In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-19-00068-CR

JAMES CLIFTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court
Jefferson County, Texas
Trial Cause No. 18-29583

MEMORANDUM OPINION

A jury convicted James Clifton of aggravated assault with a deadly weapon, a box cutter.[1] Following the trial, Clifton appealed. He argues the trial court erred when, in response to a request by the jury while the jury was deliberating, the jury asked the trial court to define the word *attempt*. The word *attempt* is a relevant word in the charge since the charge asked the jury to evaluate whether Clifton "believed

[1] *See* Tex. Penal Code Ann. § 22.02(a).

his use of deadly force was necessary to defend himself against [the victim's] use or attempted use of unlawful deadly force." According to Clifton, the definition the trial court gave the jury in response to its request is not in a substantially correct form because the court defined *attempt* too narrowly. Clifton suggests that when compared to the word's common meaning, the instruction the trial court gave the jury defining *attempt* represents a prohibited comment on the weight of the evidence. He suggests the definition the trial court used restricted the jury from considering whether *Billy*,[2] the man the jury convicted Clifton of assaulting, acted negligently or recklessly in creating a situation that Clifton perceived to threaten his life when the two men met outside Clifton's home.

We conclude the definition the trial court used for the word *attempt* is narrower than the definition commonly used for the word. Since the Legislature did not provide a statutory definition for *attempt*, and because the definition the trial court used alludes to a particular type of evidence—intentional rather than reckless or negligent conduct—we agree the definition constitutes a comment on the evidence. In this case, Clifton lodged a timely objection to the definition for *attempt*,

[2] To protect the victim's privacy, we identify him with a pseudonym. *See* Tex. Const. art. I, § 30 (granting crime victims "the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process[.]"

so the question we must answer is whether Clifton suffered *some harm* from the error. For the reasons explained in detail below, we conclude *some harm* resulted, so we reverse the trial court's judgment and award Clifton a new trial.

Background

In June 2018, a grand jury indicted Clifton for aggravated assault with a deadly weapon, a box cutter. Less than a year later, the trial court called the case for trial. The State called four witnesses in the trial: (1), the victim, Billy, (2) Billy's fiancé, Leah Trahan, (3) Detective Rojeleo Meza, a City of Port Arthur police officer, and (4) Officer Lawrence Myers, another of the City's officers.

Billy testified that in May 2018, his niece, Kierra, was living with Clifton when she called him from Clifton's home. Kierra told Billy that she and Clifton had argued, Clifton had threatened to hit her, and she wanted Billy to come help her move. Accompanied by Trahan and his children, Billy drove his van to Clifton's home. When they arrived, Billy stood in the front yard while Trahan sounded the horn. About five minutes later, Kierra came out. She didn't have her clothes with her when she came outside, so Billy told her to go back inside and retrieve her clothes. While Billy waited for Kierra, Clifton came outside. According to Billy, Clifton acted aggressively, had his chest poked out, and was jingling something in his pocket with his hand.

After Clifton came outside, the two men stood about an arm's length apart. Billy asked: "Were you threatening to hit my niece?" Clifton answered: "Yeah. What's up with it?" Billy testified he took Clifton's statement as "confrontational" and as street terminology for do "you want to fight." Billy acknowledged he told Clifton after Clifton said "what's up" by saying "[l]et's take it to the street[.]" According to Billy, he thought fighting on the street rather than on a person's property left you a better chance of not landing in jail.

At that point, Billy heard Trahan call to him from the van. Billy turned toward his van, which he had parked in the street, and Clifton used the box cutter to cut him on his back. Billy denied ever swinging his fist at Clifton, threatening Clifton, or "bow[ing] up" to him. Billy admitted, however, he was visibly upset before Clifton hurt him and he went to Clifton's home in response to Kierra's phone call for help.

