



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00241-CR

Cody Allen **WATERS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CR1094
Honorable Lori I. Valenzuela, Judge Presiding¹

Opinion by: Rebeca C. Martinez, Justice

Sitting: Marialyn Barnard, Justice
Rebeca C. Martinez, Justice
Irene Rios, Justice

Delivered and Filed: November 22, 2017

AFFIRMED

Cody Allen Waters appeals his conviction on one count of aggravated assault with a deadly weapon. Waters argues on appeal that the trial court erred in submitting a jury instruction on provoking the difficulty, and that the evidence was insufficient to prove that he actually provoked the difficulty, thereby precluding his claim of self-defense. We affirm the trial court's judgment.

¹ The Honorable Raymond Angelini presided over the trial.

BACKGROUND

At approximately 1:30 a.m. on January 24, 2014, Waters was at a restaurant and bar located in a shopping center in north San Antonio. Waters was sitting at the bar visiting with one of the bartenders, Jennifer Kirk. The bar was not crowded at that time; however, a group of six people, Debbie and Jaime Arredondo, John and Yvonne Smithwick, Liliana Bergholtz, and Jeff Hoot, were seated around a bar table blocking one of the aisles. None of them knew Waters. On his way back to the bar from the restroom, Waters tried to pass through the single aisle that was blocked by the Arredondo group. Waters made a comment expressing annoyance that his path was blocked, but then returned to his place at the bar by another route. The group members' testimony differed as to the exact comment made by Waters, ranging from "you don't sit whatever way you want to" and "I guess you're going to make me walk around," to "y'all think you can sit wherever the f**k y'all want to sit" and "you guys think y'all can just block the whole f**king walkway." The members of the group ignored Waters's comment. Several testified that Waters's behavior seemed odd because there were several other paths Waters could have chosen to return to his seat at the bar. After Waters returned to his place at the bar, John overheard him talking loudly about guns and combat skills. Debbie noticed Waters looking over at the group as he talked to the bartender. No member of the Arredondo group said anything to Waters or made any gesture toward him.

At about 2:00 a.m., the Arredondo group got up to leave the bar. Jennifer urged Waters to wait inside the bar while the group exited because she thought there might be "a problem" between Waters and the group. Instead, according to John, Waters "race[d] to the door" and walked out in front of the group. John testified that in his opinion Waters was "wanting trouble." After the group walked outside, John and Yvonne walked away toward their vehicle, while Debbie, Jaime, and Jeff walked Liliana to her vehicle, which was parked near the entrance. As they were standing behind Liliana's vehicle saying good-bye, Waters drove through the parking lot toward them at a

high rate of speed in a silver Land Rover, passing right in front of Debbie and Jeff. Jeff and Debbie yelled at Waters to slow down. Debbie admitted using an expletive. Waters stopped his vehicle and backed up, rolling down the passenger window and making a comment in response. Liliana testified that Waters asked whether they “have a problem with him,” while Debbie testified that Waters said, “you just f**ked with the wrong person.” Jeff stated that Waters said, “you don’t want to f**k with me” to which Jeff replied, “you’re right” because Waters was a “big guy” and Jeff did not want any trouble. According to Liliana, Jaime replied, “just slow down, dude.”

Instead of driving away, Waters exited his vehicle from the driver’s side. Jeff testified that Waters reached behind him as he was getting out of the vehicle, and then walked around the back of the vehicle toward them. Jeff thought that Waters had reached for a weapon, so Jeff said, “you’re going to shoot us over this?” As he walked toward them, Waters said that he was not going to shoot anyone, but he was going to “kick their ass.” At that point, a verbal argument began between Waters, Jeff, and Jaime. Debbie attempted to intervene in the argument and stepped between Waters and her husband Jaime, yelling at Waters to just get back in his car and leave because the group did not want any trouble. Nothing was blocking Waters’s vehicle or otherwise preventing him from leaving the scene. Waters made a reply in which he called Debbie a “bitch.” Liliana stated that Waters said, “you shut up you little bitch,” while Debbie stated that Waters told Jaime, “tell your bitch to shut up.” Jeff heard Waters say something to the effect of “get this bitch away from me.” Jennifer stated she heard Waters say to Jaime, “if you want to fight, get your bitch out of the way.” John testified that Waters told Jaime, “get your bitch before I knock her out too.”

