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily limit the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. *Id.* at 336.

B. Applicable law

As alleged in the indictment, a person commits the first-degree felony offense of murder if he intentionally or knowingly causes the death of an individual. PENAL § 19.02(b)(1). These are the essential elements of murder—the requisite intent, causation, and the death of a human being who was alive. *See id.*; *see also id.* § 1.07(a)(26) (defining "individual" as "human being who is alive").

Self-defense is a defense to prosecution for the offense of murder if the defendant's use of force is justified. *Braughton*, 569 S.W.3d at 606. Subject to some exceptions, a person is justified in using deadly force against another when and to the degree the actor reasonably believes the deadly force is immediately necessary either to protect the actor against the other's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of certain felonies, including murder, robbery, and aggravated robbery. PENAL §§ 9.31(a), 9.32(a).

C. Analysis

Whether Harris shot Valentine in self-defense was the pivotal issue at trial. The issue was hotly contested, and substantial evidence supports Harris's claim.

Wilson, one of the only two eyewitnesses at trial, testified that Valentine arrived armed and paranoid. Wilson also testified that Valentine physically accosted Harris when Harris tried to depart. According to Wilson, in the ensuing confrontation, both men reached for their pistols virtually simultaneously. But Wilson thought Harris had acted in self-defense under the circumstances.

It is undisputed that Valentine was physically imposing due to his stature. He was just under 6 feet tall, weighed around 300 pounds, and had a large build.

It also is undisputed that both Valentine and Harris were armed with pistols. The bullets and shell casings recovered show each man fired his pistol just once.

Text messages show that Valentine's confederate, Massey, referred to the drug deal as a *lick*. Massey conceded one possible meaning of this is robbery. This is also how Templeton, one of the investigating detectives, understood the term.

Wood, the medical examiner, conceded it was possible based on the evidence that Valentine had been engaged in a physical struggle when he was fatally shot. She testified it was very unlikely Valentine fired his pistol after having been shot due to the nature of the injury, which most likely incapacitated Valentine immediately.

The preceding evidence undoubtedly raises the possibility that Harris shot Valentine in self-defense. But the jury heard substantial contrary evidence too.

It is undisputed that Harris shot Valentine in the back of the head. The evidence indicates Harris did so by reaching up and behind Valentine while the two men struggled. But when conjoined with the fact that Valentine fired his weapon into the floor, a rational jury could infer that Harris drew and fired his pistol first.

Casillas, one of the investigating detectives, stated that he understood Wilson, when interviewed after the shooting, as having said Harris drew his pistol first. Though his testimony was less certain, Templeton shared Casillas's impression.

It also is undisputed that Harris fled from Wilson's apartment after shooting Valentine and had to be tracked down by the police. The jury was entitled to infer from Harris's flight that Harris did not think he had killed Valentine in self-defense. *See Clay v. State*, 240 S.W.3d 895, 905 n.11 (Tex. Crim. App. 2007); *Robinson v. State*, 236 S.W.3d 260, 267 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

In sum, conflicting evidence exists on the issue of self-defense. Faced with this conflicting evidence, much of which depended on the jury's assessments of witness credibility, a rational jury could find against Harris as to self-defense. And we must defer to the jury's resolution of the evidentiary conflicts in this case.

To the extent Harris contends the evidence conclusively proved self-defense, we disagree. Notably, neither of the eyewitnesses at trial testified that Valentine reached for his pistol first. Nor does any evidence compel such an inference.

Nor is other evidence as unequivocal as Harris suggests. While Wood opined it was quite improbable Valentine fired after being wounded, her testimony does not preclude the possibility that he fired immediately after Harris did. That possibility is consistent with Wilson's recollection of a momentary pause between the shots.

We overrule Harris's challenge to the legal sufficiency of the evidence.

II. Jury Question

Harris contends the trial court erred in refusing to answer the question the jury asked about the presumption of reasonableness in the context of self-defense. He maintains the jury's question indicated the jury was uncertain as to whether his own criminal activity, possessing prescription cough syrup with the intent to sell it, categorically precluded the possibility that he shot Valentine in self-defense. So, in refusing to answer the question, Harris asserts, the trial court negated the defense.

