In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00034-CR

FORREST LEE HAWTHORNE, Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the 163rd District Court
Orange County, Texas
Trial Cause No. B-090642-R

MEMORANDUM OPINION

After a bench trial, the trial court convicted Forrest Lee Hawthorne of aggravated assault. *See* Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02(a)(2) (West Supp. 2010). In seven issues, Hawthorne challenges his conviction. We affirm the trial court's judgment.

Background

Hawthorne and Gunner Downs resided in the same boarding house and worked for the same employer. Debra Horner, Downs's girlfriend, resided with Downs. One day at work, Downs confronted Hawthorne about statements Hawthorne made to Horner about Downs. According to Downs, the situation became "uncontrollable," the men "had some

words[,]" and Hawthorne "blew up." According to Hawthorne, he expressed his opinion, Downs walked away, and the men did not speak the rest of the day.

After work, Downs stopped at the liquor store, where Horner worked, to purchase whiskey and a twelve-pack of sixteen-ounce beer. According to Horner, Downs later called her at the liquor store, said he was upset about what Hawthorne told Horner, and he wanted to confront Hawthorne. Horner asked Downs not to confront Hawthorne, but she "guess[ed] he was going to anyway."

According to Downs, he went home, drank a shot of whiskey, and drank two to three sixteen-ounce cans of beer. After checking the mail, he saw Hawthorne. Downs confronted Hawthorne again and placed his finger in Hawthorne's face. Downs testified that he was unarmed and did not pound on Hawthorne's door, touch Hawthorne, threaten Hawthorne, or choke Hawthorne. Hawthorne "whipped a knife out [of his pocket] and started slashing" Downs. Downs fell backward, but Hawthorne kept cutting. When Downs spoke to Hawthorne, Hawthorne told Downs to "shut up" and he "had some more for [Downs] if [Downs] kept up with him." Downs did not defend himself. At some point, Hawthorne returned to his room.

According to Hawthorne, Downs pounded on Hawthorne's room door and said, "Forrest, the next time I see you, I'm going to kill you[.]" Believing Downs to be exaggerating, Hawthorne opened the door and Downs lunged at Hawthorne. Downs grabbed Hawthorne's neck and dug his thumbs into Hawthorne's throat. Realizing that

Downs's threat was serious, Hawthorne pulled a knife from his pocket and "poked" Downs in the chest. When Downs did not respond, Hawthorne dragged the knife across Downs's chest. Hawthorne described Downs as "berserk." When Downs backed off, Hawthorne called 9-1-1. Hawthorne testified that he acted in self-defense.

When Deputy Andrew Hollier arrived at the boarding house, Hawthorne told Hollier that Downs was "bleeding" and "needed help." Hollier testified that emergency medical services had already been contacted. Hawthorne admitted cutting Downs with a knife. Hollier located the knife. Hollier testified that the knife was capable of causing death or serious bodily injury and is a deadly weapon.

Jesus Narro testified that he also lives at the boarding house. After the confrontation, Downs told Narro that Hawthorne "cut" him.

After the confrontation, Downs was transported to the hospital via helicopter. His injuries required either stapling or suturing. Downs was in the intensive care unit for one-and-a-half days, received blood transfusions, had surgery, and remained in the hospital for a week after the incident.

Sufficiency of the Evidence

In issues one through six, Hawthorne challenges the sufficiency of the evidence on grounds that (1) the State failed to overcome the presumption found in section 9.32(b) of the Penal Code, (2) the trial court failed to apply the statutory presumption in section 9.32(b), (3) his conduct was justified as a matter of law, and (4) the trial court either

failed to apply or failed to properly apply the "retreat" law found in section 9.32(c)-(d) of the Penal Code.

Standard of Review

The "*Jackson v. Virginia* legal-sufficiency 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." *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). When evaluating the sufficiency of the evidence under *Jackson*, we assess all the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could find 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). We "must give deference to 'the responsibility of the trier of fact to fairly resolve conflicts in 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).