At that point, the confrontation escalated into a physical altercation. Liliana and John testified that Waters swung a punch at Jaime, but instead hit Debbie in the side because she was standing in front of Jaime. Jaime became angry, moved toward Waters, and the two men started

grappling and fighting with each other. Jeff testified that “everybody started engaging” and “everybody got locked up.” By “everybody,” Jeff meant himself, Jaime, Waters, and Debbie. Jeff testified that he was trying to separate Jaime and Waters. Jeff conceded that he may have grabbed Waters by the head, or in the head area, from behind while trying to pull him away from Jaime. According to Jeff, none of the members of the Arredondo group had a weapon. After the scuffle started, John and Yvonne drove up in their black Tahoe SUV, and John jumped out, leaving the car running. John testified he did not get involved in the fight, however, because his wife reminded them they had children at home. Jeff also testified that John did not join the fight. Jennifer, who had come outside to the parking lot, was yelling at Waters to stop. Liliana was trying to pull Debbie out of the middle of the fight, but Debbie resisted. Jeff testified that he, Jaime, and Waters became entangled together during the struggle, and they all fell to the ground. Jeff landed on top of or to the side of Waters and that is when he saw a gun in Waters’s hand. Jeff attempted to pin down Waters’s hand holding the gun. Debbie also testified that she saw a gun on the ground at some point during the fight, and tried to move Jaime out of the way. Debbie did not know where the gun came from. Liliana had just turned back toward her vehicle to get her cell phone to call the police when she heard a gunshot; she ducked down inside her car. Both John and Jennifer stated they saw a gun in the waistband of Waters’s pants when his shirt was pulled up during the fight. After Jennifer heard a gunshot, she looked at Waters and saw the gun in his hand, but it was aimed away from the other people. Jeff did not recall hearing a gunshot, but heard Jaime yelling, “you shot my wife,” “you killed my wife,” and “I’m going to kill you.” Jeff saw Debbie lying on the ground in a pool of blood. Jennifer and Jeff ran over to Debbie and began applying pressure to the gunshot wound on her head. When John heard the gunshot, he grabbed Yvonne and ran inside the bar for protection. John called 911 from inside the bar. He testified that some of the bar employees told them to hide in a back room because Waters was “crazy.”

Meanwhile in the parking lot, Jaime had jumped into John's Tahoe SUV, which was still running, and accelerated toward Waters, who fled down the sidewalk. Jaime continued speeding through the parking lot in pursuit of Waters and crashed head-on into a parked vehicle, pushing it over the curb and into a retaining wall. At the same time, Waters fell down and fired multiple gunshots from the ground into the lower part of the Tahoe driver's door, hitting Jaime twice in his leg. Jeff and Jennifer were kneeling next to Debbie and neither saw the Tahoe coming, but heard the crash and gunshots. Jennifer was grazed by the stationary vehicle that Jaime hit with the Tahoe. After a few minutes, Waters walked up to Jennifer and told her to come with him. They walked to the adjacent Starbucks where Waters unloaded his handgun and placed it on the table, along with his driver's license and concealed handgun license, and waited for the police to arrive. Waters was arrested and charged with one count of aggravated assault with a deadly weapon for shooting Debbie.

In addition to the above testimony, other eyewitnesses to the incident testified at trial. Jonathan Goodman stated he went to the bar after work and was outside smoking a cigarette when he observed two men and a woman involved in a verbal confrontation in the parking lot. Goodman heard Waters say, "are you ready" and "are we going to do this?" In Goodman's opinion, Waters was "acknowledg[ing] that he wanted to fight." Goodman saw that the woman kept trying to get between the men and heard Waters tell the other man, "get this bitch out of the way." Goodman's opinion was that Waters was acting as the aggressor in the confrontation. Goodman stated he had previously seen Waters at the bar "mean mugging," which he stated is a "term for . . . 'aggressive staring.'" Goodman then saw the husband push his wife aside and shove Waters. Waters and the husband began "throwing fists" at each other. Next, Goodman saw a Tahoe SUV drive up and a man jumped out, leaving the engine running. The man from the Tahoe came up behind Waters and put him in a "choke-hold." Goodman, a former service member with combat medic training,

