



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-18-00065-CR

JUSTIN LEE WALL, Appellant

v.

THE STATE OF TEXAS

On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1427734D

Before Sudderth, C.J.; Gabriel and Wallach, JJ.¹
Memorandum Opinion by Justice Gabriel

¹The Honorable Mike Wallach, Judge of the 348th District Court of Tarrant County, sitting by assignment of the Chief Justice of the Texas Supreme Court. *See* Tex. Gov't Code Ann. § 74.003(h).

MEMORANDUM OPINION

Appellant Justin Lee Wall appeals from his conviction for the murder of Steven Scott. In two issues, he argues that the trial court abused its discretion by excluding impeachment evidence and that he was egregiously harmed by the trial court's failure to properly charge the jury on his justification defense of self-defense. We conclude that Wall was egregiously harmed by the error in the jury charge; thus, we reverse the trial court's judgment and remand for a new trial.

I. BACKGROUND

Carl Christian, Scott, Scott's wife, and the Scotts' two children lived in Christian's grandmother's house. On August 31, 2015, Wall was at the house drinking alcohol and smoking marijuana with Christian and Scott. Wall had a gun with him, which he showed several times throughout the day, and he argued loudly with Scott at one point. After Wall, Scott, and Christian went to a back room of the house, Wall continued to brandish his gun. Christian told Wall to leave, but Scott said Wall could stay because "it would be all right." Christian never saw Scott try to tie Wall up or keep him from leaving, but he heard Scott tell Wall that they should start their own gang and that Wall would have to get his "Aryan tattoos" removed. Shortly after Christian left the room, he heard gunshots. Scott's wife also heard gunshots. Christian ran back into the room and saw that Scott was lying on the floor between the bedroom door and a dresser, bleeding heavily, and that Wall was gone. Scott died

from the gunshots, which Wall (who was two inches shorter than Scott) had fired from approximately one foot away in a downward trajectory.

After Wall fled, he called his grandmother to pick him up. Wall then called 911, but immediately disconnected the call. When 911 called Wall's number, Wall, apparently believing that his grandmother was calling him, answered: "Go ahead, come around, I'm at Carl's house." When the operator told Wall that it was 911 calling, Wall responded, "Someone's trying to kill us" before hanging up.

When Wall's grandmother arrived at Christian's house, Wall was "crying, sobbing, carrying on," and he told her, "Oh, grandma, I had to shoot Steve." On their way back home, Wall told his grandmother to pull over so he could drop his gun in a storm drain. The next morning, Wall's mother took him to a hospital because of his mental state. Wall told his mother that he had shot Scott in self-defense. When the police arrived at Wall's mother's home that afternoon, she told them that he was still at the hospital. When Wall was discharged, he was arrested for Scott's murder. Wall waived his rights, admitted to the officers that he had shot and killed Scott, and showed the officers where to find his gun; but he again asserted that he had shot Scott in self-defense. Wall told the officers that when Christian left the room, Scott told Wall that he was in a gang, that several gang members wanted Wall dead, that Wall was his "insurance policy," and that he would take Wall to have a meeting with a gang member. Wall asserted that Scott would not let him leave and came at him, saying that he would "[s]nap [Wall's] neck," in an attempt to tie Wall up and forcibly take

him to the meeting. Before Scott could do so, Wall shot him once. When Scott kept moving forward, Wall “continued to fire [multiple] rounds at Mr. Scott.”²

Wall was indicted with Scott’s murder and represented himself at trial with standby counsel. *See* Tex. Code Crim. Proc. Ann. art. 1.051(f).³ Because Wall admitted to killing Scott, the only contested issue for the jury was self-defense. The jury found Wall guilty of Scott’s murder, and the trial court sentenced him to 45 years’ confinement. Wall’s motion for new trial was deemed denied. *See* Tex. R. App. P. 21.8(c).