Deadly Force in Defense of Person

A person commits aggravated assault if he intentionally, knowingly, or recklessly caused bodily injury to another and used or exhibited a deadly weapon during commission of the assault. Tex. Penal Code Ann. §§ 22.01(a)(1), 22.02(a)(2). A "deadly weapon" constitutes "anything that in the manner of its use or intended use is capable of

causing death or serious bodily injury." Tex. Penal Code Ann. § 1.07(17)(B) (West Supp. 2010).

Use of force is justified when the actor reasonably believes the force is immediately necessary to protect the actor against another's use or attempted use of unlawful force. Tex. Penal Code Ann. § 9.31(a) (West Supp. 2010). Use of deadly force is justified when (1) force is justified under section 9.31, and (2) the actor reasonably believes the deadly force is immediately necessary to protect the actor against another's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. Tex. Penal Code Ann. § 9.32(a) (West Supp. 2010). The actor's belief that deadly force was immediately necessary is presumed reasonable if 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 [aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or 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. § 9.32(b) (West Supp. 2010).

"A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force[.]" *Id.* § 9.32(c) (West Supp. 2010). When "determining whether an actor . . . reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat." *Id.* § 9.32(d) (West Supp. 2010).

Citing section 2.05 of the Penal Code, Hawthorne contends that his conduct was justified as a matter of law and that the State was required to show, beyond a reasonable doubt, that the facts giving rise to the presumption do not exist. *See* Tex. Penal Code Ann. § 2.05(b)(2)(A) (West Supp. 2010). Section 2.05 instructs the trial court regarding submission of the presumption to a jury in a jury trial. *Id*. § 2.05. "In a trial before the court, there is no jury charge." *Coonradt v. State*, 846 S.W.2d 874, 876 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd).

Even so, section 2.05 provides that "if there is sufficient evidence of the facts that give rise to the presumption, the issue of the existence of the presumed fact must be

submitted to the jury *unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact*[.]" Tex. Penal Code Ann. § 2.05(b)(1) (emphasis added). Only when the existence of the presumed fact is submitted to the factfinder would the State then have a burden to prove beyond a reasonable doubt that the facts giving rise to the presumption do not exist. *Id*. § 2.05(b)(2)(A).

In this case, the trial court heard two versions of the confrontation between Hawthorne and Downs. One version characterizes Downs as the aggressor. Hawthorne testified that Downs instigated the confrontation, threatened to kill him, and choked him to the point that Hawthorne began to lose consciousness. He used his knife to ward off Downs and contacted 9-1-1 after the confrontation. A second version characterizes Hawthorne as the aggressor. Downs testified that when he confronted Hawthorne at the boarding house, Hawthorne suddenly pulled his knife and began cutting Downs. Downs denied touching Hawthorne, threatening to kill Hawthorne, or choking Hawthorne. Hawthorne left Downs bleeding in the hallway. Downs sustained serious injuries.

As the sole judge of the credibility of the witnesses and the weight to be given their testimony, the trial court bore the burden of resolving the conflicting versions of the events. *See Jackson,* 443 U.S. at 318-19; *see also Hooper*, 214 S.W.3d at 13. In doing so, the trial court was entitled to accept Downs's version of the events and reject Hawthorne's version. Hawthorne's testimony alone does not conclusively prove self-

defense as a matter of law. *See London v. State*, 325 S.W.3d 197, 203 (Tex. App.—Dallas 2008, pet. ref'd). The trial court could have concluded that the evidence as a whole clearly precluded a finding beyond a reasonable doubt of the presumed fact, *i.e.*, Hawthorne's reasonable belief that deadly force was immediately necessary.

Additionally, "[a] judge in a bench trial is presumed to have applied the correct law to the facts." *Ex parte Jackson*, 911 S.W.2d 230, 234 (Tex. App.—Houston [14th Dist.] 1995, no pet.); *see also Bevill v. State*, 842 S.W.2d 837, 839 (Tex. App.—Beaumont 1992, no pet.). The record in this case does not demonstrate that the trial court either failed to apply or failed to properly apply the correct law.

