Affirmed and Memorandum Opinion filed November 14, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00740-CR

MARQUIS AMOS GREEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1421611

M E M O R A N D U M O P I N I O N

A jury found appellant Marquis Amos Green guilty of murder. The jury made an affirmative finding on use of a deadly weapon and the trial court sentenced appellant to confinement for twenty-five years in the Institutional Division of the Texas Department of Criminal Justice. Appellant timely filed a notice of appeal. In three issues, appellant complains of charge error in that: (1) the trial court erred by failing to apply a reasonable belief standard in the application paragraph of the

charge on defense of property; (2) the trial court erred in failing to instruct the jury on transferred intent; and (3) the trial court erred in refusing appellant's request for a mistake of fact instruction. We affirm.

BACKGROUND

On September 23, 2013, Jason Hay broke into appellant's home taking property and money. According to Hay, no one else burglarized the appellant's home. That same day, Rhonda Chisholm went to appellant's house to sell prescription drugs. Chisholm arrived at the same time Hay was walking out of appellant's home with a television. As Chisholm exited her car, Hay told her to get back in and stay there. Hay then loaded the television in the back of his car and drove away. According to appellant, he was burglarized by Hay and a female. Appellant came out of the house with a shotgun as Hay was driving away and Chisholm was closing the door of her car. Appellant fired the shotgun through the windshield of the car, directly at Chisholm. Chisholm died from a gunshot wound to the face.

The jury was charged on the offense of murder. The charge further included an instruction on protection of one's own property and use of deadly force to protect property. *See* Tex. Penal Code §§ 9.41, 9.42. The jury was instructed to find appellant "not guilty" if it found appellant's use of force was justified. The jury found appellant guilty and, as noted above, the trial court sentenced him to prison for twenty-five years.

STANDARD OF REVIEW

In a criminal case, we review complaints of jury charge error in two steps. *Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015). First, we determine whether error exists in the charge. *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim.

App. 2005). Second, we review the record to determine whether sufficient harm was caused by the error to require reversal of the conviction. *Id*.

The degree of harm necessary for reversal depends on whether the defendant preserved the error by objecting to the charge. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). When charge error is not preserved reversal is not required unless the resulting harm is egregious. *Id*.; *see also* Tex. Code Crim. Proc. art. 36.19. Charge error is egregiously harmful when it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2016). That is, the error must have been so harmful that the defendant was effectively denied a fair and impartial trial. *Almanza*, 686 S.W.2d at 172. Egregious harm is a difficult standard to prove and must be determined on a case-by-case basis. *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). In determining whether error is egregious, we consider the following factors: (1) the entirety of the jury charge; (2) the state of the evidence; (3) the arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole. *See Sanchez*, 209 S.W.3d at 121; *Almanza,* 686 S.W.2d at 171. Neither party has the burden to show harm. *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

The egregious harm standard does not apply to a trial court's failure to submit defensive instructions. *See Posey v. State*, 966 S.W.2d 57, 60–64 (Tex. Crim. App. 1998); *see also Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013) ("A defendant cannot complain on appeal about the trial judge's failure to include a defensive instruction that he did not preserve by request or objection: he has procedurally defaulted any such complaint."). A defendant must object or request a special instruction to preserve error for appellate review for the omission of defensive instructions. *Arana v. State*, 1 S.W.3d 824, 827 (Tex. App.—Houston

[14th Dist.] 1999, pet. ref'd). Without an objection or request, any error in failing to submit a defensive instruction is waived. *Id*.

REASONABLE BELIEF STANDARD

Appellant's first issue contends the trial court erred by failing to apply a reasonable belief standard in the application paragraph of the charge relating to defense of property, causing him egregious harm. Appellant concedes no objection was made in the trial court.

As regards the defense of property, the abstract portion of the charge instructed the jury as follows:

> A person unlawfully dispossessed property is justified in using force against the other when and to the degree the defendant reasonably believes the force is immediately necessary to recover the property if the defendant uses the force immediately or in fresh pursuit after the dispossession and:
>
> > (1) the defendant reasonably believes the other had no claim of right when he dispossessed the defendant; or
> >
> > (2) the other accomplished the dispossession by using force, threat or fraud against the defendant.

See Tex. Penal Code § 9.41. Further, the charge defined "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the defendant."

The application paragraph for defense of property stated:

> Now, if you find from the evidence beyond a reasonable doubt that the defendant, Marquis Amos Green, did cause the death of Rhonda Chisholm, by shooting Rhonda Chisholm with a deadly weapon, namely, a firearm, as alleged, but you further find from the evidence or have a reasonable doubt thereof, that the defendant would have been justified in using force to protect his property against Rhonda Chisholm, and that the defendant reasonably believed that deadly force

> when and to the degree used, if it was, was immediately necessary to prevent Rhonda Chisholm, a person it was reasonable to believe was in the imminent commission of burglary, robbery, aggravated robbery, as above defined, or to prevent Rhonda Chisholm, a person it was reasonable to believe was fleeing immediately after committing burglary, robbery, aggravated robbery; and the defendant reasonably believed that the property could not be protected or recovered by any other means; or the defendant reasonably believed that the use of force other than deadly force to protect or recover the property would expose the defendant or another to a substantial risk of death or serious bodily injury, then you will acquit the defendant and say by your verdict "Not Guilty."