With some exceptions, Trahan's testimony about the altercation between the two men generally tracks Billy's testimony. But it differs in certain respects. Trahan, for instance, testified she saw the two men "bowing up" or "puffing up to each other." She also testified that when Kierra called Billy, Billy overheard Clifton say to Kierra while on the phone "he was going to slap the – out of her." After Kierra called, according to Trahan, Billy was "kind of upset." She and the children accompanied him to Clifton's home because Trahan felt nothing would happen in front of them if she went. Describing what happened after they arrived at Clifton's

home, Trahan explained that, from her perspective, the encounter between the men wasn't casual, and was instead like "I'm the bigger man thing, you know. They were both standing tall, looking each other in the eyes."

Trahan agreed that Clifton cut Billy in the back after she called to him and asked him to come back to the van. According to Trahan, she left the van and told Clifton "you didn't have to cut him like that." Clifton responded, "[w]ell, that man was going to hit me." Trahan stated Clifton did not appear to be scared or in distress. And she testified Billy never displayed a weapon, never swung on Clifton, and never balled up his fists. Instead, Trahan thought Billy was leaving when Clifton cut Billy on his back.

Two Port Arthur police officers, Detective Rojeleo Meza and Officer Lawrence Myers, responded to a phone call Trahan placed to a 911 dispatcher. According to Detective Meza, on the day the incident occurred, he spoke to Billy at the hospital where he was being treated for his injuries. Meza photographed Billy's injuries. The trial court admitted these photographs into evidence during the trial. The photos show two large, X shaped lacerations on Billy's back.

At trial, Officer Myers explained he went to Clifton's house to investigate a possible stabbing. When he arrived, he spoke to Clifton, who was standing in his front yard. Myers wore a body camera during the interview. The trial court admitted the video into evidence in Clifton's trial. Officer Myers testified that Clifton told

him "he had just been involved in a disturbance where he had possibly cut someone." The video confirms that testimony and shows Clifton give Officer Myers the box cutter Clifton used that day. According to Myers, box cutters are deadly weapons because they can cause serious injuries to others. And he explained that, given Clifton's demeanor and what Clifton told him about the encounter that he too, at first thought Clifton had acted in self-defense. But Officer Myers explained that he changed his mind when Clifton told him Billy turned and was walking away from the meeting when Clifton used the box cutter on Billy's back. Myers explained that if Billy turned to leave, he no longer represented a threat. Even so, Myers acknowledge a difference exists between "turning away" and "walking away." He also stated that had Clifton chosen to do nothing, the two men were close enough together that Billy could have turned and hit Clifton with his fist.

Clifton was the last witness to testify. Generally speaking, his testimony focuses on his claim of self-defense. According to Clifton, he had undergone surgery that involved placing a tube in his body about a week before the altercation occurred that is used in kidney dialysis. The tube comes out of his stomach and wraps around it. Clifton testified his doctor told him to be careful with the graft because pulling it out could cause a person to bleed to death.

In some ways, Clifton's testimony about his altercation with Billy differs from the account Billy provided at trial. Clifton acknowledged that he and Kierra had

argued after he came home that day, found the door open, saw her on the phone, and he thought she was not watching her young son closely enough because he could have walked through an open door. Kierra cussed him and, according to Clifton, "kept running up in my face." Clifton testified he told Kierra "[y]ou better get out of my face. What you trying to do, make me slap the stuff out of you?" At that point, Kierra started hitting him. Clifton explained he walked away.

Clifton provided an innocent explanation for having a box cutter in his pocket when he went outside his home. According to Clifton, he had put the box cutter in his pocket because he intended to use it to cut up cardboard boxes and throw them away. Clifton explained that when he walked away from Kierra, he left the house and intended to go sit under a tree. Upon leaving the house through the front door, Billy was in his yard. Billy walked up to him, stopped and "got in his stance to hit me[.]" Clifton explained he knew he had no chance should a fight break out given his recent surgery and that Billy was the younger and bigger man. Clifton showed the jury how Billy stood, stating Billy turned and had "his fist balled up." Clifton testified: "So, before he could swing and hit me, I pulled my knife out; and I started swinging at him." Clifton testified he feared for his life because he was worried his graft would come out if the men fought.

