Affirmed and Memorandum Majority and Concurring Opinions filed July 20, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00139-CR

ERIC ANDERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 1492073

MEMORANDUM MAJORITY OPINION

In this appeal from a conviction for capital murder, appellant argues in three issues that the trial court reversibly erred by refusing a requested instruction on defense of a third person, by denying a motion to suppress his recorded statement, and by admitting speculative lay testimony about his perceived state of mind. For the reasons given below, we overrule each of these issues and affirm the trial court's judgment.

BACKGROUND

The main evidence in this case consists of two separate videos.

The first video, which has no audio, is surveillance footage from the convenience store where the capital murder occurred. The video showed appellant briefly enter the store by himself, look around, and step outside. After roughly a minute, appellant reentered the store, followed by a masked individual whose street name was Trill. Appellant then approached the complainant, who was one of the store's regular customers, and pointed a gun at the complainant's head. The complainant grabbed for the gun, and a struggle ensued. Trill intervened in the struggle by firing a single shot from his own gun, and that shot injured appellant and killed the complainant. Appellant and Trill then ran away, without taking any property.

The surveillance footage was aired on the local news, where appellant was identified by his girlfriend's mother. When she confronted appellant with the surveillance footage, he denied any sort of involvement in the offense, but then he immediately fled the state. A few weeks later, he was apprehended and agreed to an interview with authorities.

That interview was recorded on the second key video in this case. Appellant explained during the interview that he was introduced to the complainant through Trill, who indicated that the complainant was interested in purchasing marijuana. Appellant agreed to exchange marijuana for the complainant's gun, which appellant would hold as collateral until the complainant could pay for the marijuana in cash. On the night of the offense, appellant arranged to meet with the complainant in order to return the gun and collect his payment.

Appellant said that he made eye contact with the complainant when he first entered the store, and he anticipated that the complainant would then follow him outside to complete their exchange. When the complainant failed to come outside, appellant said that he got impatient, so he reentered the store and demanded his money from the complainant at gunpoint. During the ensuing struggle, appellant claimed that the gun was turned on him and that he heard the complainant click off the safety. Appellant also said that he told Trill to shoot the complainant once the complainant had fought back.

Appellant was charged as a party to capital murder, to which he pleaded not guilty. Based on the two videos and on other evidence not discussed here, the jury returned a verdict of guilty. Because the prosecutor did not seek the death penalty, the trial court imposed an automatic sentence of life without parole.

DEFENSE OF A THIRD PERSON

The evidence conclusively established that appellant was not the principal actor who murdered the complainant. Instead, appellant was a party to a capital murder that was principally committed by Trill. Because appellant faced criminal responsibility as a party, defense counsel argued during the charge conference that appellant was entitled to every defensive instruction that Trill would have received, including defense of a third person. The prosecutor countered that appellant was not entitled to that instruction because the evidence conclusively established that appellant was the first aggressor. The trial court agreed with the prosecutor and denied the requested instruction. Appellant now challenges that ruling.

We review a complaint of charge error under a two-step process, considering first whether error exists. *See Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error does exist, we then analyze that error for harm under the procedural framework of *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

When deciding whether the trial court erred, we begin with the rule that the trial court must give a requested defensive instruction on every issue raised by the evidence, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and even if the trial court is of the opinion that the evidence is not entitled to belief. *See Misner v. State*, 610 S.W.2d 502, 503–04 (Tex. Crim. App. 1981). Furthermore, when the defendant is charged as a party, as appellant was here, the trial court must also give every requested defensive instruction that the principal could have received. *Id.* at 504 ("We are of the opinion that [the principal] would have been entitled to have a jury instructed on the law of self-defense. Accordingly the appellant, who was guilty only as a party to the offense committed by [the principal], was also entitled to the requested instruction.").

Appellant claims that Trill, as the principal, would have been entitled to an instruction on defense of a third person. That defense provides that an actor is justified in using deadly force to protect a third person in any situation in which the third person would apparently be justified in using deadly force to protect himself. *See* Tex. Penal Code § 9.33; *Hughes v. State*, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986) (describing how the defense places the actor "in the shoes of the third person"), *superseded by statute on other grounds as stated in Morales v. State*, 357 S.W.3d 1 (Tex. Crim. App. 2011). This defense is subject to the same limitation that applies to self-defense, which is that the use of force against another is not justified if the actor provoked the difficulty. *See* Tex. Penal Code § 9.31(b)(4); *Elizondo v. State*, 487 S.W.3d 185, 197–98 (Tex. Crim. App. 2016) (explaining the doctrine of provocation).