Appellant claims it should have read as follows:

> Now, if you find from the evidence beyond a reasonable doubt that the defendant, Marquis Amos Green, did cause the death of Rhonda Chisholm, by shooting Rhonda Chisholm with a deadly weapon, namely, a firearm, as alleged, but you further find from the evidence or have a reasonable doubt thereof, that the defendant *would have had a reasonable belief that he* would have been justified in using force . . .

The statute provides that a person "is justified . . . if he would be justified . . . when and to the degree he *reasonably believes* . . ." Appellant's suggested language would alter the plain language of the statute requiring that the actor *be* justified, albeit based upon a reasonable belief.

The application paragraph of the jury charge applied the law to the facts and tracks the applicable statute. *See* Tex. Penal Code § 9.41; *see Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994) ("A jury charge that tracks the language of a particular statute is a proper charge on the statutory issue."); *see also Casey v. State*, 215 S.W.3d 870, 886 (Tex. Crim. App. 2007); *Martinez v. State*, 924 S.W.2d 693, 699 (Tex. Crim. App. 1996). The application paragraph properly listed the conditions under which the jury could acquit the defendant. *See Vega*, 394 S.W.3d at 520 (a proper application paragraph lists the specific conditions under which a

jury is authorized to acquit). Accordingly, as regards the application paragraph on the defense of property, we find no error in the charge. Appellant's first point of error is overruled.

TRANSFERRED INTENT

In appellant's second issue, he argues the trial court erred in failing to instruct the jury on transferred intent. The record reflects that at the close of the charge conference, after all parties had included additional instructions, the judge asked if appellant had any objections to the charge and was told, "No, Your Honor."

Without an objection or request, any error in failing to submit a defensive instruction is waived and cannot be raised on appeal. *Arana*, 1 S.W.3d at 827; *see also Vega*, 394 S.W.3d at 519; *Posey*, 966 S.W.2d at 60-64. Absent a request or objection to the charge, the trial court had no duty to instruct the jury on the defensive issue of transferred intent, and thus did not err. *Posey*, 966 S.W.2d at 62 (finding article 36.14 of the Texas Code of Criminal Procedure imposes no duty on a trial court to instruct the jury *sua sponte* on unrequested defensive issues because an unrequested defensive issue is not the law "applicable to the case."). Accordingly, appellant's second issue is overruled.

MISTAKE OF FACT

Lastly, appellant contends the trial court erred in refusing his request for a mistake-of-fact instruction in the jury charge. Appellant argues that he reasonably believed the victim had committed burglary and he acted on that belief. This mistaken belief, appellant claims, entitled him to a mistake-of-fact instruction because he lacked the necessary criminal intent to support his conviction for murder.

"It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of

culpability required for commission of the offense." Tex. Penal Code § 8.02(a); *Louis v. State* 393 S.W.3d 246, 253 (Tex. Crim. App. 2013). An instruction is not required if the evidence, viewed in the light most favorable to the defendant, does not establish a mistake of fact defense. *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999).

A person commits murder if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." Tex. Penal Code §19.02(b)(2). The intent to kill may be inferred from the use of a deadly weapon. *Cavazos v. State*, 384 S.W.3d 377, 384 (Tex. Crim. App. 2012). A shotgun is considered a deadly weapon. *Flanagan v. State*, 675 S.W.2d 734, 755 (Tex. Crim. App. 2012). Appellant pointed a shotgun directly at the complainant and fired. *See* Tex. Penal Code §19.02(b)(2). From that act, a rational trier of fact could find appellant intended to cause serious bodily injury to the complainant or committed an act clearly dangerous to human life that caused her death. *See Cavazos*, 384 S.W.3d at 384; *Flanagan*, 675 S.W.2d at 755.

Appellant's mistaken belief that the complainant was involved in the burglary does not negate his culpable mental state — rather it raised the justification defenses of protection of property and use of deadly force to protect property. Tex. Penal Code §8.02(a); *Louis*, 393 S.W.3d at 253; *Lugo v. State*, 923 S.W.2d 598, 601 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd) ("A mistake about the existence of a fact which would establish an affirmative defense to an offense, rather than negating an element of the offense, does not raise the mistake of fact defense."). Accordingly, the trial court did not abuse its discretion in denying appellant's request to instruct the jury on mistake of fact. Appellant's third issue is overruled.

CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ John Donovan
Justice

Panel consists of Justices Jamison, Busby and Donovan.
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