The instructions in the written charge include instructions relevant to Clifton's claim of self-defense. One of the sentences in the original charge, before being

supplemented later, explained: "A person's use of deadly force against another that would otherwise constitute the crime of aggravated assault is not a criminal offense if the person reasonably believed the force used was immediately necessary to protect the person against the other's use or attempted use of deadly force." That instruction informed the jury that it could excuse Clifton's use of the box cutter if Clifton reasonably believed using the box cutter was immediately necessary to protect himself against Billy's use or attempted use of deadly force. Before the trial supplemented the charge during jury deliberations, the written charge didn't define the phrase "attempted use of deadly force" or the word *attempt*.

The jury sent out two notes while deliberating its verdict. The first asked the trial court to define "deadly force" and "attempted," as in "attempted deadly force." In reply to the first question, the trial court instructed the jury:

> In response to your question submitted in Jury Question 1, please note that 'deadly force' is defined in the Jury Instructions under the portion regarding self[-]defense.
>
> As to 'attempt,' please use its commonly accepted meaning.
>
> Please continue your deliberations.

Later, the jury sent the trial court a second note. In it, the foreperson explained:

> The jurors' individual definitions for the word 'attempt' conflict.
>
> Could we please get a Webster's definition of the word 'attempt'?

The trial court responded but did not rely on Webster's to define *attempt*. Instead, the trial court crafted a definition of its own, patterning the definition it sent to the jury after the Penal Code's definition for a crime, criminal attempt.[3] The instruction to the jury's second question states:

> In response to Jury Question 2, you may consider 'attempt' to be an intended act amounting to more than mere preparation that tends but fails to effect the objective intended.
>
> Please continue your deliberations.

Clifton objected to the court's proposed definition at trial, arguing the instruction amounted to an improper comment on the weight of the evidence. He also argued "the definition . . . doesn't correspond or apply to use or attempted use of deadly force in the context of self[-]defense." The trial court overruled the objections and gave the jury the definition we quoted above.

When the jury returned with its verdict, it found Clifton guilty of aggravated assault, as charged in the indictment. Clifton was the sole witness who testified in the punishment phase of his trial. Following the punishment phase of the trial, the jury assessed Clifton's sentence at five years in prison and recommended to the trial court that it place Clifton on probation. The trial court rendered a verdict in accord

[3] Tex. Penal Code Ann. § 15.01(a) ("A person commits an offense, if with the specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.").

with the jury's verdict, signed a judgment suspending Clifton's sentence, and placed him on community supervision for ten years.

Later, Clifton appealed. In his appeal, Clifton filed a brief raising just one issue. He argues he is entitled to a new trial because the supplemental instruction the trial court gave the jury to define *attempt* improperly commented on the weight of the evidence that was relevant to Clifton's claim of self-defense.

Standard of Review

A two-step process is used to resolve appeals that argue error in the charge.[4] Step one requires the reviewing court to determine whether the instruction complained of in the appeal was erroneous.[5] If not, the court's analysis ends.[6] But if so, the reviewing court must then determine whether the error was harmful.[7] Since Clifton preserved the alleged error in the trial, the error is reversible if it caused him "'some harm.'"[8] In this context, *some harm* means "actual harm and not merely a theoretical complaint."[9]

[4] *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Jordan v. State,* 593 S.W.3d 340, 346 (Tex. Crim. App. 2020).
[9] *Id*.

Self-Defense

Under appropriate circumstances, defendants may justifiably use deadly force against others.[10] The Penal Code provisions governing claims of self-defense provide that "deadly force is justified if, among other things, the actor 'reasonably believes the deadly force is immediately necessary . . . to protect himself against the other's use or attempted use of unlawful deadly force.'"[11] Subject to several exceptions, including one that prohibits individuals from using force against others "in response to verbal provocation alone[,]"[12] "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."[13] The Penal Code defines *deadly force* as "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."[14] The Penal Code defines *reasonable belief* as "a belief that would be held by an ordinary and prudent man in the same circumstances as the defendant."[15]

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[10] *See Morales v. State*, 357 S.W.3d 1, 4 (Tex. Crim. App. 2011).
[11] *Id.* at 11 (citing Tex. Penal Code. Ann. § 9.32(a)(2)(A)).
[12] Tex. Penal Code Ann. § 9.31(b)(1)
[13] *Id.* § 9.31(a).
[14] *Id.* § 9.01(3).
[15] *Id.* § 1.07(a)(42).