testified that a choke-hold maneuver is designed to make the person “pass out.” Goodman stated that while Waters was in the choke-hold, a third man (Jeff) slammed Waters down on top of the Tahoe’s hood and the husband started hitting Waters with his fists. All of the men then rolled off the hood to the other side and Goodman lost sight of the fight.

About thirty seconds later, Goodman heard a gunshot. To that point, Goodman had not seen anyone with a gun. Goodman walked around the Tahoe and saw that Waters had a gun in his hand. Goodman told Waters to put his gun away. Goodman went to assist Debbie, who was lying on the ground with her head grazed by the gunshot. Goodman heard Jaime yell at Waters, “you’re dead . . . I’m going to kill you.” Jaime then tried to run over Waters with the Tahoe, but Waters ran, fell to the ground, and “unloaded the rest of his magazine” into the driver’s side door. Goodman stated that when Waters fired into the driver’s door, the Tahoe was stationary and Waters was yelling, “get the f**k out of the truck” and still trying to fire his gun after it was empty. The Tahoe had crashed into Goodman’s parked pickup truck and pushed it into a retaining wall. According to Goodman, the Tahoe did not hit Waters or pin him against the other vehicle.

Lucas Lozano also observed the incident in the parking lot. Lozano and his girlfriend had gone to the bar to hang out with some co-workers after work. They left at closing time. While walking to his car, Lozano saw the driver of a silver Land Rover get out of his vehicle and start arguing with two men and a couple. Lozano heard the driver, Waters, say, “I’m going to beat your ass. I’m not going to shoot you.” Lozano also heard Waters say, “you better handle your bitch.” A scuffle followed between Waters and the group. Lozano heard a gun fall to the ground. Lozano turned to his girlfriend and urged her to get into the car. A few seconds later, Lozano heard a gunshot but did not see who fired the gun. Lozano and his girlfriend drove away from the scene and called 911. They later returned to give statements to the police. One of the responding police officers, San Antonio Police Officer Scott Marshall, testified that Waters admitted to the shooting

at the scene. Officer Marshall testified that Waters had only minor injuries to his face that night and identified a photograph showing Waters with an abrasion on his forehead.

Neither Jaime nor Waters testified at trial. The only defense witness was Jennifer Kirk, the bartender. Jennifer testified that she and Waters had been dating for approximately one month when the shooting occurred. On that night, Waters came into the bar earlier in the evening for a drink, left at about 8:30 p.m., and then returned at about 1:15 a.m. Jennifer stated she did not observe the initial interaction between Waters and the Arredondo group when he returned to the bar from the restroom, but later noticed that glances were being exchanged between Waters and members of the group. No words were exchanged. Jennifer interpreted Waters's behavior and demeanor at that time as him feeling like the group was "some sort of threat. Like he needed to keep his eyes on them." She stated that all the men involved that night, including Waters, were "big guys." When the group got up to leave the bar, Jennifer attempted to convince Waters to stay in the bar awhile longer because she feared a potential problem if they all left at the same time. Waters disregarded Jennifer's request, and exited the bar at the same time as the Arredondo group, i.e., approximately 2:00 a.m.