Under these rules, if Trill reasonably believed that appellant would have been justified in using deadly force to protect himself from the complainant, then Trill would have been justified in stepping in appellant's shoes and exercising that force

on appellant's behalf. *See Hanley v. State*, 921 S.W.2d 904, 911 (Tex. App.—Waco 1996, pet. ref'd). However, if Trill knew that appellant would not have been justified in using deadly force because appellant provoked the difficulty, then Trill would not have been justified in using deadly force either. *Id.*

The record does not affirmatively establish what Trill believed in this case. Trill did not testify, and there is no other sort of direct evidence about his state of mind, which is traditionally a fact issue for the jury to decide. *See Brown v. State*, 122 S.W.3d 794, 800 (Tex. Crim. App. 2003).

Appellant argues that the jury could have rationally found that Trill's use of deadly force was justified. Appellant partially bases this argument on statements from his recorded interview, in which he said that Trill was never supposed to come inside the store. Appellant also refers to the surveillance footage, which showed that Trill entered the store behind appellant. From this evidence, appellant suggests by implication that he and Trill were not working in concert, that Trill may not have seen any provocation on appellant's part, and that Trill justifiably protected appellant from what he apparently perceived as the complainant's use of unlawful force.

For the sake of argument, we will assume without deciding that appellant was entitled to the requested instruction and that the trial court erred by refusing to give it. The question then becomes whether the trial court's error was reversible. Because defense counsel objected to the omission of the instruction, the *Almanza* framework instructs us that the conviction must be reversed if appellant suffered "some harm." *See Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013). Under the "some harm" standard, we must determine whether appellant suffered actual harm, as opposed to merely theoretical harm. *Id.* We consider the whole record in this analysis, including the jury charge, the arguments of counsel, the entirety of the evidence, and any other relevant information from the trial. *Id.*

Defense counsel mentioned the possibility of a justification defense in his opening statement, but his main strategy was that he sought to defeat the charge of capital murder by showing that appellant never intended to rob or kill the complainant. Counsel argued that appellant only wanted to collect the money that was rightfully his. To that end, the trial court submitted instructions on the lesser-included offenses of felony murder and aggravated robbery. The jury rejected those lesser submissions and convicted appellant of the greater offense of capital murder. Though a justification defense would have defeated that greater offense, there is no indication that the omission of the instruction precluded counsel from pursuing his main strategy.

Even if the justification defense had been submitted, the evidence strongly suggests that the jury would have rejected it. Appellant established during his recorded interview that he was the first aggressor. He said that he became impatient with the complainant's inaction, so he approached the complainant with a gun drawn and demanded that the complainant pay his debt. This aggression meant that appellant provoked the difficulty, and that the complainant's defensive response to that provocation was lawful. Had appellant fired the fatal shot instead of Trill, appellant would not have been eligible to claim self-defense because his initial use of force was unlawful. *See Dyson v. State*, 672 S.W.2d 460, 463–64 (Tex. Crim. App. 1984) (concluding that provocation was established as a matter of law where the defendant testified that he wanted to fight and he drew a gun on his brother).

There was also overwhelming evidence that Trill witnessed appellant's provocation. This evidence comes primarily from the surveillance footage, which established the following timeline:

- Two seconds after appellant entered the store, Trill followed him inside while wearing a ski mask, and then appellant pulled out a gun.

- One second later, Trill looked to his left, which was away from appellant and the complainant.
- One second later, Trill turned his head back to the front, in the direction of appellant and the complainant. At the same time, appellant approached the complainant and put a gun to his head. The complainant, who saw appellant's approach, immediately wrestled for control of the gun.
- One second later, Trill angled his head slightly to his right, in the direction of where appellant and the complainant were wrestling on the floor.
- One second later, Trill pulled out his gun.
- Two seconds later, Trill fired his gun.

In other words, the surveillance footage showed that Trill fired his gun six seconds after he entered the store, and only four seconds after appellant pointed a gun to the complainant's head.

