

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-09-00534-CR**

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**JOHN HENRY RUBEN a/k/a JOHN HENRY RUEBEN  
a/k/a JOHN HENRY RUBIN, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the Criminal District Court  
Jefferson County, Texas  
Trial Cause No. 08-03485**

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**MEMORANDUM OPINION**

A jury convicted John Henry Ruben a/k/a John Henry Rueben a/ka/ John Henry Rubin of aggravated assault. The jury found an additional allegation in the indictment true and assessed punishment of fifteen years imprisonment and a fine of \$5,000. The trial court sentenced Ruben in accordance with the jury's verdict. We find Ruben's two issues are without merit and affirm the trial court's judgment.

## BACKGROUND

On Saturday, March 29, 2008, Jesse James was at Douglas Rogers's home. Also present were Ruben, Barry Buchanan, Ray Segura, and a man nicknamed Rim. James testified that all of them had been smoking crack that evening. James further testified that he brought the crack to the house to share with the others, including Ruben. After sharing with Ruben, James recalled that Ruben asked him for more crack, but James refused to give him more. James told Ruben there was no more crack. Ruben then left the room and went to the back of the house. James testified that as he was leaving out of the front door, Ruben re-entered the room and accused James of "snitch[ing] him out." James did not know why Ruben accused him of snitching. James had never had problems with Ruben and did not threaten him that night. He testified he never raised a weapon of any kind towards Ruben and in fact, was not in possession of a weapon of any kind.

James's back was to Ruben when Ruben re-entered the room. James testified, "I was just about to reach for the latch, [when Ruben] came in and start[ed] shooting at me." James fell to the floor. James testified, "[Ruben] walked up to me and put the gun point blank to my shoulder and shot me." James then gave Rim his last piece of crack because he did not want it on him when he was taken to the hospital.

On cross-examination, James denied being a drug-dealer and testified that he was merely sharing his crack. James gave a statement to the police and when confronted with his statement, James admitted that he initially told the police that he did not share crack

with Ruben. James explained that when he gave his statement to the police he had just gotten out of the hospital and was taking heavy painkillers.

Dispatch directed Sergeant Candace Cox to respond to the “shooting call” at 620 Shamrock. Upon driving into the area where the shooting occurred, Cox testified Rogers flagged her and other officers down. She found James lying against the inside of the front door of the house on his side, bleeding.

Dispatch also directed Officer Andrew Carrier to the scene of the shooting. Upon arrival, Cox directed Carrier to the house where he expected to find the possible suspect. Carrier testified that as he approached the house, Ruben exited the front door with his hands in the air and yelled out, “I shot him.” Later Carrier entered the house and found a small caliber handgun and magazine lying on the floor. Officer Carrier testified that it appeared the gun had been set down intentionally, not dropped.

Officer Erik Kvarme also responded to the “shots fired” call. When he arrived, Cox directed Kvarme and other officers to gain entry into the house with the victim, which they did through the rear door. The only person they located inside the house was James. Inside of the house, Kvarme found and identified .25 caliber shell casings and a .25 caliber misfired cartridge. The casings and misfired cartridge matched the .25 caliber semiautomatic weapon recovered from the house police witnessed Ruben exit. Kvarme found four fired cartridges and one unfired cartridge. Kvarme understood James received four wounds in his body, which would match the number of expended cartridges he found

at the house.

Roy Guidry, Jr. and Ruby Richard resided at the house Ruben exited. He testified that Ruben was living with Rogers on the date of the offense. Guidry testified Ruben did not seem troubled during the conversation they had the afternoon of the offense. Around 8:45 p.m., Guidry testified he heard two or three shots fired. About five minutes later Ruben knocked on his door and Guidry let him inside. Ruben then told Guidry that he had shot James. Guidry recalled that Ruben's demeanor was "a little nervous . . . concerned about making this call to the police; but other than that, he was calm." Ruben asked Guidry to call 911, which he did. He then handed Ruben the phone "because [Ruben] wanted to tell them what he did." He listened to Ruben speak to 911 and recalled that Ruben told 911 that he shot somebody and Guidry was "pretty sure" that Ruben asked for the police to come. Guidry testified that he did not hear Ruben tell 911 that anyone had threatened him or pulled a weapon on him. Thereafter, Guidry initiated a second call to 911 because he was uncertain if the operator understood that they needed an ambulance.

Ruben testified on his own behalf that he shot James in self-defense. He explained that prior to March 29, 2008, he had not had any altercations or problems with James. Ruben rented a room from Rogers. After visiting with Guidry, Ruben testified he went home and retired alone to his bedroom around 8:15 p.m. He testified it was common for Rogers to invite people to come to his house. Ruben realized other people were in the house when he heard noise from the front room. He left his room to see what was going

on in the front room, and saw James standing by the front door letting people inside the house. He testified that the people in the front room were making noise and getting high. Ruben testified he asked the people to “hold it down[,]” to which James responded, “. . . I got something for you[.]” Ruben testified that as James said this to him he “stuck his left hand in his pocket” and “turned around pulling it out.” Ruben testified it “[l]ooked like he had a knife” and he believed James was pulling a knife out of his pocket. Ruben was fearful when he saw James pulling what he thought was the knife out of his pocket because he previously saw James “cut” someone. In response, Ruben testified he felt like he had to take action to protect himself so he picked up his pistol, which was on top of the nightstand by his bed, and walked toward James and started firing. Ruben testified that he believed shooting James was immediately necessary to avoid eminent harm. After shooting James, Ruben tried to leave the house, but as he was leaving, James reached up at him, so he shot him again. Ruben testified that when he left the house he went to Guidry’s house to call an ambulance to “come see about [James].” He recalled talking to the 911 operator and telling the operator that he was an old man trying to save his life. Ruben told the jury that he believed his actions were necessary to save his life because some of James’s family were gang members and lived right down the street.