A few moments later, Jennifer walked outside. She observed members of the Arredondo group yelling at Waters as he walked to his car, but stated Waters did not acknowledge them and just got into his car. Jennifer walked over to Waters's car and again tried to convince him to come back inside the bar and wait for her to finish her shift because she was "worried that there would be some sort of an altercation." Waters refused. Jennifer went back inside the bar. When she noticed that "some sort of confrontation" was going on in the parking lot, Jennifer walked back outside. Jennifer saw that Waters's vehicle was stopped in the middle of the parking lot and he was standing outside the vehicle. She did not know what caused Waters to exit his vehicle, but saw that Waters and one of the men from the Arredondo group were yelling at each other from

about twenty feet apart. Jennifer testified she heard Waters say, “if you want to fight, get your bitch out of the way.” The distance between Waters and the other man closed and they started swinging at each other. A woman was in between Waters and the other man, trying to pull her husband away. Jennifer did not see anything in either man’s hands. Jennifer stated that two other men also got involved in the scuffle with Waters, for a total of three men from the Arredondo group and Waters. During the struggle, one of the men pulled up Waters’s sweatshirt and Jennifer saw a handgun in the back waistband of Waters’s pants. Jennifer yelled at Waters to “stop,” and reached for her cell phone to dial 911. At that point, the scuffle “went from upright to on the ground.” One of the men from the Arredondo group was near Waters’s head and the other two men were on either side of Waters on the ground. Jennifer did not recall seeing any of the men use their fists on Waters or kick Waters while he was on the ground. Jennifer then heard a gunshot. She immediately looked at Waters and saw a gun in his hand, but stated it was pointed away from the woman who was shot. Jennifer saw the woman lying on the ground and ran over to check on her. Blood was coming from her head, and someone told Jennifer to keep putting pressure on the wound. The woman’s husband came and knelt down by his wife. He was frantic and yelling, “you shot my wife” over and over. Jennifer’s focus was on helping the woman, and she did not notice when the husband (Jaime) left. But, shortly afterwards, Jaime crashed a black SUV into the vehicle parked next to Jennifer, striking Jennifer and knocking her over. Simultaneously with being struck by the vehicle, Jennifer heard four to six gunshots. The black SUV was going so fast that it rammed the parked vehicle into a retaining wall. Jennifer crawled up on the sidewalk out of the way and sat there for a few minutes before Waters walked toward her and told her to come with him. Waters seemed frantic. They walked around to the front side of the Starbucks, and Waters laid down the disassembled gun and his drivers’ license on an outdoor table. They waited three or four minutes for the police to arrive. Waters told the police he was the person who shot Debbie and Jaime.

Waters was indicted on a single count of aggravated assault with a deadly weapon by shooting Debbie Arredondo and causing her bodily injury. *See* TEX. PENAL CODE ANN. § 22.02(a)(2) (West 2011). At the conclusion of trial, the jury found Waters guilty and the trial court sentenced him to fifteen years' imprisonment. Waters now appeals.

ANALYSIS

On appeal, Waters raises two related issues, arguing that the evidence did not support submission of a jury instruction on whether he provoked the difficulty, and that the evidence was legally insufficient to support a finding that he provoked the difficulty.

Jury Instruction

The trial court submitted instructions on self-defense and provoking the difficulty in the jury charge. Waters did not object to the provocation instruction. On appeal, Waters asserts the trial court erred in submitting the provocation instruction because his use of mere "fighting words" was insufficient to constitute provocation under the legal standard. The State responds that the evidence was sufficient to create a fact issue for the jury as to whether Waters provoked Jaime into attacking him.

We analyze an allegation of jury charge error in two steps, first determining whether error exists and then whether the degree of harm necessary for reversal occurred. *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex. Crim. App. 2005). If error exists and the error was preserved, reversal is required if "some harm" exists. *Id.* If error exists, but it was unpreserved, then the error must have caused actual "egregious harm" to warrant reversal. *Id.*

The provocation doctrine has its roots in common law but is codified in the self-defense statute contained in the Texas Penal Code. *Smith v. State*, 965 S.W.2d 509, 513 (Tex. Crim. App. 1998) (noting the common law concept of provoking the difficulty is founded on the principle of estoppel); *see* TEX. PENAL CODE ANN. § 9.31(b)(4) (West 2011). The provocation doctrine is

commonly referred to as “provoking the difficulty” or “provoking the attack,” and acts as a limitation on a defendant’s right to self-defense. *Smith*, 965 S.W.2d at 512; *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016) (defendant forfeits his right to self-defense if he provokes the attack). The concept is that “[a] man may not take advantage of his own wrong to gain favorable interpretation of the law . . . [O]ne cannot willingly and knowingly bring upon himself the very necessity which he sets up for his own defense.” *Smith*, 965 S.W.2d at 513-14 (quoting *Sorrell v. State*, 74 Tex. Crim. 505, 169 S.W. 299, 307 (1914)).