A. Standard of review

When a trial court substantively answers a question from the jury during deliberations, the court's answer amounts to an additional or supplemental jury instruction. *Daniell v. State*, 848 S.W.2d 145, 147 (Tex. Crim. App. 1993). But when, as here, the trial court refuses to answer the jury's question or merely refers

the jury to the instructions already given, the court's refusal to answer or reference to the instructions given is not an additional or supplemental jury instruction. *Id.*

The question in this appeal is whether the jury's question was proper. If so, the trial court was obligated to substantively answer with an additional or supplemental instruction. *Gamblin v. State*, 476 S.W.2d 18, 20 (Tex. Crim. App. 1972); *Wade v. State*, 164 S.W.3d 788, 794–95 (Tex. App.—Houston [14th Dist.] 2005, no pet.). If not, the trial court did not err in refusing to give an additional or supplemental instruction. *Gamblin*, 476 S.W.2d at 20; *Wade*, 164 S.W.3d at 795.

In deciding whether a jury's question was proper and thus required an additional or supplemental instruction, we are guided by the principles that apply to the contents of the jury charge. *See Allaben v. State*, 418 S.W.2d 517, 521 (Tex. Crim. App. 1967); *Barrera v. State*, 10 S.W.3d 743, 747 (Tex. App.—Corpus Christi 2000, no pet.). This is so because any additional or supplemental instruction that the trial court gives to the jury must generally comply with the same rules that govern the charge itself. *Lucio v. State*, 353 S.W.3d 873, 875 (Tex. Crim. App. 2011).

Article 36.14 of the Code of Criminal Procedure governs the charge. *Daniell*, 848 S.W.2d at 147. It requires the charge to distinctly set forth the law applicable to the case. TEX. CODE CRIM. PROC. art. 36.14. This includes defensive issues, like self-defense, when raised by the evidence and properly requested. *Mendez v. State*, 545 S.W.3d 548, 552–53 (Tex. Crim. App. 2018). Article 36.14 also bars the charge from

doing several things. The charge cannot express an opinion on the weight of the evidence, summarize the testimony, discuss the facts, or include argument calculated to provoke the jury's sympathy or passions. *Lucio*, 353 S.W.3d at 875.

If the trial court erred in refusing to give an additional or supplemental instruction, then we must assess whether the error harmed the defendant. *Daniell*, 848 S.W.2d at 147–48 & n.4. When, as here, the defendant objected to the trial court's refusal to give an additional or supplemental instruction in answer to the jury's question, we must reverse if the error caused him some harm. *Heigelmann v. State*, 362 S.W.3d 763, 775–76 (Tex. App.—Texarkana 2012, pet. ref'd).

Some harm means actual harm, not merely theoretical harm. *Jordan v. State*, 593 S.W.3d 340, 347 (Tex. Crim. App. 2020). Under this standard, we must reverse if the error was calculated to injure the defendant's rights. *Id.* This means that the presence of any harm, regardless of degree, requires reversal. *Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019). That is, we can only affirm if the error is harmless. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

Neither side bears a burden of proof with respect to showing harm. *Rogers v. State*, 550 S.W.3d 190, 191 (Tex. Crim. App. 2018). Instead, we must make our own assessment as to whether some harm occurred. *Elizondo v. State*, 487 S.W.3d 185, 205 (Tex. Crim. App. 2016). In making our review for harm, we look at the entire

record, including the jury charge, contested issues, weight of the evidence, arguments of counsel, and other relevant information. *Jordan*, 593 S.W.3d at 347.

B. Applicable law

To be justified in using deadly force against another, the actor must reasonably believe that deadly force is immediately necessary for one of two purposes: to protect the actor against the other's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of certain felonies, including murder, robbery, and aggravated robbery. PENAL § 9.32(a). Under certain circumstances, the actor's belief that deadly force is immediately necessary is presumed to be reasonable. *Id.* § 9.32(b). This presumption applies when 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 [specified offenses, which include murder, robbery, and aggravated robbery];
>
> (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.