Under Texas law, the defendant has the right to defend himself from apparent danger to the same extent as he would were the danger real.[16] Furthermore, a person on his own property, "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[.]"[17]

At trial, the State did not object to the court's proposed charge, which includes instructions on Clifton's claim of self-defense. The State has also not complained of the trial court's decision to charge the jury on self-defense in its brief. Instead, the State argues that should the definition the court used for *attempt* be found incorrect, the error did not harm the verdict the jury reached in the trial.

Analysis

Did error occur?

Generally, the jury "is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby."[18] In turn, trial courts must give the jury a written charge "distinctly setting forth the law applicable to the case; not expressing any opinion as to the weight of the evidence, not summing up the testimony, discussing the facts or using any argument in [its] charge calculated to

[16] *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996) (citing *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984)).

[17] Tex. Penal Code Ann. § 9.32(c).

[18] Tex. Code Crim. Proc. Ann. art. 36.13.

arouse the sympathy or excite the passions of the jury."[19] Ordinarily, trial courts give the jury the entire charge before sending it to deliberate on its verdict.[20] Even so, the court may give the jury further instructions should the jury request them.[21] In such cases, the additional instructions the court decides to provide must still follow the rules of impartiality and neutrality governing the court's other instructions.[22]

Given the restrictions the Legislature has placed on the authority trial courts have to instruct juries, the Court of Criminal Appeals has cautioned trial courts they should avoid defining terms that are not defined by statute.[23] That's because "definitions for terms that are not statutorily defined are not considered to be the 'applicable law[.]'"[24] Just last year, the Court of Criminal Appeals explained that trial courts should "avoid including non-statutory instructions because such instruction frequently constitute impermissible comments on the weight of the evidence."[25] "Even a judge's innocent attempt to provide clarity for the jury by including a neutral instruction can result in an impermissible comment on the weight

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[19] *Id.* art. 36.14; *see Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015).

[20] *Lucio v. State*, 353 S.W.3d 873, 875 (Tex. Crim. App. 2011); *see also* Tex. Code Crim. Proc. Ann. art. 36.16.

[21] Tex. Code Crim. Proc. Ann. art. 36.16

[22] *Lucio,* 353 S.W.3d at 875.

[23] *Green*, 476 S.W.3d at 445 (citing three cases, which we have omitted, that the Court of Criminal Appeals issued between 2007 and 2013 for that proposition).

[24] *Id*.

[25] *De La Torre v. State*, 583 S.W.3d 613, 617 (Tex. Crim. App. 2019) (citation omitted).

of the evidence because the instruction singles out a particular piece of evidence for special attention, which the jury may then focus on as guidance from the judge."[26]

As commonly used, according to Webster's Dictionary, attempt means "to make an effort to do, accomplish, solve, or effect[.]"[27] This definition does not focus on the actor's state of mind. Instead, it looks to the conduct regardless of whether the actor engaged in the conduct intentionally, knowingly, recklessly, or negligently. But the trial court gave the jury a supplemental instruction defining attempt as "an intended act amounting to more than mere preparation that tends but fails to effect the objective intended." Because the trial court included an element of intent, the definition the jury followed did not allow jurors to freely give the word its common meaning.[28]

Chapter 9 of the Penal Code—the chapter covering claims of self-defense—does not define the word *attempt*. The trial court looked to Chapter 15 to define *attempt*. While Chapter 15 of the Penal Code defines criminal attempt, the definition for the phrase describes the elements needed to prove that a criminal attempt, a crime that requires a *mens rea*, occurred. [29] Describing the elements required to prove a crime are based on considerations that differ from justification defenses that excuse

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[26] *Id*. (cleaned up).

[27] Webster's Third New International Dictionary 140 (2002).

[28] *See Green*, 476 S.W.3d at 445.