II. JURY CHARGE

Wall asserts that although he did not object to the jury charge, he was egregiously harmed by the charge’s (1) failure to instruct the jury that a reasonable doubt on self-defense required acquittal, (2) failure to explain the State’s burden regarding Wall’s defense, and (3) inclusion of a converse application paragraph on the defense that instructed the circumstances under which the jury could reject Wall’s defense. *See Vega v. State*, 394 S.W.3d 514, 515–16 (Tex. Crim. App. 2013) (holding “when a trial judge instructs on [an unrequested] defensive issue, he must do so

²Wall fired five bullets, three of which hit Scott in the chest and upper clavicle.

³The trial court twice admonished Wall of the dangers of self-representation, including that he would “be responsible for doing all of the things that a licensed and trained criminal defense attorney would have to do in the course of the trial” and that he would “be held to the same standard as an attorney would be held to.” *See* Tex. Code Crim. Proc. Ann. art. 1.051(g).

correctly; thus any error in the charge actually given is subject to review” for egregious harm); *see also Mendez v. State*, 545 S.W.3d 548, 553 (Tex. Crim. App. 2018) (applying *Vega*).

A. ERROR ANALYSIS

In our review of unpreserved jury-charge error, we first determine whether error occurred; if not, our analysis ends. *See Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). Here, the State concedes that the charge contained error because it did not “properly instruct the jury on the issue of self-defense.” Indeed, the application instructions on Wall’s defense were erroneous as a matter of law. *See Tex. Penal Code Ann. § 2.03(d); Alonzo v. State*, 353 S.W.3d 778, 781 (Tex. Crim. App. 2011); *Barrera v. State*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998); *Fennell v. State*, 424 S.W.2d 631, 632 (Tex. Crim. App. 1968) (op. on reh’g). *See generally* Comm. On Pattern Jury Charges, State Bar of Texas, Texas Criminal Pattern Jury Charges: Criminal Defenses PJC 32.2–.3 (2018) (pattern charges for self-defense involving deadly force to protect against deadly force by another and for self-defense involving deadly force) (hereinafter cited as “PJC: Criminal Defenses”).

B. EGREGIOUS-HARM ANALYSIS

Accordingly, our question becomes whether the identified errors in the charge egregiously harmed Wall. *See Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013); *Oursbourn v. State*, 259 S.W.3d 159, 180 (Tex. Crim. App. 2008). Egregious harm is a “high and difficult standard” to meet, and such a determination must be

“borne out by the trial record.” *Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). Egregious harm occurs if the error was calculated to injure Wall’s rights, if Wall did not have a fair and impartial trial, or if the error vitally affected a defensive theory. *See* Tex. Code Crim. Proc. Ann. art. 36.19; *State v. Ambrose*, 487 S.W.3d 587, 597 (Tex. Crim. App. 2016). To make this determination, we consider the entire charge; the state of the evidence, including contested issues and the weight of the probative evidence; the parties’ jury arguments, including any statements made to the jury by the State, Wall, or the trial court during trial; and any other relevant information in the record. *See Arrington v. State*, 451 S.W.3d 834, 840, 844 (Tex. Crim. App. 2015); *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). We look not for theoretical harm but for actual harm. *See Arrington*, 451 S.W.3d at 840, 844; *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011).

1. The Entire Charge

As Wall recognizes, the charge “defined self-defense in the abstract and laid out general definitions”:

Upon the law of self-defense, you are instructed that 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 person’s use or attempted use of unlawful force. The use of force against another is not justified in response to verbal provocation alone.

A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when he reasonably believes that such force is immediately necessary to protect himself against the other person’s use

or attempted use of unlawful deadly force, and if a reasonable person in Defendant's situation would not have retreated.

“Reasonable belief,” as used herein, means a belief that would be held by an ordinary and prudent person in the same circumstances as the Defendant.