But failure to satisfy the conditions required for the presumption of reasonableness to apply does not bar a claim of self-defense. *Rogers*, 550 S.W.3d at 193. If the presumption does not apply, the reasonableness of the actor's belief that deadly force was immediately necessary presents a fact issue for the jury to resolve based on the evidence admitted at trial. *See id.* (self-defense must be submitted to jury if issue is raised by evidence even when that evidence is disputed or weak).

C. Analysis

1. The trial court erred in refusing to answer the jury's question.

The defense argued that Harris shot Valentine in self-defense. The charge therefore instructed the jury on self-defense. As part of the instruction on self-defense, the charge included the following explanation as to when an actor's belief that deadly force was immediately necessary is presumed to be reasonable:

> Presumption
>
> An actor's belief that deadly force was immediately necessary is presumed to be reasonable if:
>
> 1. the actor 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 aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery; and

2. the actor did not provoke the person against whom the force was used; and

3. the actor 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.

If you find the State has disproved one or more elements of 1, 2, or 3 listed above, the presumption does not apply and you are not required to find that the actor's belief was reasonable.

See PENAL § 9.32(b).

But the charge did not explain the nature of presumptions in general. *See id.* § 2.05(b)(2) (requiring trial court to give certain instructions to jury with respect to presumptions that favor defendant). Nor did the charge instruct the jury how the presumption of reasonableness interacted with the remainder of the instructions on self-defense beyond the statement that the jury was not required to find the defendant's belief reasonable if the State disproved one of the elements required for the presumption to apply.

The instruction on the presumption of reasonableness confused the jury during its deliberations. The jury sent a note to the trial court asking: "[D]oes the admitted commission of a crime, sale of a controlled substance, negate the basis of a claim of self-defense?" But the trial court refused to the answer the jury's question. Instead, the trial court informed the jury: "You have been given the law." The trial court also

checked a box on its response form that stated: "The court under the law is not permitted to answer the question that you have presented. Please refer to and follow the instructions already given to you, and continue your deliberations."

The trial court was mistaken in its conclusion that the law disallowed it from answering the jury's question. The jury's question was a proper one. It requested further instruction on the law applicable to the facts of the case. The applicable law is an appropriate subject for an additional or supplemental jury instruction. TEX. CODE CRIM. PROC. art. 36.14. Moreover, the trial court could have answered the jury's question with a simple "no." While the presumption of reasonableness does not apply when a defendant is engaged in criminal activity, his criminal activity does not disallow a jury from finding he acted in self-defense. *Rogers*, 550 S.W.3d at 193; *Barrios v. State*, 389 S.W.3d 382, 393 (Tex. App.—Texarkana 2012, pet. ref'd).

When, as here, the jury expresses confusion about a rule of law based on the wording of the charge and the trial court can dispel the jury's confusion with a simple additional or supplemental instruction, the trial court does not err by giving one. Two decisions suffice to show that a trial court does not err in so instructing the jury.

In *Bonner v. State*, the defendant was tried for aggravated robbery. 820 S.W.2d 25, 26 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). At trial, there was testimony that the defendant threatened employees with a knife while trying to leave a store with stolen merchandise. *Id.* During deliberations, the jury sent the trial court

a note effectively asking two questions: whether the defendant has to threaten harm while trying to take property to be guilty of robbery or whether the defendant could still be guilty of robbery even if he threatened harm during his flight from the robbery. *Id.* at 29. The trial court answered the first question "no" and the second question "yes," elaborating that the law provided that a threat "does not have to be made while the actor is attempting to obtain or maintain control of the property, it may be made during the commission of flight or attempted flight." *Id.* On appeal, the defendant challenged this supplemental instruction as an improper comment on the weight of the evidence. *Id.* Noting that the trial court's supplemental instruction was a correct statement of the law and did not refer to any evidence, the court of appeals held that the trial court did not err in giving the instruction. *Id.*