Viewed in the light most favorable to the State, the trial court could reasonably conclude, beyond a reasonable doubt, that Hawthorne committed the offense of aggravated assault and was not justified in using deadly force against Downs. *See Jackson*, 443 U.S. at 319; *see also Hooper*, 214 S.W.3d at 13. We overrule issues one through six.

Exclusion of Evidence

In issue seven, Hawthorne challenges the trial court's exclusion of Horner's testimony that she was choked by Downs.

Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except, in a criminal case, evidence of a pertinent character trait of the victim of the crime offered by an

accused. Tex. R. Evid. 404(a)(2). Reputation or opinion testimony may be used to prove a person's character or character trait. Tex. R. Evid. 405(a). Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show action in conformity therewith, but may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id*. at 404(b).

"The rules of evidence permit the defendant to offer evidence concerning the victim's character for violence or aggression on two separate theories when the defendant is charged with an assaultive offense[.]" *Ex parte Miller*, No. AP-76,167, 2009 Tex. Crim. App. LEXIS 1486, at *16 (Tex. Crim. App. Oct. 28, 2009) (not yet released for publication).

> First, the defendant may offer reputation or opinion testimony or evidence of specific prior acts of violence by the victim to show the "reasonableness of defendant's claim of apprehension of danger" from the victim. This is called "communicated character" because the defendant is aware of the victim's violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not. This theory does not invoke Rule 404(a)(2) because Rule 404 bars character evidence only when offered to prove conduct in conformity, *i.e.*, that the victim acted in conformity with his violent character. . . .
>
> Second, a defendant may offer evidence of the victim's character trait for violence to demonstrate that the victim was, in fact, the first aggressor. Rule 404(a)(2) is directly applicable to this theory and this use is called "uncommunicated character" evidence because it does not matter if the defendant was aware of the victim's violent character. The chain of logic is as follows: a witness testifies that the victim made an aggressive move against the defendant; another witness then testifies about the victim's character for violence, but he may do so *only* through reputation and opinion testimony under Rule 405(a).

Id. at **17-19 (internal footnotes omitted).

During direct-examination of Horner, Hawthorne attempted to elicit Horner's testimony that, sometime after the confrontation between Hawthorne and Downs, Horner moved out of Downs's home because Downs choked Horner. The State objected. Hawthorne argued that the testimony was relevant because "a key component of this case is that a man choked another man, and then this man had to come forth with self-defense. I just asked her the question why did she leave, and the answer is that the complaining witness has a propensity to violence. He choked someone else." The trial court sustained the State's objection, noting that "[r]eputation for truth and violence is admissible, but a subsequent incident is not."

Hawthorne contends that Horner's testimony was relevant to the issue of who was the first aggressor in the confrontation between Hawthorne and Downs. Accordingly, Hawthorne sought to introduce Horner's testimony as uncommunicated character evidence. *See Miller*, 2009 Tex. Crim. App. LEXIS 1486, at *19. However, only opinion and reputation testimony is admissible to show the victim's character for violence. *See id*. at **17-19. Hawthorne was not entitled to use a specific act of violence to show that Downs was the first aggressor. *See id*. at *21. That use is an attempt to prove Downs's conduct in conformity with his violent character, which Rules 404(a) and 405(a) prohibit. *See id*. The record does not suggest that Hawthorne attempted to use Horner's testimony for any admissible purpose. For these reasons, we cannot say that the

trial court abused its discretion by excluding Horner's testimony. We overrule issue seven.

Having overruled Hawthorne's seven issues, we affirm the trial court's judgment.

AFFIRMED.

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STEVE McKEITHEN
Chief Justice

Submitted on February 22, 2011
Opinion Delivered March 9, 2011
Do Not Publish

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