The person's belief that the deadly force was immediately necessary as described above is presumed to be reasonable if the person knew or had reason to believe that person against whom the deadly force was used 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; 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 was committing or attempting to commit an offense other than a Class C Misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

“Deadly force” means force that is intended or known by the person using it to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury.

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.

See Tex. Penal Code Ann. §§ 1.07(a)(42); 9.01(3); 9.31(a)–(b); 9.32(a), (c). However, the application paragraph applying those general principles to the specific facts was, as Wall states, a “converse application instruction” that informed the jury that it was required to “find against” Wall's defense if it found beyond a reasonable doubt that Wall's beliefs relevant to the defense were unreasonable or that a reasonable person would have retreated:

If you find from the evidence beyond a reasonable doubt: (1) that at the time and place in question [Wall] did not reasonably believe that he was in danger of death or serious bodily injury; (2) that a reasonable person in [Wall's] situation, at such time and place, would have retreated before using deadly force against Steven Scott; or (3) that [Wall], under the circumstances, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Steven Scott's use or attempted use of unlawful deadly force, if any, as viewed from [Wall's] standpoint, at the time, then you must find against [Wall] on the issue of self-defense.

The jury was not told that a reasonable doubt on the issue of self-defense requires that the accused be acquitted as provided in section 2.03(d). Tex. Penal Code Ann. § 2.03(d); PJC: Criminal Defenses, *supra* at 32.2–.3.

The jury charge also included instructions that the State had the burden to prove Wall was guilty of each element of the charged offense beyond a reasonable doubt and that if the State failed to do so, the jury was required to acquit Wall. The State argues that “the self-defense application paragraph did correctly place the burden of proof for self-defense on the State, albeit in an incomplete manner.” Although a defendant has the burden of producing some evidence to support a claim of self-defense, the State has the burden of persuasion in disproving self-defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991). This burden does not require the State to produce evidence refuting the self-defense claim; rather, the State must prove each element of its case beyond a reasonable doubt. *Zuliani*, 97 S.W.3d at 594. The penal code places the burden on the State to prove each element of the offense charged; it does not

require the State to “negate the existence of a defense.” Tex. Penal Code Ann. § 2.03(b). However, the State must have proven beyond a reasonable doubt that self-defense did not apply to Wall’s conduct. *See* PJC: Criminal Defenses, *supra* at 32.2–3.

Here, the jury charge included an instruction on the presumption of innocence and an instruction placing the burden of proof on the State to establish each element of the indicted offense beyond a reasonable doubt. But the charge failed to explain which party held what burden regarding Wall’s justification defense; and by instructing the jury to find against Wall if they found Wall’s beliefs were unreasonable, the charge seemed to suggest that Wall had a burden to show that his conduct equated to self-defense. *Cf. Allen v. State*, 253 S.W.3d 260, 265 (Tex. Crim. App. 2008) (“[T]hese [abstract] reasonable-doubt instructions, by their terms, apply to the elements of the State’s case, not to confession-and-avoidance type of defensive issues such as self defense or consent. They do not amount to an abstract instruction that any reasonable doubt as to a *defensive issue* must be resolved in the appellant’s favor, to which we would reasonably assume the jury would refer in applying the application paragraph on consent.”). Further, the jury was not informed that if it found Wall guilty of murder beyond a reasonable doubt, then it must decide whether the State met its burden to show that Wall’s use of force was not made in self-defense. *See* PJC: Criminal Defenses, *supra* at 32.2 (pattern charge regarding failure to retreat, including the State’s burden to prove beyond a reasonable doubt that defendant did not have reasonable belief deadly force was necessary).

