In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00148-CR

CODY MICHAEL DAVIS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 88th District Court
Hardin County, Texas
Trial Cause No. 23179

MEMORANDUM OPINION

Cody Michael Davis appeals from his conviction for murder. In three issues, Davis complains of jury charge error. We affirm the trial court's judgment.

BACKGROUND

Davis was indicted for murdering Owen Goodman by stabbing him with a knife. Davis pleaded not guilty to the charge. The evidence showed that Goodman lived with Davis's mother, Davis's sister, and Davis. On the date of this incident, Goodman was engaged to Davis's mother. The record reflects that Davis and

Goodman were both unemployed at the time of this incident, did not get along with each other, and frequently fought. Davis and Goodman were the same age, and Goodman did not approve of Davis living with his mother.

A video-recorded statement of Davis was admitted into evidence and played for the jury. The investigating officer testified to the statements Davis made to him after the incident, and Davis later took the stand and testified on his own behalf.

The State presented testimony from Davis's mother that the two men fought frequently, but they never used weapons. Both the investigating officer and Davis testified that Davis was larger and stronger than Goodman and usually got the best of Goodman in each of the fights. Davis testified that on the morning of this incident, he and Goodman bumped into each other in the living room, which resulted in an argument that escalated into a fight. Davis testified that he threw the first punch. Davis explained that his sister heard what was going on and, from the front porch, told them to stop or she was going to call the police. Davis testified that he threw Goodman to the ground and turned his attention to prevent his sister from calling the police. According to Davis, Goodman then retreated to the kitchen, where Goodman picked up a phone and a knife and said he was calling the police. Davis testified that he walked toward Goodman in the kitchen to take the phone away from him so he would not call the police. In his videotaped statement,

Davis told the investigating officer that he had to walk around a kitchen counter to reach Goodman. Davis testified that Goodman told Davis to stay away from him, but when Davis continued forward and reached for the phone, Goodman slashed at him with the knife. Davis testified that until then, he did not think Goodman was going to use the knife against him.

Davis explained that he began to wrestle with Goodman and was able to dislodge the knife from Goodman's hand. Davis testified that both he and Goodman reached for the knife on the floor, and Goodman began to hit Davis with his other hand. Davis testified that he gained control of Goodman's wrist, began pushing backward, and that he then reached and grabbed a different knife and began stabbing Goodman. According to Davis, Goodman struggled to defend himself, attempting to get away from Davis, but Davis was on top of him and continued stabbing him in the back and in the back of his head. Davis explained that at one point, he flipped Goodman onto his back and began stabbing him in the head, face, and chest area. Davis testified that Goodman was still trying to get away from him, but he kept stabbing until Goodman stopped moving. The forensic pathologist who performed the autopsy on Goodman testified that he found eighty-five identifiable individual stab wounds, including multiple stab wounds to each eye penetrating to the brain, which were identified as the injuries that caused

Goodman's death. Davis testified that the stab wounds to the eyes were the last wounds he inflicted upon Goodman.

The trial court submitted a proposed jury charge to the parties and asked if either side had any objections. In the trial court's proposed charge, the trial court included an instruction on self-defense. While Davis did not object to the proposed charge, Davis tendered a proposed instruction describing various provisions of section 9.32(b) of the Texas Penal Code and requested that it be submitted in the application portion of the charge. The trial court denied the request. The trial court then submitted the jury charge to the jury as originally proposed. After the charge was submitted, the jury found Davis guilty of murder and sentenced him to sixty years of imprisonment.

DAVIS'S ISSUES

In three issues, Davis complains that the trial court failed to properly charge the jury in accordance with the law on the defensive theory of self-defense. In his first issue, Davis argues that the application paragraph in the court's charge failed to instruct the jury of the presumption of reasonableness as to Davis's alleged belief that the use of deadly force was immediately necessary to protect his life. Davis's second issue contends that the jury charge failed to apply the law to the facts to charge the jury on the defensive issue of self-defense. The third issue

asserts that the charge failed to instruct the jury that Davis had no duty to retreat before using deadly force to protect his life.