In *Bell v. State*, the defendant was tried for sexual performance by a child and other sex offenses. 326 S.W.3d 716, 718 (Tex. App.—Dallas 2010, pet. dism'd). At trial, the defendant testified that the 12-year-old child had told him she was 19 years old. *Id.* at 719–20. During deliberations, the jury asked the trial court two interrelated questions: whether the fact that the defendant thought he was misled about the child's age was a factor in deciding he did not know he was committing a crime and whether being misled in this regard was a defense. *Id.* at 722. In response, the trial court answered that being mistaken about the child's age "is not a defense." *Id.* at 722–23. On appeal, the defendant challenged the instruction on the ground that it

assumed the truth of a contested fact—whether he was aware of the child's true age—and thus was an improper comment on the weight of the evidence. *Id.* at 723. Given that the defendant's knowledge of the child's age was not relevant to the defendant's guilt as a matter of law, the court of appeals held that the trial court did not err in answering the jury's question with the supplemental instruction that a mistaken belief as to the child's age was not a defense. *Id.* at 723–24.

In contrast, a trial court properly refuses to give an additional or supplemental instruction when the charge already answers the jury's question. *E.g.*, *Ash v. State*, 930 S.W.2d 192, 195–96 (Tex. App.—Dallas 1996, no pet.). But this is not the case here. The charge did not explicitly instruct the jury that it could find Harris acted in self-defense even if he was engaged in criminal activity. At best, the jury might have inferred this rule of law from the existing jury instructions. But the jury's question evincing confusion on this very matter shows it had not in fact made this inference. Furthermore, the jury should not have to infer the law applicable to the case. It is the role of the trial court to instruct the jury on the law. TEX. CODE CRIM. PROC. art. 36.13. When the charge contains a gap that causes the jury to be uncertain about the applicable law, the trial court must fill that gap with an additional or supplemental instruction rather than leaving the jury to work out the law on its own. TEX. CODE CRIM. PROC. art. 36.14, 36.16; *see also Reeves*, 420 S.W.3d at 818 (purpose of jury charge is not merely to avoid confusing jury but to prevent confusion).

Here, the trial court's refusal to substantively answer the jury's question creates a problem like the one appellate courts face in civil cases when a charge commingles valid and invalid theories of recovery in a single broad-form liability question. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). Given the confusion evinced by the jury's question, it is possible that the jury rejected Harris's claim of self-defense for an invalid reason. Namely, the jury could have found that Harris was engaged in criminal activity when he used deadly force and mistakenly believed that this fact negated his claim of self-defense. Due to the general guilty verdict returned by the jury, we have no way of knowing whether the jury rejected Harris's self-defense claim for this invalid reason or for a valid one. *Cf. Owens v. State*, 827 S.W.2d 911, 917 (Tex. Crim. App. 1992) (no way to tell whether jury considered extraneous act evidence for proper or improper purpose given that limiting instruction given by trial court did not include proper purpose at issue).

Of course, we presume the jury understood and followed the charge absent evidence to the contrary. *Taylor v. State*, 332 S.W.3d 483, 492 (Tex. Crim. App. 2011). Here, however, the jury's note asking about the applicable law evidences that it did not understand the charge. *See, e.g.*, *Castillo-Fuentes v. State*, 707 S.W.2d 559, 562–63 (Tex. Crim. App. 1986) (note jury sent to court during deliberations asking question about applicable law showed jury was confused by instructions); *Dolkart v. State*, 197 S.W.3d 887, 894 (Tex. App.—Dallas 2006, pet. ref'd) (same); *see also*

Luquis v. State, 72 S.W.3d 355, 367 (Tex. Crim. App. 2002) (indicating that jury notes could indicate or express confusion as to how to apply law stated in charge). We cannot presume the jury understood the charge because the jury said it did not. *See Elizondo*, 487 S.W.3d at 208 (ordinary presumption that jury followed written instructions does not apply when written instructions are not understandable).