The application paragraph included an incorrect instruction on Wall’s duty to retreat that allowed the jury to consider Wall’s failure to retreat in determining the reasonableness of his belief that deadly force was necessary. *See* Tex. Penal Code Ann. § 9.32(d) (proscribing jury’s consideration of failure to retreat in determining reasonable belief that deadly force was necessary); *Whitney v. State*, 396 S.W.3d 696, 701–03 (Tex. App.—Fort Worth 2013, pet. ref’d) (concluding no error in charge that tracked statutory language applicable to retreat but holding “the legislature intended to eliminate a defendant’s burden to affirmatively establish that he . . . retreated before employing force (or deadly force) and to stress the set of circumstances under which a defendant could not be held to have such a duty”); PJC: Criminal Defenses, *supra* at 32.2 (addressing failure to retreat in light of State’s burden on the defense and describing under what circumstances retreat may not be considered). Similarly, the abstract portion of the charge instructed that the use of deadly force would be justified “if a reasonable person in Defendant’s situation would not have retreated.”⁴ *Cf.* Tex. Penal Code Ann. § 9.32(c) (providing person with right to be present, having

⁴The charge later correctly tracked the statutory language in section 9.32(c) that a person is “not required to retreat” if the three statutory requirements are met. *See* Tex. Penal Code Ann. § 9.32(c). But the earlier instruction seemed to place some burden on Wall to show that it was reasonable for him not to retreat based on Scott’s use or attempted use of unlawful deadly force: “A person is justified in using deadly force . . . if [the factors listed in section 9.32(a) are met] and if a reasonable person in Defendant’s situation would not have retreated.” Retreat is not a stated factor in the determination of reasonable justification under section 9.32(a).

not provoked the confrontation and having not engaged in criminal activity, “is not required to retreat before using deadly force”).

Although the State may argue the failure to retreat as a relevant factor in determining whether a defendant reasonably believed that his conduct was immediately necessary to defend himself, the jury cannot be instructed on retreat as a defendant’s affirmative duty because it is a comment on the weight of the evidence. *See id.* § 9.32(c)–(d); *Morales v. State*, 357 S.W.3d 1, 5–6 (Tex. Crim. App. 2011); *Whitney*, 396 S.W.3d at 703; PJC: Criminal Defenses, *supra* at 32.3. The charge here not only incorrectly instructed the jury on retreat, it also informed the jury under what circumstances it must “find against the Defendant on the issue of self-defense” and focused on the State’s burden to prove beyond a reasonable doubt the elements of the charged offense. At no point was the jury instructed how it could reach a not-guilty verdict based not on the elements of the offense but on the State’s failure to show that self-defense did not apply to Wall’s conduct. As argued by Wall on appeal, “the jury had absolutely *no vehicle* by which to apply self-defense to the charged offense.”

After viewing the charge as a whole, we conclude that this factor weighs heavily in favor of an egregious-harm finding because the charge itself undermined and vitally affected Wall’s sole defense, which was the only disputed issue at trial. *See Villarreal*, 453 S.W.3d at 433–36; *Haven v. State*, No. 05-15-01165-CR, 2017 WL 1149666, at *6 (Tex. App.—Dallas Mar. 28, 2017, pet. ref’d) (mem. op., not designated for publication); *Burd v. State*, 404 S.W.3d 64, 72 (Tex. App.—Houston [1st Dist.] 2013,

no pet.). *See generally Hutch*, 922 S.W.2d at 172–73 (recognizing error in application paragraph more harmful than error in abstract paragraph because “[a]n abstract charge does not inform the jury of what facts, if found by it, would permit the jury’s consideration of the contested evidence”).

2. The State of the Evidence

Self-defense was the only contested issue at trial because Wall never denied shooting and killing Scott. The State correctly argues that we may consider the plausibility of the evidence raising self-defense in our review of the effect of the error on Wall’s trial. *Allen*, 253 S.W.3d at 267–68. Wall asserts that his self-defense evidence was “strong”—plausible—revealing that he was harmed by the erroneous jury charge.