APPLICABLE LAW

We review claims of jury charge error under the two-pronged test set out in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). We first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error exists, we then evaluate whether the error caused harm. *Id*. The degree of harm required for reversal depends on whether that error was preserved in the trial court. *Id*. When, as here, error was preserved in the trial court by a timely written request for instructions, we must reverse if the error is "calculated to injure the rights of [the] defendant." Tex. Code Crim. Proc. Ann art. 36.19 (West 2006). In other words, we must determine whether there was some harm. *Trevino v. State*, 100 S.W.3d 232, 242 (Tex. Crim. App. 2003) (citing *Almanza*, 686 S.W.2d at 171). This standard requires the reviewing court to find that the defendant "'suffered some actual, rather than merely theoretical, harm from the error.'" *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (quoting *Warner v. State*, 245 S.W.3d 458, 462 (Tex. Crim. App. 2008)). In evaluating whether there was some harm, we consider "the entire jury charge, the state of the evidence, including the contested issues and weight of probative

evidence, the argument of counsel[,] and any other relevant information revealed by the record of the trial as a whole." *Barron v. State*, 353 S.W.3d 879, 883 (Tex. Crim. App. 2011) (quoting *Almanza*, 686 S.W.2d at 171).

The trial court must give the jury "a written charge distinctly setting forth the law applicable to the case[.]" Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007). The purpose of the jury charge is to instruct the jury on the law that applies to the case and to guide the jury in applying the law to the facts of the case. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). The purpose of the abstract or definitional portions of the charge is to help the jury to understand the meaning of concepts and terms used in the application paragraphs of the charge. *Caldwell v. State*, 971 S.W.2d 663, 666 (Tex. App.—Dallas 1998, pet ref'd). As the Court of Criminal Appeals has explained, a jury charge is adequate:

> if it either contains an application paragraph specifying all of the conditions to be met before a conviction under such theory is authorized, or contains an application paragraph authorizing a conviction under conditions specified by other paragraphs of the jury charge to which the application paragraph necessarily and unambiguously refers, or contains some logically consistent combination of such paragraphs.

Plata v. State, 926 S.W.2d 300, 304 (Tex. Crim. App. 1996), *overruled on other grounds by Malik v. State,* 953 S.W.2d 234 (Tex. Crim. App. 1997).

ISSUE ONE

We first address Davis's argument that the trial court erred in failing to give a "presumption of reasonableness" instruction. The self-defense statute provides that a defendant is justified in using deadly force if, among other things, he "reasonably believes the deadly force is immediately necessary . . . to protect [himself] against the other's use or attempted use of unlawful deadly force[.]" Tex. Penal Code Ann. § 9.32(a)(2)(A) (West 2011). Davis argues that section 9.32 of the Penal Code mandates that the jury presume that the use of deadly force was reasonable under certain circumstances. *See* Tex. Penal Code Ann. § 9.32(b) (West 2011). Section 9.32(b) states that an actor's belief that the deadly force was immediately necessary is presumed to be reasonable if the actor:

> (1) knew or had reason to believe that the person against whom the deadly force was used:
>
> . . .
>
> (C) was committing or attempting to commit . . . [murder] . . . ;
>
> (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 . . . .

Tex. Penal Code Ann. § 9.32(b)(1)(C), (2), (3). While Davis did not object to the proposed jury charge, Davis did submit a written request for an instruction in the application portion of the charge on this presumption and, Davis therefore

preserved error. *See Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996); *see also* Tex. Code Crim. Proc. Ann. art. 36.15 (West 2006).

"The Penal Code requires that a presumption that favors the defendant be submitted to the jury 'if there is sufficient evidence of the facts that give rise to the presumption . . . unless the court is satisfied that the evidence as a whole clearly precludes a finding beyond a reasonable doubt of the presumed fact[.]'" *Morales v. State*, 357 S.W.3d 1, 7 (Tex. Crim. App. 2011) (quoting Tex. Penal Code Ann. § 2.05(b)(1) (West 2011)). When a rule or statute requires an instruction under particular circumstances, that instruction is the law applicable to the case. *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008). "Such statutes and rules set out an implicit 'If-then' proposition: If the evidence raises an issue of [voluntariness, accomplice witness, confidential informant, etc.], then the trial court shall instruct the jury [as to whatever the statute or rule requires]." *Id.*

During the guilt-innocence phase of the trial, the trial court instructed the jury as follows, in relevant part:

> [a] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. The actor's belief that the force was immediately necessary is presumed to be reasonable if the actor did not provoke the person against whom the force was used and was not otherwise engaged in criminal activity.