Disregarding the jury's manifestation of confusion, the State maintains the presumption instruction itself was accurate and there is no indication the jury failed to heed this instruction. Citing *Colburn v. State*, the State argues the jury's note does not support Harris's position that the jury was confused in a way that could have led it to misapply the presumption as barring his self-defense claim. *See* 966 S.W.2d 511, 519 (Tex. Crim. App. 1998) (jury note did not overcome presumption that jury followed court's instruction). But *Colburn* itself refutes the State's argument.

Colburn was a capital murder case. *Id.* at 512. While deliberating on punishment issues relevant to whether the defendant would receive a life sentence or the death penalty, the jury sent a note to the trial court asking if the defendant would be eligible for parole if he received a life sentence. *Id.* at 513, 519. Because Texas law forbids consideration of parole, the trial court answered by instructing the jurors that the law prohibited them from considering parole. *Id.* On appeal, the defendant contended that the trial court erred in giving the instruction because it indirectly informed the jury that he was eligible for parole. *Id.* The defendant further

contended that the jury's note showed that the jury considered parole. *Id.* at 519–20. Reasoning that the trial court's instruction correctly stated the law and did not imply that the defendant could be eligible for parole, the Court held that the trial court did not err in instructing the jury on the law. *Id.* at 520. The Court further held that there was no evidence rebutting the presumption that the jury did as it was instructed. *Id.* The sole potential evidence that the jury improperly considered parole consisted of its note to the trial court. *Id.* But the Court observed that even if the note indicated the jury had considered parole at a preliminary point, the trial court then instructed the jury not to do so, and there was no evidence the jury disobeyed. *Id.*

But a note from the jury asking about parole ordinarily supports a strong inference that the jury improperly considered parole. *Smith v. State*, 830 S.W.2d 926, 928 (Tex. Crim. App. 1991) (per curiam). The note in *Colburn* did not do so only because the trial court's subsequent instruction negated this ordinary inference. *See* 966 S.W.2d at 519–20. That is, *Colburn* is a case in which the trial court correctly remedied a problem evidenced by a jury note with an instruction to the jury. *Id.*

In sum, *Colburn* supports Harris's position. There, the Court discounted any evidentiary value the jury's note might possess because the trial court responded with an instruction, which the reviewing court presumed the jury heeded. Here, in contrast, the trial court refused to answer the jury's question. The jury's unanswered question rebuts the presumption that the jury understood and followed the law as set

forth in the charge. In reality, the State asks us to apply a very different presumption: a presumption the jury correctly answered its own question. That presumption would improperly place the jury in the position of deciding the applicable law, rather than applying the law given by the court. *See DeLay v. State*, 410 S.W.3d 902, 915 (Tex. App.—Austin 2013) (jury's unanswered questions about law improperly left it to decide what law required), *aff'd*, 465 S.W.3d 232 (Tex. Crim. App. 2014).

The State also argues the trial court could not answer the jury's question without improperly commenting on the weight of the evidence by drawing the jury's attention to particular evidence and implicitly endorsing Harris's claim of self-defense. We disagree that answering the jury's question would have done either.

The jury asked if the trial court's presumption-of-reasonableness instruction meant that Harris could not claim self-defense if he was engaged in criminal activity when he used deadly force. This question is a legal one, the applicable law is straightforward, and the trial court could have correctly answered with a simple "no." That answer would not implicitly endorse either side's theory of the case.

Assuming for argument's sake that a simple "no" could have somehow been suggestive, it still would not have been a comment on the weight of the evidence. This is so for two distinct reasons, neither of which the State acknowledges.

First, the jury's question concerned an instruction on a presumption. When a presumption exists, the trial court necessarily calls specific evidence to the jury's

attention in the charge. *Bartlett v. State*, 270 S.W.3d 147, 151 (Tex. Crim. App. 2008). Doing so is not an improper comment on the weight of this evidence. *Id.* For the same reason, the trial court would not have been improperly commenting on the weight of the evidence by answering the jury's question about this instruction.