At trial, Wall’s own statements to others raised his claim of self-defense. He told the police that Scott tried to keep him from leaving by going for Wall’s neck and attempting to tie him up after telling Wall that he was Scott’s insurance policy for his gang. Wall told his mother and his grandmother that he shot Scott in self-defense because he was in fear for his life. His mental state was such that Wall’s mother took him to the hospital. When the police arrived at the scene, Scott was on the floor between a dresser and the bedroom door, which was the only way in and out of the room. In one of the pictures of the crime scene, a coaxial cable is on the floor next to the closet across the room from the bedroom door, which Wall posits was “consistent with what [Wall] described [Scott] was attempting to bind him with.” Another crime-

scene photo seems to show a thick, curved wire lying in a pool of Scott's blood. The investigating detective testified that Wall's behavior was "erratic" during his post-arrest interview the next day and that Wall never denied shooting Scott.

The forensic evidence showed that none of the bullets were shot from a "close range" but were fired from "a distance of further than 1 foot." Some of the bullets were fired in a downward trajectory but it could not be determined if Scott was sitting or standing at the time he was shot: "All we can tell is [Scott's] relative position at the instance that weapon was discharged. [Scott] could have leaned over. [Wall] could have been standing on top of something tall. They [i.e., the bullet wounds] would all look the same." The first bullet hit Scott while he was facing Wall. The second and third bullets hit Scott while his right side was "more or less" facing Wall, "slightly" or a "little bit" from back to front. The investigating detective testified that it was "possible" that the evidence supported Wall's explanation of "someone just coming at someone and being shot." But he also stated that the "two bullets closer to the back" did not "align with somebody coming at you."

The evidence also showed that Wall, who had been drinking alcohol and smoking marijuana, had a gun and had brandished it multiple times while being loud and argumentative. Neither Scott nor Christian had a gun. Before he left the room, Christian stated that Scott did not try to keep Wall from leaving and that he did not see Scott try to tie Wall up. When Christian returned to the room after hearing gun shots, Wall was gone. Christian testified that before trial, a friend of Wall's told him

that Wall wanted Christian to testify that Wall had marks on his wrists where he had been bound.

The investigating police detective testified that when he asked Wall if Scott had a knife, Wall “indicated that Mr. Scott was coming to stab, and then he reversed that statement and then said, ‘Snap my neck.’” Wall did not tell the detective that Scott tried to tie him up to prevent him from leaving. And when Wall was arrested, he had no injuries to his wrists, and no guns or knives were found in Scott’s house.

We conclude this factor weighs in favor of a finding of egregious harm. There was evidence supporting Wall’s self-defense theory. Although this evidence was contested, it was not so weak that Wall’s self-defense theory was implausible. *See, e.g., Villarreal*, 453 S.W.3d at 436 (noting evidentiary factors, including the “relative weakness” of self-defense, that must be considered under second prong of egregious-harm analysis). We cannot say that Wall could not have been egregiously harmed by the error in the jury charge, which directly affected the only contested issue in the case. *See Salinas v. State*, No. 13-15-00310-CR, 2016 WL 2747770, at *6 (Tex. App.—Corpus Christi May 5, 2016, no pet.) (mem. op., not designated for publication) (finding state of the evidence weighed slightly in favor of egregious harm because the charge error affected “the central issue in the case”); *Burd*, 404 S.W.3d at 73 (finding second factor weighed in favor of egregious harm because “Burd’s defensive theory was the only issue in the case and the evidence relating to it was hotly disputed in each detail”). Thus, we are unable to conclude that the state of the evidence made it less

likely that the jury charge caused Wall actual harm. *See Arrington*, 451 S.W.3d at 841; *cf. Villarreal*, 453 S.W.3d at 436 (noting “mere existence of conflicting testimony surrounding a contested issue does not necessarily trigger a finding of egregious harm”); *Mendoza v. State*, No. 14-15-00537-CR, 2016 WL 3341107, at *5–6 (Tex. App.—Houston [14th Dist.] June 14, 2016, no pet.) (mem. op., not designated for publication) (finding state of the evidence did not support egregious-harm finding because “the specific issue relevant to the charge error . . . was not contested during trial” but concluding other factors weighed in favor of such harm).