[29] *Compare* Tex. Penal Code Ann. § 15.01 (Criminal Attempt), *with id*. §§ 9.02-9.63 (Justifications Excluding Criminal Responsibility).

crimes, as those justifications were outlined in Chapter 9. Based on those differences, our sister court in *Edwards v. State* held the definition for criminal attempt "only applies when a conviction is sought under Section 15.01."[30]

And nothing in Chapter 9 shows the Legislature intended to restrict the common and ordinary meaning for the word *attempt* to require evidence of a specific intent. We hold the trial court erred by relying on the definition for criminal attempt to give meaning to the word *attempt* as it is used in section 9.31 of the Penal Code. Since *attempt* has not acquired a technical meaning under the law, the trial court should have allowed the jury to assign the word any meaning the jury wanted to apply to *attempt* based on its common use.

Was Clifton harmed?

A. Standard of Review

Next, we evaluate whether the outcome of the trial might have differed had the error not occurred. In its brief, the State acknowledges the definition the trial court used for *attempt* "may have drawn particular attention to evidence regarding Billy's state of mind, which is not a necessary component of a self-defense finding." "To assess harm, we must evaluate the whole record, including the jury charge, contested issues, weight of the probative evidence, arguments of counsel, and other

[30] *Edwards v. State*, 487 S.W.3d 330, 336 (Tex. App.—Eastland 2016, no pet.).

relevant information."[31] Since Clifton objected to the instruction at issue and advances those same arguments to support his appeal, we apply a *some harm* standard when evaluating whether the erroneous instruction affected the outcome of the trial.[32]

B. The Charge as a Whole

The charge contains three sections. The first defines aggravated assault with a deadly weapon and the terms that are associated with the offense. The third section contains the court's general instructions, which we refer to as boilerplate. Nothing in sections one and three weighs in favor or against a finding of harm.

In the second section of the court's charge, the court instructed the jury on self-defense. At the beginning of section two, the court instructed the jury the State had to prove each element in the indictment beyond reasonable doubt and to consider whether Clifton's use of deadly force was justified. The charge explained a person "is justified in using force when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use of attempted use of unlawful force." Nothing is incorrect in section two, before it was supplemented, as the language the trial court used tracks the language relevant to a

[31] *Jordan,* 593 S.W.3d at 347.

[32] *Miller v. State*, 815 S.W.2d 582, 586 n.5 (Tex. Crim. App. 1991) ("Unless *all* harm was abated, appellant suffered 'some' harm.").

claim of self-defense as set out in Chapter 9 of the Penal Code.[33] In the second supplemental charge, however, which the trial court submitted in response to the second request the jury sent asking to define *attempt*, the trial court's instruction added an element of intent that did not exist in the original charge. The boilerplate section of the charge defines *intentionally* as "conduct when it is his/her conscious objective or desire to cause the result." Because the supplemental instruction required the jury to decide whether Billy's actions showed he was conscious of his objective or desired to cause the result—a fight—the instruction prevented the jury from considering whether Billy negligently or recklessly created a perception, which would have been viewed by a reasonably prudent person, as creating an immediate threat that Billy would use deadly force. By restricting the evidence relevant to the jury's decision process, the trial court lowered the State's burden to prove Clifton committed the crime of aggravated assault.

Put another way, the supplemental instruction nudged the jury toward a result, a conviction. Compounding that problem, the supplemental instruction required the jury to decide whether Billy's acts amounted "to more than mere preparation." As commonly used, however, *attempt* means "make an effort."[34] While some jurors might use the word *attempt* in a manner to require evidence of more than mere

[33] *See* Tex. Penal Code Ann. §§ 9.01, 9.31, 9.32.
[34] Webster's Third New International Dictionary 140.

preparation by the actor to justify the defendant's use of deadly force, other reasonable jurors could, in the absence of the supplemental instruction, consider the character and circumstances surrounding the actor's preparations as being enough to show the actor's preparations created the impression he represented an immediate threat. In other words, *attempt* does not necessarily require anything more than preparations. Boiling it down, defendants need not necessarily wait to see if the actor swings at them under circumstances endangering the defendant's life before the jury can decide the defendant had the right to strike first.