Second, it was the jury who singled out the specific evidence at issue—engaging in criminal activity—by asking the question that it did. Had the trial court answered with a correct and neutral statement of the legal effect of this evidence, it would not have been making an improper comment on the evidence's weight. *Lucio*, 353 S.W.3d at 876–77. As the Court of Criminal Appeals has held, trial courts can provide instructions of this nature in response to jury questions asked during deliberations even when including such an instruction in the original charge would have constituted an improper comment on the weight of the evidence. *Id.*

We hold the trial court erred in refusing to answer the jury's question.

2. The trial court's refusal to answer the jury's question was harmful.

The trial court's refusal to answer the jury's question left the jury on its own to make sense of the law governing self-defense, which was the pivotal disputed issue at trial. That Harris fatally shot Valentine was undisputed. The crux of the trial was whether Harris was justified in doing so. The parties hotly contested this issue. As we discussed in evaluating the sufficiency of the evidence, the evidence was conflicting, and substantial evidence supported Harris's claim of self-defense.

The State's closing argument underscores the pivotal role Harris's self-defense claim played. The State's argument also shows that the context in which Harris claimed to act in self-defense—an aborted drug deal—loomed large.

The State began with a question: "When two guys take guns to a drug deal and one ends up dead, what does that make the other one?" According to the State, it made Harris a murderer. The State downplayed Valentine's initiation of the physical confrontation, arguing this did not justify Harris's use of deadly force. Throughout its closing argument, the State repeatedly emphasized that Harris shot Valentine in the back of the head as a fact that made self-defense improbable.

The State also repeatedly emphasized the criminal context in which Harris resorted to deadly force. The State asserted that the jury ultimately did not need to know anything other than that Harris shot Valentine in the back of the head during a drug deal to find Harris guilty, arguing: "If that was all we had, if this had been a transaction just between people that fled or were left behind or we didn't have any eyewitnesses, would you have any trouble saying the person who shot Valentine in the back of the head that day was the murderer? I don't think you would."

And the State went further, arguing Harris's purported belief that deadly force was necessary was unreasonable because he was engaged in criminal activity. The State maintained that Harris's resort to deadly force was unreasonable precisely because Harris was involved in a drug deal when he shot Valentine, asserting:

> [I]t is only self-defense if the person reasonably believed the force used was immediately necessary. So what makes a person reasonable[?] You might say to yourself, these guys were involved in a drug deal, there's nothing reasonable about it. They're committing crimes, they're doing wrong, they're not reasonable people to start with. So a reasonable person wouldn't find themselves in that situation."

Nor was this an isolated remark. For example, the State later asked, "We're talking about a situation where we've got individuals coming into a criminal enterprise, a criminal interaction, they both are bringing guns, so what do they expect to happen?" Still later, the State argued: "[W]e've got two people going into a situation to do a drug transaction." The State returned to this topic—the criminal nature of the whole episode—over and over again, stressing that there was "no question" Harris was "engaged in criminal activity" when he shot Valentine in the back of the head.

That is the context in which the jury posed its question. Expressing confusion about the presumption-of-reasonableness instruction, the jury asked: "[D]oes the admitted commission of a crime, sale of a controlled substance, negate the basis of a claim of self-defense?" This question went to the heart of Harris's self-defense claim, and the trial court's refusal to answer made it possible for the jury to reject Harris's claim on the basis that his own criminal activity barred self-defense, which is contrary to the law. *See Rogers*, 550 S.W.3d at 193; *Barrios*, 389 S.W.3d at 393.

Thus, the trial court's refusal to dispel the jury's confusion about whether criminal activity categorically negated self-defense was calculated to harm Harris's rights. Indeed, the trial court's refusal to answer the jury's question vitally affected

Harris's principal defensive theory. That is enough to satisfy the more demanding egregious-error standard that applies when a party does not timely object. *See Marshall v. State*, 479 S.W.3d 840, 843 (Tex. Crim. App. 2016) (error is egregious if it affects very basis of case, deprives defendant of valuable right, or vitally affects defensive theory); *Reeves*, 420 S.W.3d at 816 (egregious harm is "high and difficult standard" and some harm is "less-stringent standard"). When harm is egregious, of course, there necessarily is some harm. *See Reeves*, 420 S.W.3d at 816.