3. Arguments and Statements Made to the Jury

During voir dire, the State defined self-defense by tracking the language in section 9.32(a) and questioned some veniremembers on what a reasonable belief would be. The State also exhaustively questioned the venire on when deadly force would be immediately necessary and how voluntary intoxication could affect the reasonableness of that belief. In its opening jury argument, the State pointed out that the physical evidence that would be presented did not support Wall’s version of events. In closing jury argument, the State argued that the elements of murder were undisputed because Wall had admitted to shooting Scott and killing him and recognized that the only issue before the jury was Wall’s defense. The State referred to the abstract instructions on self-defense and stressed that Wall’s belief that he was threatened must have been reasonable. The State suggested that Wall’s belief was unreasonable by pointing to the physical evidence contradicting Wall’s account, to the

fact that Wall fled the scene to dispose of the gun, to Wall's voluntary intoxication, and to his "plain normal voice" on the 911 calls. The State did not mention its burden of persuasion on Wall's defense.

Wall questioned the venire on voir dire and asked if any would be "biased against the law of self-defense." Wall argued in his opening and closing jury arguments that he was in fear for his life when he shot Scott, rendering his belief that the use of deadly force was immediately necessary reasonable. Wall otherwise did not address the State's burden on his defense.

We conclude that the parties' arguments to the jury did not exacerbate or emphasize the error contained in the jury charge and was neutral as to which party bore the burdens of persuasion and proof on the defense. *See, e.g., Allen*, 253 S.W.3d at 266; *Ashton v. State*, 526 S.W.3d 490, 502–03 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd); *Smith v. State*, 515 S.W.3d 423, 431 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). This factor does not weigh in favor of egregious harm.

4. Other Relevant Information

Neither the State nor Wall points to any other record information relevant to our harm analysis; but courts have considered things such as the jury's rejection of a charged count and whether the jury sent clarification requests during their deliberations. *See Flores v. State*, 513 S.W.3d 146, 161 (Tex. App.—Houston [14th Dist.] 2016, pet. ref'd). There were no other counts submitted to the jury other than murder. During deliberations, the jury asked to hear Wall's 911 call. These do not

seem to be relevant to whether the charge error vitally affected Wall's self-defense theory; thus, this factor weighs neither for nor against an egregious-harm finding. *See id.*

5. Egregious-Harm Holding

After reviewing the factors to determine egregious harm, we conclude that Wall was egregiously harmed by the error contained in the jury charge. The error affected Wall's sole defensive theory. And the state of the evidence is not such that we are able to conclude that Wall's defense was implausible. No statements to the jury exacerbated or emphasized the error to the jury, and no other record information is directly relevant to our harm analysis. But because the first two factors weigh in favor of an egregious-harm finding, we conclude that the charge error vitally affected Wall's sole defense and was fundamental error that required no objection. *See Villarreal*, 453 S.W.3d at 433; *Nava*, 415 S.W.3d at 298; *see also Uddin v. State*, 503 S.W.3d 710, 723 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (“[T]he charge given the jury was not just incomplete—it was affirmatively misleading.”). We sustain Wall's first issue.

III. CONCLUSION

We conclude that based on the charge error, which vitally affected the only contested issue in the case, and based on the state of the evidence relevant to that defense, Wall was egregiously harmed by the charge error and he is entitled to a new trial. As such, we need not address Wall's second issue directed to the exclusion of impeachment evidence. *See* Tex. R. App. P. 47.1. We reverse the trial court's

judgment and remand the case for further proceedings. *See* Tex. R. App. P. 43.2(d),
43.3(a).

/s/ Lee Gabriel

Lee Gabriel
Justice

Do Not Publish
Tex. R. App. P. 47.2(b)

Delivered: May 9, 2019