In addition to this surveillance footage, appellant stated in his recorded interview that he verbally demanded money from the complainant. Given his proximity to appellant, Trill was likely to have heard that demand. Appellant also stated during his interview that Trill intended to assist in the confrontation, even though appellant did not desire any assistance. According to appellant, right before he reentered the store, Trill told him, "I'm watching out for you." Altogether, this evidence heavily suggests that Trill anticipated the provocation and did not merely come across it by happenstance, as appellant has suggested in his brief. Indeed, Trill was wearing a ski mask, as if he came prepared for a confrontation. Based on the overwhelming weight of this evidence, the jury would have likely rejected any argument that Trill's use of deadly force had been justified. *Cf. Gonzales v. State*, 474 S.W.3d 345, 353 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (concluding that the erroneous denial of a self-defense instruction was harmless where there was overwhelming evidence that the use of deadly force was not

justified); *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. ref'd) (concluding that error in the wording of a self-defense instruction was harmless where the evidence showed that the defendant provoked the altercation and the victim did not use or attempt to use deadly force).

Appellant claims that the omission of a justification defense resulted in some harm, citing this court's decision in *Dugar v. State*, 464 S.W.3d 811 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). But that case is readily distinguishable on the facts. The main strategy in *Dugar* was self-defense, and in furtherance of that strategy, the defendant took the stand and specifically claimed self-defense. Nevertheless, the trial court refused to give a self-defense instruction because the trial court believed that the victim of the offense was an innocent bystander. We reversed the trial court's judgment because the defendant's testimony clearly raised the issue of self-defense and because the victim's bystander status would not have precluded the self-defense instruction. Here, by contrast, the main defensive strategy was not a justification defense. Appellant did not testify, and similarly, there was no direct evidence from Trill that he acted in justifiable defense of appellant.

In one other point, appellant refers to a note sent by the jury during deliberations, which asked, "For capital murder can [the] jury reduce the years?" Appellant suggests that this note demonstrates harm because the jury expressed a concern about the automatic sentence of life without parole. But this concern has no bearing on the defense of a third person, which was never mentioned in the note.

Considering the record as a whole, we cannot say that appellant suffered actual harm. We therefore conclude that any error in the denial of the requested instruction was harmless.

MOTION TO SUPPRESS

The trial court conducted a hearing outside the presence of the jury to determine whether it should suppress appellant's custodial statement, which had been recorded on the second video discussed above. Defense counsel argued during the hearing that the statement should be suppressed because appellant invoked his right to counsel, but his interrogating officers did not terminate the interview. Though the statement lasted for more than an hour, the hearing focused on just the first few minutes of the video, before the officers had even warned appellant of his rights.

The video begins with small talk. The officers discuss the cold weather, and then appellant changes the subject to his girlfriend:

Appellant: Do y'all got her in custody?

Officer 1: We're talking about you right now.

Appellant: I need to know where she at. She got my child. Do y'all—do y'all got her in custody?

Officer 1: Who got your child?

Appellant: She supposed to be pregnant.

Officer 1: She supposed to be pregnant? How far along pregnant is she supposed to be?

Appellant: Like, about three months.

Officer 1: Three months? When she tell you this? You sure?

Appellant: I'm positive. I've seen the test. I'm positive.

Officer 1: You've seen the test?

Appellant: [Nods affirmatively.]

Officer 1: Hmm. So then if, first let's, let's, let's, let's—I'm still trying to figure out why you got us up here in Wisconsin talking to you, why you—

Appellant: 'Cause I got scared. But I don't wanna talk unless I got a lawyer, though. That's what my mom told me. 'Cause I

didn't do nothing. Y'all seen me on camera. I didn't do nothing. You see what I'm saying. But—

Officer 2: What did your momma tell you?

Appellant: Don't talk to y'all unless I got a lawyer. But like I, I told myself though, you see what I'm saying, I'll talk to y'all if y'all—I'll work with y'all, you see what I'm saying, just 'cause of the simple fact that I didn't have nothing to do with him doing what he did.

Officer 1: Well put it this way. If you won't—if that's the case, then, and like you said, you don't wanna talk, we ain't gotta talk. But trust me when I tell you if we don't talk, this ain't going away.

The conversation continued with appellant asking if the officers had anyone else in custody. The officers responded that they could not answer that question until appellant was warned of his rights. They then administered those warnings and appellant agreed to cooperate.

Defense counsel argued at the end of the hearing that the trial court should grant the motion to suppress because appellant had invoked his right to counsel but the officers continued to talk to him, sometimes threateningly. The prosecutor responded that the motion should be denied because appellant's invocation was not unequivocal, or alternatively, because appellant had reinitiated the conversation after invoking his right.