We sustain Harris's challenge of the trial court's refusal to answer the jury.

III. New-Trial Motion and Concurring Opinion

Harris contends the trial court erred in denying his motion for new trial by operation of law. *See* TEX. R. APP. P. 21.8(a), (c) (new-trial motion automatically denied when trial court does not rule on it within 75 days after imposing or suspending sentence). In his motion, Harris argued the trial court should not have included the instruction on the presumption of reasonableness in the jury charge.

A. Presentment and error preservation

A defendant must timely present a new-trial motion to the trial court. TEX. R. APP. P. 21.6. To satisfy this presentation requirement, the defendant must give the trial court actual notice that he timely filed the motion and request a hearing or ruling on the motion. *Obella v. State*, 532 S.W.3d 405, 407 (Tex. Crim. App. 2017) (per curiam); *Gardner v. State*, 306 S.W.3d 274, 305 (Tex. Crim. App. 2009). Mere filing

of the motion is not enough. *Stokes v. State*, 277 S.W.3d 20, 21 (Tex. Crim. App. 2009). If the defendant does not satisfy the presentation requirement, he cannot assign error to the denial of the motion on appeal. *Obella*, 532 S.W.3d at 407. To preserve error, the record must show presentation. *Gardner*, 306 S.W.3d at 305–06.

Harris's motion for new trial was denied by operation of law. The record does not show or even suggest Harris presented the motion to the trial court. Harris, therefore, has not preserved for review his complaint about the denial of the motion.

B. Concurring opinion and issues raised

In her concurring opinion, Justice Farris sidesteps the preceding error-preservation issue. She does so by addressing Harris's complaint about the inclusion of the instruction on the presumption of reasonableness in the charge as if he has independently raised this issue, separate and apart from the denial of his motion for new trial. But Harris did not raise this issue at trial. Nor has he done so on appeal.

Appellate courts are courts of review. Thus, we ordinarily cannot reverse a trial court on any theory or basis that might have been applicable to the case but was not raised. *Najar v. State*, 618 S.W.3d 366, 373 (Tex. Crim. App. 2021). It is improper for us to reverse the trial court on a theory or basis that was not raised at trial or on appeal. *State v. Bailey*, 201 S.W.3d 739, 743 (Tex. Crim. App. 2006).

Justice Farris proceeds as if Harris objected to the presumption-of-reasonableness instruction in the trial court. In doing so, Justice Farris relies on an

exchange between the trial court and counsel during jury selection. In this exchange, defense counsel represented she "stipulated to the record" that Harris was engaged in criminal activity when he shot Valentine. Therefore, defense counsel continued, she objected to discussing the presumption of reasonableness with prospective jurors because there was "no reason" to discuss this subject with them. The trial court overruled the objection, stating it would instruct the jury based on the evidence.

But this exchange took place before the jury was selected and heard the evidence. Later, during the charge conference, Harris did not object to the inclusion of the presumption-of-reasonableness instruction. Harris complained about the inclusion of this instruction in the charge for the first time in his new-trial motion. It is indisputable that an objection made before the trial proper even begins does not constitute an objection to the jury charge, which is finalized near the trial's end.

Nor has Harris raised charge error as an independent ground for reversal on appeal. Harris challenges the legal sufficiency of the evidence, the trial court's refusal to answer the jury's question about the presumption of reasonableness, and the trial court's denial of his motion for new trial by operation of law. We cannot rewrite his appellate brief to raise an issue he did not. *See Bailey*, 201 S.W.3d at 743–44 (holding court of appeals erred in reframing appellant's issue on appeal in way that resulted in reversing trial court on issue that had not been raised below).

We overrule Harris's challenge to the denial of his new-trial motion, and we decline to reframe that challenge as a complaint about the charge he did not raise.

CONCLUSION

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

Gordon Goodman
Justice

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

Chief Justice Radack, dissenting.

Justice Farris, concurring.

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