The application paragraph provided as follows:

> Now if you find from the evidence beyond a reasonable doubt that on or about the 4th day of OCTOBER, 2014, in Hardin County, Texas, the defendant, CODY MICHAEL DAVIS, did then and there intentionally or knowingly cause the death of OWEN GOODMAN, by stabbing him with a knife, you will find the defendant GUILTY of MURDER as alleged in the indictment. Unless you so find, or if you have a reasonable doubt thereof, or you find that he was acting in self[-]defense as that term has been defined, and you shall find the Defendant NOT GUILTY of MURDER.

Generally, a defendant is entitled to an instruction on every defensive issue raised by the evidence regardless of the strength of the evidence. *Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). It is not the court's function to evaluate the credibility or weight to be given the evidence raising the defensive issue. *Gibson v. State*, 726 S.W.2d 129, 132–33 (Tex. Crim. App. 1987). The fact that the evidence raising the issue may conflict with or contradict other evidence is irrelevant in determining whether a charge on the defensive issue must be given. *Id*. at 133. The purpose of this rule is to ensure that the jury, not the judge, decides the relative credibility of the evidence. *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991) (op. on reh'g); *Woodfox v. State*, 742 S.W.2d 408, 409–10 (Tex. Crim. App. 1987). In determining whether a defensive instruction should have been given, "we view the evidence in the light most favorable to the defendant's requested submission." *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App.

2006). The question of whether a defense is raised by the evidence is a sufficiency question, which we review as a question of law. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007).

Section 9.32(b)(3) of the Texas Penal Code states that an actor's belief that the use of deadly force was immediately necessary is presumed to be reasonable if the actor knew or had reason to believe that the person against whom the deadly force was used was committing or attempting to commit murder, did not provoke the person against whom the force was used, and was not otherwise engaged in criminal activity. Tex. Penal Code Ann. § 9.32(b)(1)(C), (2), (3). In this case, Davis testified that he started a fight with Goodman, and when Davis's sister threatened to call the police, Davis threw Goodman to the ground and turned his attention to his sister. According to the testimony at trial, Goodman retreated to the kitchen and picked up his phone, stated that he was going to call the police, picked up a knife, and told Davis to stay away from him. Davis testified that he then walked toward Goodman with the intention of taking his phone away from him so that Goodman could not call the police for help. When Davis reached for Goodman's phone, the altercation began anew, and Davis killed Goodman.

The record is devoid of any evidence that would lead a reasonable person to believe that when Davis used deadly force toward Goodman, Goodman was

committing or attempting to commit murder. Davis admitted in his statement and stated in his testimony that Goodman got up from the floor after being thrown down by Davis, and moved away from Davis and into the kitchen. Davis testified that when he reached for Goodman's hand to take the phone from him, Goodman slashed at him with the knife, and Davis explained that it was not until that point that he believed or feared that Goodman was going to use the knife against him.

Section 42.062 of the Texas Penal Code provides, in part, that a person commits a Class A misdemeanor offense of interference with emergency request for assistance if the person

> knowingly prevents or interferes with another individual's ability to place an emergency call or to request assistance, including a request for assistance using an electronic communications device, in an emergency from a law enforcement agency, medical facility, or other agency or entity the primary purpose of which is to provide for the safety of individuals.

Tex. Penal Code Ann. § 42.062(a), (c) (West Supp. 2016). Subsection (d) of this statute defines "emergency", in part, as "a condition or circumstance in which any individual is or is reasonably believed by the individual making a call or requesting assistance to be in fear of imminent assault[.]" *Id.* § 42.062(d). In this case, Goodman had already been assaulted and thus, was justified in attempting to request emergency assistance.

The presumption of reasonableness in Texas Penal Code section 9.32(b)(3) applies unless the State proved beyond a reasonable doubt at least one of the following: (1) the appellant neither knew nor had reason to believe that the victim was committing or attempting to commit murder; (2) the appellant provoked the victim; or (3) at the time the deadly force was used, the appellant was engaged in criminal activity. Tex. Penal Code Ann. § 9.32(b); *Villarreal v. State*, 453 S.W.3d 429, 435 (Tex. Crim. App. 2015).