The trial court made the following ruling: "All right. So let the record reflect that the Court finds that the statement is admissible. While the defendant did say I don't want to talk unless I have an attorney, it's clear on the video that he does reinitiate conversation and that the *Miranda* warnings were read, they were waived and that the defendant gave a statement freely and voluntarily and that there was no coercion or no pressure."

Appellant now challenges this ruling, which we review for an abuse of discretion. *See State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018).

An individual has a constitutional right to have an attorney present during a police interrogation. *See Cross v. State*, 144 S.W.3d 521, 526 (Tex. Crim. App. 2004). Once the individual has invoked this right, police interrogation must cease until counsel has been provided or the individual has reinitiated a dialogue. *Id.* If the individual reinitiates a dialogue, the police are free to obtain further statements, so long as each statement is voluntarily made after the waiver of *Miranda* rights. *Id.* at 529.

In this case, appellant invoked his right to counsel when he said, "I don't wanna talk unless I got a lawyer." *See State v. Gobert*, 275 S.W.3d 888, 894 (Tex. Crim. App. 2009) (holding that the defendant made an invocation of his right to counsel when he said, "I don't want to give up any right, though, if I don't got no lawyer"). The interrogation could have ended with this invocation, but the trial court found that appellant reinitiated a dialogue on his own. The record supports the trial court's finding. After asserting that he did not want to talk without a lawyer, appellant decided to do just that—i.e., he talked without a lawyer. Appellant discussed how there was video evidence of the offense, and he indicated that he could talk with the officers because he believed this video evidence was exculpatory. Because the record shows that appellant reinitiated a dialogue, we conclude that there was no constitutional violation, and that the trial court did not abuse its discretion by denying the motion to suppress. *See Granviel v. State*, 723 S.W.2d 141, 146–47 (Tex. Crim. App. 1986) (concluding that, if the defendant had invoked his right to counsel, he reinitiated the conversation by saying "it really doesn't matter" and then agreeing to sign a statement).

SPECULATIVE LAY TESTIMONY

The clerk of the convenience store testified that he heard appellant tell the complainant to "give it up." The prosecutor asked the clerk to expand on this testimony, which led to the following exchange:

> Q. And based off of those words, what did you—what do you understand "Give it up" to mean?
>
> A. Like, robbery, give me what you got.
>
> The Court: Can you speak up? I'm sorry.
>
> A. I'm guessing it's robbery.
>
> Defense: Judge, I object to him guessing.
>
> The Court: All right.
>
> Defense: I object to him speculating as to what it means.
>
> The Court: All right. Overruled.

Appellant contends that the trial court abused its discretion by admitting speculative lay testimony about his state of mind. For the sake of argument, we can assume without deciding that the trial court's ruling was erroneous. The question then becomes whether appellant suffered any harm under the standard for nonconstitutional error.

Nonconstitutional error must be disregard unless it affects a defendant's substantial rights. *See* Tex. R. App. P. 44.2(b). An error affects a defendant's substantial rights when the error has a substantial and injurious effect or influence on the jury's verdict. *See King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997). If the error had no influence or only a slight effect on the verdict, then the error is harmless. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998).

Appellant suggests that this testimony was harmful because his mental state was disputed throughout the trial. But the clerk testified later on cross-examination

that he did not know what appellant meant by his words. In the challenged portion of his testimony, the clerk merely gave his own perception of the events as he witnessed them, and his perception was rational, given that appellant's words were demanding and accompanied by the threat of a gun. Besides, the jury also heard appellant's own statements from his recorded interview, where he explained that he wanted the money that he believed the complainant owed. Even without the clerk's testimony, the jury had a substantial basis for believing that appellant was committing a robbery.

Having considered all of the evidence, we conclude that any error in the admission of the clerk's testimony was not likely to have any effect on the jury's verdict, or at most, just a slight effect. Therefore, any such error was harmless. *See Solomon v. State*, 49 S.W.3d 356, 364–65 (Tex. Crim. App. 2001) (holding that any error in the admission of a lay witness's opinion testimony was harmless where the jury had already heard all of the facts upon which the opinion was based, the witness did not purport to be in a position to possess information not already related to the jury, and the opinion added little weight, if any).

CONCLUSION

The trial court's judgment is affirmed.

/s/ Tracy Christopher
Chief Justice

Panel consists of Chief Justice Christopher and Justices Spain and Wilson. (Spain, J., concurring).

Do Not Publish — Tex. R. App. P. 47.2(b).