A jury charge on provocation is required when sufficient evidence exists that (1) the defendant did some act or used some words which provoked the attack on him, (2) such act or words were reasonably calculated to provoke the attack, and (3) the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm on the other person. *Elizondo*, 487 S.W.3d at 197; *Smith*, 965 S.W.2d at 513. The three elements are questions of fact and may be proven by circumstantial evidence. *Smith*, 965 S.W.2d at 513. In deciding whether to submit the instruction, the trial court must decide “whether evidence has been presented that *could* support a jury’s finding on all three elements of provocation beyond a reasonable doubt.” *Elizondo*, 487 S.W.3d at 197 (emphasis in original). In determining whether there was sufficient evidence to warrant the instruction, an appellate court views the evidence in the light most favorable to submission of the instruction. *Smith*, 965 S.W.2d at 514 (appellate court resolves conflicts in the evidence and draws reasonable inferences in favor of giving the instruction).

The first element is the threshold for the application of the provocation doctrine. Under this element, the evidence must show that the defendant did or said something that actually caused the attack on him. *Elizondo*, 487 S.W.3d at 199; *Smith*, 965 S.W.2d at 514. “This requirement preserves the right of self-defense of a defendant who may have plotted provocation, and intended

to provoke a difficulty, but who nevertheless does not put his plan into action.” *Smith*, 965 S.W.2d at 514. In addition, while the defendant’s acts or words will usually be leveled directly at the victim, a defendant’s acts or words directed at a third party may also provoke a difficulty. *Id.*; *see also Elizondo*, 487 S.W.3d at 199. The State need not prove the exact words or the particular act by the defendant that provoked the difficulty—the jury must merely be able to find there was *some* provoking act or words. *Smith*, 965 S.W.2d at 515. Here, the evidence, viewed in the light most favorable to the instruction, showed that Waters was the initiator of every interaction with the Arredondo group, inside the bar as well as outside in the parking lot. Waters’s words and actions toward the members of the group were initially provocative and became directly threatening and aggressive in the parking lot. As Waters walked toward Jaime, Jeff, and Debbie in the parking lot, he used threatening words by stating he was not going to shoot them but was “going to kick their ass.” The witnesses’ testimony was consistent that Waters directed his comment calling Debbie a “bitch” toward Jaime and several testified that Waters threw the first punch at Jaime, making contact with Debbie instead,² before Jaime reacted. In addition, there was witness testimony that Waters not only called Debbie a “bitch,” but threatened to “knock her out too” before he threw the punch at Jaime that hit Debbie. Jaime immediately reacted by lunging toward Waters and “grappling” and fighting with him. Viewing the evidence in the light most favorable to submission of the instruction, a rational jury could find that Jaime’s attack on Waters occurred as a direct result of Waters’s disrespectful and threatening language toward Debbie and Waters’s action in throwing a punch at Jaime which struck Debbie. Based on this evidence, a rational jury could find that these words and actions by Waters actually caused the attack by Jaime.

² Jeff and Liliana testified that Waters struck Debbie when he threw the first punch at Jaime. Debbie testified that she did not recall being hit by Waters.