On this record, we conclude that the trial court could have reasonably been satisfied that the evidence as a whole clearly precluded a finding beyond a reasonable doubt of the presumption that Davis's decision to use deadly force was immediately necessary. *See* Tex. Penal Code Ann. § 9.32(b). Therefore, the trial court did not err by failing to instruct the jury on the presumption of reasonable belief that deadly force was immediately necessary. We overrule Davis's first issue.

ISSUE TWO

In his second issue, Davis complains that the trial court failed to apply the law to the facts adduced at trial to his theory of self-defense. "The jury charge is the means by which a judge instructs the jurors on the applicable law." *Vogt v. State*, 421 S.W.3d 233, 238 (Tex. App.—San Antonio 2013, pet. ref'd) (citing

Vasquez v. State, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012)). The charge "'must contain an accurate statement of the law and must set out all the essential elements of the offense.'" *Vasquez*, 389 S.W.3d at 366 (quoting *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995)) The jury charge should be written "in accordance with the indictment[.]" *Yzaguirre v. State*, 394 S.W.3d 526, 530 (Tex. Crim. App. 2013). "It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and to prevent confusion." *Reeves,* 420 S.W.3d at 818 (quoting *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977)).

An application paragraph should apply the specific charges alleged against the defendant to the evidence presented at trial. *See id*. at 817; *Vasquez*, 389 S.W.3d at 367. The application paragraph must: (1) specify all conditions which must be met before a conviction is authorized; (2) "authorize a conviction under conditions specified by other paragraph of the jury charge to which the application paragraph necessarily and unambiguously refers[;]" or "(3) contain[] some logically consistent combination of such paragraphs." *Vasquez*, 389 S.W.3d at 367 (quoting *Plata*, 926 S.W.2d at 304). In short, the charge must "apply the law to the facts adduced at trial." *Gray v. State*, 152 S.W.3d 125, 127 (Tex. Crim. App. 2004). However, "[i]t is unnecessary to repeat every abstract definition in the

application paragraph of the jury charge." *Holland v. State*, 249 S.W.3d 705, 709 (Tex. App.—Beaumont 2008, no pet.).

Under the law of self-defense, a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *See* Tex. Penal Code Ann. § 9.31(a) (West 2011). "'Deadly force' [is] force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." Tex. Penal Code Ann. § 9.01(3) (West 2011). A person is justified in using deadly force against another if he would be justified in using force against the other under section 9.31 and when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use or attempted use of deadly force. Tex. Penal Code Ann. § 9.32(a)(1), (2)(A). "Reasonable belief" is a belief that an ordinary and prudent person in the same circumstances as the defendant would hold. Tex. Penal Code Ann. § 1.07(a)(42) (West Supp. 2016).

While Davis argues there was evidence that Goodman was the first aggressor, his own testimony discredited that theory. Davis admitted that he instigated the fight. By Davis's own testimony, Goodman slashed at him with the

knife only when Davis reached to take the phone away from Goodman, and Davis admitted he had no fear that Goodman would use the knife against him until Davis attempted to take the phone from Goodman.

"The right of self-defense commences when the necessity arises, continues as long as there is real or apparent danger, and ceases when the danger disappears." *Hunter v. State,* 128 S.W.2d 1176, 1179 (Tex. Crim. App. 1939). The record indicates that Davis initiated the altercation, and once he began to stab Goodman, Davis continued to use deadly force beyond what was necessary to incapacitate Goodman. Davis testified that he continued to stab Goodman "until he stopped moving." Davis testified that the last wounds he inflicted upon Goodman were to his eyes, and the forensic examiner testified that those were the fatal wounds. In Davis's own words,

> Like I said, the first half of it or maybe not even half of it, you know, was self-defense and taking the knife away from him. After that, it was just murder. I just—I got after him. It was anger. It was just anger, hate, rage, whatever you want to call it. And then it was over with.