Finally, we note that Clifton's entire defense hinged on his claim of self-defense. Here, had the trial court not given the supplemental instruction at issue, one or more of the jurors, acting reasonably, could have determined that Billy represented an *immediate* threat in using deadly force. The fact Billy turned to walk away from Clifton is but one more factor for the jury to consider in deciding whether the threat Billy posed was immediate when Clifton struck him in the back.

On this record, we hold the error that occurred weighs heavily in favor of finding that *some harm* occurred.

C. Arguments by the Attorneys

During their opening statements, both the prosecutor and Clifton's attorney discussed the evidence they expected the jury would hear in the trial about Clifton's

claim of self-defense. For example, the prosecutor in opening statement explained the evidence would show:

> Mr. Clifton cooperate[d] with the police, and you will get to hear him. He [explained] to [police] exactly what happened in the driveway. And he's going to say, 'Yeah, he came up. He never swung at me. He said he wanted to fight me and take it to the street. He never threatened me. He didn't have a weapon on me. He didn't threaten. He didn't bow up to me. And he turned around and I went after him and I got him and I knew I got him a second time because I saw his shirt.' That's not self[-]defense.

In final argument, the attorneys for the parties also focused on the evidence of self-defense. Clifton's attorney argued that, for various reasons, Clifton perceived Billy to represent an immediate threat that required Clifton to use deadly force. He emphasized the stance Billy took approaching Clifton, arguing that it was one from which Billy could have struck Clifton with his fists. He explained that while the two men stood there, Billy had "his fists balled up at his side." In the rebuttal section of the prosecutor's argument, she said:

> [Billy] did not use any force, much less deadly force. So, [self-defense] does not apply. He did not get a swing in. He did not attempt to hit him. He didn't come after him. He tried to leave the scene, and he was cut twice in the back. If you-all believe that that's true, then self[-]defense does not apply.

These arguments required the jury to evaluate the evidence relevant to Clifton's claim of self-defense in the context of the guidance the trial court gave the jury in the charge and the supplemental charge. The trial court's supplemental instruction required the jury to focus on whether Billy's conduct went beyond merely

preparing for a fight and required the jury to focus on whether Billy intentionally created the impression he was about to use deadly force. The law, however, does not require Billy's conduct to be intentional since cases involving claims of self-defense revolve around the defendant's beliefs and whether the jury could reasonably find, based on its resolution of the disputed facts about what the defendant observed, that the defendant did or did not act in self-defense.

D. Other factors

Last, we consider the evidence and any other information in the record relevant to the question of harm. Whether Clifton acted in self-defense was hotly contested in the trial. Clifton admitted he cut Billy with the box cutter in the trial. Thus, Clifton's defense strategy rested completely on his claim that he acted in self-defense.

As an appellate court, our role is not to weigh in on whether the jury would have acquitted Clifton: courts reserve that decision to a "properly instructed jury."[35] While the record contains evidence reasonable jurors might have used to convict Clifton, there was also evidence that other reasonable jurors could have relied on to acquit Clifton of committing the aggravated assault. Simply put, the evidence before the jury of Clifton's guilt is not so overwhelming that we can say with any

[35] *Elizondo v. State*, 487 S.W.3d 185, 209 (Tex. Crim. App. 2016).

confidence that the error that exists in the supplemental instruction did not cause *some harm* in the process the jury used to reach its verdict.

In conclusion, on this record we cannot determine whether the jury rejected Clifton's defense because it disbelieved his testimony or did so because the trial court's supplemental instruction prevented the jurors from considering evidence relevant to his defense. We conclude the catch-all factor weighs heavily in finding the error caused *some harm*.

For the reasons we have explained, we hold the trial court's error caused *some harm* and sustain Clifton's issue.

Conclusion

The trial court's judgment is reversed. We remand the case to the trial court for further proceedings consistent with the opinion.

REVERSED AND REMANDED.

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HOLLIS HORTON
Justice

Submitted on April 3, 2020
Opinion Delivered August 5, 2020
Do Not Publish

Before Kreger, Horton and Johnson, JJ.