Next we turn to the second element and determine whether there was sufficient evidence that Waters's words and/or acts were reasonably calculated to provoke Jaime's attack on him. "[A]n act is reasonably calculated to cause an attack if it is reasonably capable of causing an attack, or if it has a reasonable tendency to cause an attack." *Elizondo*, 487 S.W.3d at 199 (quoting *Smith*, 965 S.W.2d at 517). In addition, words alone may also provoke a difficulty "if they are clearly designed to do so." *Id.* Here, Waters addressed Jaime and referred to Jaime's wife Debbie as a "bitch," in combination with an express threat to "knock her out" according to one witness, or an implied threat to "get your bitch out of the way" if Jaime "want[ed] to fight," according to another witness. These words by Waters were immediately followed by his action in throwing a punch toward Jaime, which struck Debbie. Viewing the evidence in the light most favorable to the instruction, we conclude a rational jury could find that Waters's threatening words and his aggressive act of throwing the punch were reasonably capable of causing, or had a reasonable tendency to cause, Jaime's attack against Waters in response. *See Smith*, 965 S.W.2d at 517. Viewing Waters's words and actions in the context of his previous comments and actions leading up to the face-to-face confrontation only strengthens our conclusion. *See Elizondo*, 487 S.W.3d at 199 (in addressing second *Smith* element, the defendant's acts and words may be considered alone or in conjunction with the other circumstances surrounding the difficulty).

Finally, with respect to the third *Smith* element, we consider whether a rational jury could find that Waters chose his words and engaged in the act of throwing the first punch for the purpose and with the intent that he would have a pretext for harming Jaime and the other members of the group. *See Elizondo*, 487 S.W.3d at 200. The mere fact that the defendant said words or did an act that indeed provoked the other's attack is not enough. *Id.* The defendant must have had the intent that the words and/or act would have the effect of provoking the attack "as part of a larger plan of doing the victim harm." *Id.* (quoting *Smith*, 965 S.W.2d at 518). The defendant's intent

is to be determined from the totality of the circumstances, and his words and actions before, during, and after the provocation may be considered in discerning his intent. *Elizondo*, 487 S.W.3d at 201; *Smith*, 965 S.W.2d at 518. “The acts of provocation alone can carry the inference of intent, and [the defendant’s] actions during or after the provocation can illuminate his intent.” *Elizondo*, 487 S.W.3d at 202. Further, the defendant’s prior words and acts can supply context and character to his words or acts of provocation and aid in determining his intent. *Id.*

Here, the totality of the circumstances show that Waters’s words and actions were part of a larger plan to provoke a fight with one or all of the members of the Arredondo group. Waters initiated the first contact with the group inside the bar and again sought out the group in the parking lot where he escalated the interaction into a fight. Inside the bar, Waters first engaged by complaining that the group was blocking the aisle and “making him walk around,” using a curse word according to two witnesses’ recollections. The evidence was undisputed that the bar was not crowded and there were other available paths that Waters could have used to return to his seat without interacting with the group. Debbie testified that Waters continued to look at the group from his bar seat, and John overheard him talking about guns. Debbie described Waters’s demeanor that night as “angry, zoned out, mean, some one [sic] you don’t want to mess with.” John testified that, based on Waters’s behavior inside the bar, he thought Waters was “wanting trouble.” In addition, Jennifer testified that she was concerned about a “potential problem” between Waters and the group, and she urged Waters to stay inside the bar but he insisted on leaving at the same time as the Arredondo group.

In the parking lot, Waters again sought out the group, aggressively driving toward them at a high speed and “almost hitting” Jeff and Debbie. When Jeff and Debbie yelled at Waters to slow down, instead of driving away he backed up and rolled down his window to yell back a threatening comment that they “just f**ked with the wrong person” or “you don’t want to f**k with me.” The

evidence showed that Waters's vehicle was not blocked in and he could have driven away, but instead he got out of his vehicle to confront the group, thereby escalating the situation into a face-to-face conflict. Waters also armed himself with his handgun before approaching the group, which supports an inference he anticipated violence and possible use of the gun. Waters is the person who made aggressive threats during the confrontation, saying that he planned to "kick their ass" and calling Jaime's wife a "bitch" and telling Jaime to "get your bitch before I knock her out too." Jaime began fighting with Waters after Waters threw the first punch at him and hit Debbie. The testimony showed that Waters was the only person with a handgun or any other type of weapon during the fight, and Jennifer testified she saw a gun in Waters's hand right after she heard the gunshot that hit Debbie. After the entire incident was over, Waters did not flee, but walked to the nearby Starbucks and waited for the police to arrive. Waters confirmed to police that he was the shooter.