On this record, no juror could rationally conclude that Davis believed that he needed to use deadly force to protect himself throughout the encounter with Goodman. *See Reed v. State*, 703 S.W.2d 380, 384–85 (Tex. App.—Dallas 1986, pet ref'd); *see also Mata v. State*, 141 S.W.3d 858, 863 (Tex. App.—Corpus

Christi 2004), *rev'd on other grounds*, 226 S.W.3d 425 (Tex. Crim. App. 2007). We conclude that there was no evidence from which a jury could have rationally determined that Davis killed Goodman in self-defense. *See, e.g.*, *Riddle v. State*, 888 S.W.2d 1, 6–7 (Tex. Crim. App. 1994) (holding that when there was no testimony of a continued threat by the victim, appellant hitting the victim in the head another fourteen times was not justified); *Morgan v. State*, 545 S.W.2d 811, 815 (Tex. Crim. App. 1977) (finding that the alleged danger had passed when force was used).

The Texas Court of Criminal Appeals has held that when a trial court charges a jury on self-defense, any flaw in the charge on self-defense amounts to error in the charge. *See Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998). However, *Barrera* is distinguishable because in that case there was evidence that the defendant acted in self-defense, and as such he was entitled to a self-defense instruction. *See Barrera v. State*, 10 S.W.3d 743, 745 (Tex. App.—Corpus Christi 2000, no pet.); *Barrera v. State*, 951 S.W.2d 153, 155–56 (Tex. App.—Corpus Christi 1997), *rev'd,* 982 S.W.2d 415, 416 (Tex. Crim. App. 1998). Unlike *Barrera*, the record in this case is devoid of evidence that Davis acted in self-defense. Accordingly, we conclude that the trial court did not err by not including an expanded jury instruction on self-defense in the application

paragraph. *See Juarez v. State*, 961 S.W.2d 378, 383 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd) (finding that failure to include an application paragraph on a defensive issue not raised by the evidence was not error); *Hutcheson v. State*, 899 S.W.2d 39, 43 (Tex. App.—Amarillo 1995, pet. ref'd) (holding that the trial court was not required to apply abstract instruction on defensive issue to facts of case when evidence failed to raise the issue, even when the jury charge incorrectly allowed the jury to convict appellant on a lesser burden of proof than required by law). The jury charge incorporated the definition of self-defense from the abstract portion of the charge into the application paragraph by reference. *See Holland*, 249 S.W.3d at 709. We overrule issue two.

ISSUE THREE

In his third issue, Davis claims the trial court erred by failing to include the exception to the duty to retreat in the charge. The law provides that

> [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[.]

Tex. Penal Code § 9.32(c). The jury charge submitted to the jury recited the statutory language of section 9.31(e) within the definition of "self-defense." *See* Tex. Penal Code Ann. § 9.31(e) (West 2011).

Davis requested an expanded application paragraph which provided:

> A person who has a right to be present at a location where the person uses deadly force against another is not required to retreat before using deadly force in self-defense if both:
>
> 1. The person with the right to be present did not provoke the person against whom the deadly force is used; and
>
> 2. The person is not engaged in criminal activity at the time the deadly force is used.
>
> Therefore, in deciding whether the state has proved that the defendant did not reasonably believe his use of deadly force was necessary, you must not consider any failure of the defendant to retreat that might be shown by the evidence if you find both—
>
> 1. The defendant did not provoke Owen Goodman, the person against whom the defendant used deadly force; and
>
> 2. The defendant was not engaged in criminal activity at the time he used the deadly force.
>
> If you do not find both 1 and 2, you may consider any failure of the defendant to retreat that might be shown by the evidence in deciding whether the defendant reasonably believed his use of deadly force was necessary.

As discussed above, with respect to situations involving deadly force, the Texas Penal Code provides that a person does not have a duty to retreat, when:

> (c) 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 as described by this section.

> (d) For purposes of Subsection (a)(2), in determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

See Tex. Penal Code Ann. § 9.32(c), (d).

The express language of section 9.32 provides that the "no duty to retreat" provisions do not apply if the defendant provoked the person against whom force or deadly force was used or if the defendant was engaged in criminal activity at the time. As explained above, the evidence showed that Davis instigated the fight by swinging at Goodman, and that Davis was engaged in criminal activity when the deadly force was used by attempting to prevent Goodman from calling the authorities. Because an instruction on a self-defense issue is required only if the evidence raises the issue, we conclude that section 9.32(c) does not apply to the facts of this case. *See* Tex. Penal Code Ann. § 9.32(c); *see also Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). The trial court did not err by refusing to include the expanded application instructions requested by Davis. We overrule Davis's third issue.

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

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on April 25, 2016
Opinion Delivered April 26, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.