On cross-examination, Ruben admitted that he did not say anything about a knife during the 911 call or to anyone else before the trial of his case, but claimed no one had asked him about the knife. Ruben also admitted that James did not threaten him with

retaliation by his family that night. He further admitted that no one in James's family had ever threatened him.

After the close of the evidence, the trial court presented the charge to the parties. The defense did not object to or request any changes to the proposed jury charge. The jury returned a verdict of guilty.

Ruben filed this appeal wherein he contends jury charge error because "the jury charge as to the offense of aggravated assault was so misleading as to cause him egregious harm . . . as a matter of law." In his second issue, Ruben contends the evidence is factually insufficient to sustain his conviction.

#### JURY CHARGE

In his first issue, Ruben contends the trial court erred when it submitted an incorrect jury charge as to his self-defense claim to the charged offense of aggravated assault. We analyze this issue under the standard of *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g). Under *Almanza*, when an appellant does not preserve jury charge error by a timely objection, the unobjected-to charge requires reversal only if it resulted in egregious harm, i.e. the "error is so egregious and created such harm that [the accused] 'has not had a fair and impartial trial[.]'" *Id.* To determine the degree of harm, a reviewing court should consider "the entire jury charge, the state of the evidence, . . . the argument of counsel[,] and any other relevant information revealed by the record of the trial as a whole." *Id.*; see also *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008).

Here, the jury charge defined self-defense and then stated that “[t]he use of deadly force is not justified except as provided in the following Instructions regarding Deadly Force in Defense of Person.” The jury charge then explained that “[a] person is justified in using deadly force against another . . . if the actor would be justified in using force against the other as provided in the Self-Defense portion of these Instructions . . . .” The instruction for deadly force in defense of person concluded, “If the jury believes the defendant was justified in using Deadly Force in Defense of Person against Jesse James, as described in these Instructions, you must acquit the defendant.” The application paragraphs of the jury charge then instructed the jury to find Ruben guilty of the offense of aggravated assault, “[u]nless you so find, or if you have a reasonable doubt thereof, or if you believe the defendant was justified in using Deadly Force in Defense of Person as described in these Instructions, you shall find the defendant NOT GUILTY.”

Ruben’s trial counsel stated that he had no objections to the charge. The jury charge did not contain an application paragraph on the law of self-defense; however, the charge did instruct the jury about self-defense and deadly force. Ruben clearly relied on self-defense as his defensive theory at trial. Although Ruben admitted to shooting James, he presented evidence that it was an act of self-defense. In his closing argument, Ruben’s trial counsel urged self-defense. Moreover, Ruben’s counsel discussed the jury charge, specifically referenced the instructions on self-defense and the use of deadly force, and then applied the facts in this case to the instructions.

There is nothing in the record to indicate that the jury was misinformed or uninformed on the law of self-defense. The trial court instructed the jury generally on the law of self-defense, but failed to apply an abstract instruction to the facts of this case. Ruben's counsel failed to object to this omission at trial. Further, Ruben's counsel emphasized self-defense in his argument before the jury. After considering the entire jury charge, the state of the evidence, and the argument of counsel, we conclude the trial court's error with relation to the jury charge did not cause egregious harm to Ruben. *See Barrera v. State*, 982 S.W.2d 415 (Tex. Crim. App. 1998). We overrule Ruben's first issue.

#### SUFFICIENCY OF THE EVIDENCE

Ruben further contends the evidence was factually insufficient to support his conviction. In *Brooks*, the Court of Criminal Appeals concluded that there is no meaningful distinction between legal sufficiency review and factual sufficiency review. *Brooks v. State*, 323 S.W.3d 893, 902 (Tex. Crim. App. 2010). The Court held that "the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt." *Id.* at 912. To determine the sufficiency of the evidence, the appellate court must review all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Hooper v.*



*State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Under the *Jackson* standard, the reviewing court gives full deference to the jury’s responsibility “to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.” *Hooper*, 214 S.W.3d at 13 (quoting *Jackson*, 443 U.S. at 318-19).

A person commits the offense of an assault when the person “intentionally, knowingly, or recklessly causes bodily injury to another[.]” Tex. Penal Code Ann. § 22.01 (West Supp. 2010). A person commits an aggravated assault when the person commits an assault and the person “causes serious bodily injury to another,” or “uses or exhibits a deadly weapon during the commission of the assault.” *Id.* § 22.02(a)(1)-(2). However, “a person is justified in using force against another when and to the degree [he] reasonably believes the force is immediately necessary to protect [him] against the other’s use or attempted use of unlawful force.” *Id.* § 9.31(a).

Although Ruben testified that he thought James had a knife in his hand and that he shot James in self-defense, the jury was free to believe James’s testimony and disbelieve Ruben. *See Hooper*, 214 S.W.3d at 13. In particular, the jury was free to believe that Ruben approached James, who was unarmed, asked about James snitching on him, and then shot James four times. Under these circumstances, viewing the evidence most favorable to the jury’s verdict, we conclude a rational trier of fact could have found that Ruben shot James with a firearm, causing him serious bodily injury, and he did not shoot James in self-defense. *See Jackson*, 443 U.S. at 319. We overrule Ruben’s second issue.

Having overruled each of Ruben's issues, we affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER  
Justice

Submitted on October 25, 2010  
Opinion Delivered February 2, 2011  
Do not publish

Before McKeithen, C.J., Kreger and Horton, JJ.