Considering all of Waters's comments and actions toward the Arredondo group preceding the fight, we conclude that a rational jury could find that Waters called Debbie a "bitch," threatened to "knock her out too," and threw a punch that hit Debbie for the purpose and with the intent that he would have a pretext for inflicting harm on Jaime and the rest of the group. *See Elizondo*, 487 S.W.3d at 200. Indeed, Waters's words and acts of provocation toward Debbie by themselves support an inference that Waters's intent was to provoke her husband Jaime into attacking him so that he (Waters) would have a pretext for fighting and inflicting harm on Jaime. *See id.* at 202; *Smith*, 965 S.W.2d at 514. Considering those words and acts of provocation in the context of Waters's initiation of contact with the group inside and outside the bar and all his prior comments and actions toward the group that preceded the fight only strengthens the inference of intent and existence of a larger plan. Waters was the only person initiating and escalating the conflict, the only person making verbal threats and derogatory remarks, and the only person who could have

defused the conflict by simply driving away. There is no evidence that Waters ever abandoned the encounter or communicated his intent to abandon the encounter. *See* TEX. PENAL CODE ANN. § 9.31(b)(4) (describing abandonment as an exception to the provocation doctrine). An objective observer, Goodman, who knew none of the people involved, testified that Waters was acting as the aggressor in the confrontation who acknowledged by his comments of “are you ready” and “are we going to do this” that he wanted to fight.

Viewing the evidence in the light most favorable to the provocation instruction, as we must, we conclude the trial court properly submitted the instruction because there was sufficient evidence upon which the jury could find all three elements of provocation beyond a reasonable doubt. *See Elizondo*, 487 S.W.3d at 197. In reaching this conclusion, we hold “merely that the evidence was sufficient to allow the jury to pass on” the issue of provocation. *Smith*, 965 S.W.2d at 520.

Sufficiency of the Evidence

Having held that the provocation instruction was properly submitted, we next address Waters’s argument that the evidence was legally insufficient to “prove beyond a reasonable doubt that he did provoke the difficulty,” thereby forfeiting his right to act in self-defense. In resolving this issue, we apply the well-established standard of review for legal sufficiency to the same three elements of provocation discussed above. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (appellate court views all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt). In conducting a sufficiency analysis, we defer to the jury’s assessment of the credibility of the witnesses and the weight to be given to their testimony, and resolve any inconsistencies in the evidence in favor of the jury’s verdict. *Brooks*, 323 S.W.3d at 899; *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000).

Waters admitted shooting Debbie during the incident, but claimed she was accidentally shot while he was acting in self-defense. *See* TEX. PENAL CODE ANN. § 22.02(a)(2); *id.* § 9.31. Defense counsel argued in opening statement that Waters was beaten, choked, and stomped on by the men in the Arredondo group and that Waters had to use his gun because they were preventing him from leaving the scene. At the conclusion of trial, the State argued the evidence showed that Waters provoked the attack on himself as part of his plan to pick a fight, and therefore Waters was barred from claiming he acted in self-defense.

Waters's argument on appeal is based on the faulty premise that the State had the burden to disprove self-defense. As discussed above, the doctrine of provocation, once proven, necessarily precludes a defendant's assertion of self-defense. *See Elizondo*, 487 S.W.3d at 196; *see also Smith*, 965 S.W.2d at 512. Once the provocation instruction was submitted, it became the jury's role to evaluate the credibility of the witnesses and the weight to be given their testimony, and to resolve any conflicts in the evidence, to determine whether the three elements of provocation were proven. *See Brooks*, 323 S.W.3d at 899; *see also Curry*, 30 S.W.3d at 406. Deferring to the jury's credibility determinations and resolution of inconsistencies in the evidence, we conclude the evidence detailed above under Waters's first issue is legally sufficient to establish each of the three elements of provocation. *See Elizondo*, 487 S.W.3d at 197; *see also Smith*, 965 S.W.2d at 513.

CONCLUSION

Based on the foregoing analysis, we overrule Waters's issues on appeal and affirm the trial court's judgment.

Rebeca C. Martinez, Justice

DO NOT PUBLISH