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

No. 02-19-00071-CR

DREDEN LAMONT DUMAS, Appellant

V.

THE STATE OF TEXAS

On Appeal from the 213th District Court
Tarrant County, Texas
Trial Court No. 1478752D

Before Kerr, Bassel, and Wallach, JJ.
Memorandum Opinion by Justice Wallach

MEMORANDUM OPINION

A jury convicted Appellant Dreden Lamont Dumas of murder and assessed his punishment at thirty years' confinement. The trial court sentenced him accordingly. In three issues, Appellant contends that the trial court erred by excluding gang evidence that he claims is relevant to support his theory of self-defense, that the evidence is insufficient to support the verdict, and that the trial court "erred by not distinctly setting forth the law applicable to the case in the jury charge." Because we hold that the evidence is sufficient to support Appellant's conviction and the jury's rejection of his self-defense claim and that the trial court did not err, we affirm the trial court's judgment.

I. BACKGROUND AND PROCEDURAL FACTS

This case began with four teenagers and a drug deal. One November evening, Joshua Conley arranged by phone to buy almost an ounce of marijuana from Appellant, whom he did not know. Accompanied by two friends, Mikdrick Davis and D'Mauri Patterson, Conley drove his mother's car (which had two rust-encircled bullet holes in its body above the right rear wheel) from Fort Worth to Euless to pick Appellant up after his shift at work ended. Conley then drove them all to Appellant's apartment complex, with Appellant sitting in the back seat behind Conley. While Appellant went inside his apartment to get the marijuana, Conley told his friends that he planned to steal the marijuana. After Appellant came out of his apartment, he entered the car, sat in the seat behind Conley, and handed Conley the bag of

marijuana. Conley told Appellant that he no longer wanted the marijuana. Conley then held it outside his window, out of Appellant's reach. Appellant exited the car to grab his marijuana, and Conley pulled the marijuana back in the car. Appellant then pulled out a gun. The two had a "tug of war" over the bag of marijuana, which Appellant lost. Appellant shot Conley in the chest as Conley was putting the car in gear. Conley drove a short distance before driving off the road, through a cable barrier and a fence, and then into a tree. He died in the car from his gunshot wound. The medical examiner testified that the bullet entered the left side of Conley's chest and lodged at a slightly higher point in his right back. A casing was found in the car's back floorboard next to the driver's side doorjamb.

A grand jury indicted Appellant for murder. In Appellant's trial, the jury heard evidence that neither Conley nor his two friends were armed. To support his self-defense theory, Appellant wanted to put on evidence that the other three young men were all gang members, but the trial court excluded the evidence after learning that there was no evidence that Appellant knew that information when he shot Conley. Appellant did not testify.

The jury charge included statutory language regarding the no-duty-to-retreat presumption, which did not apply because Appellant was selling drugs at the time of the shooting. The record does not contain a jury-charge conference.

II. DISCUSSION

Because the sustaining of his sufficiency issue would accord Appellant greater relief than his other issues could, we address it first. *See* Tex. R. App. P. 43.3; *see, e.g.*, *Jones v. State*, 531 S.W.3d 309, 315 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

A. Sufficiency of the Evidence

In his second issue, Appellant challenges the sufficiency of the evidence to support his murder conviction and the jury's rejection of self-defense.[1] A defendant has the burden of producing some evidence to support a claim of self-defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). The State has the burden of persuasion in disproving self-defense. *Id.*; *see also 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 burden requires the State to prove its case beyond a reasonable doubt. *Zuliani*, 97 S.W.3d at 594. Self-defense is an issue of fact to be determined by the jury. *Saxton*, 804 S.W.2d at 913–14. With a verdict of guilty, a jury implicitly rejects the defendant's self-defense theory. *Id.* at 914.

[1]Appellant complains of the denial of his motion for instructed verdict. He moved for a directed verdict. These terms are interchangeable. *See Freeman v. State*, 340 S.W.3d 717, 730 (Tex. Crim. App. 2011). A challenge to the denial of a motion for instructed verdict or to the denial of a motion for directed verdict challenges the sufficiency of the evidence to support the verdict. *Williams v. State*, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996); *Rabbani v. State*, 847 S.W.2d 555, 556 (Tex. Crim. App. 1992).

In reviewing the sufficiency of the evidence to support the jury's rejection of a defendant's self-defense theory, we examine all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of murder and also could have found against the defendant on the self-defense issue beyond a reasonable doubt. *Id.*; *see Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979).

This standard gives full play to the factfinder's responsibility to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Queeman v. State*, 520 S.W.3d 616, 622 (Tex. Crim. App. 2017).

The factfinder alone judges the evidence's weight and credibility. *See* Tex. Code Crim. Proc. Ann. art. 38.04; *Queeman*, 520 S.W.3d at 622. We may not re-evaluate the evidence's weight and credibility and substitute our judgment for the factfinder's. *Queeman*, 520 S.W.3d at 622. Instead, we determine whether the necessary inferences are reasonable based on the evidence's cumulative force when viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015); *see Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017) ("The court conducting a sufficiency review must not engage in a 'divide and conquer' strategy but must consider the cumulative force of all the evidence."). We must presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we must defer to that resolution. *Murray*, 457 S.W.3d at 448–49.

The indictment charged Appellant with committing murder under two alternate theories. It charged that Appellant "intentionally or knowingly cause[d Joshua Conley's] death . . . by shooting him with a deadly weapon, to wit: a firearm." *See* Tex. Penal Code Ann. § 19.02(b)(1). Alternately, it charged that Appellant "intentionally or knowingly, with the intent to cause serious bodily injury to Joshua Conley, commit[ted] an act clearly dangerous to human life, namely, shooting him with a deadly weapon, to wit: a firearm, which caused [Conley's] death." *See id.* § 19.02(b)(2).

The trial court charged the jury on self-defense. Penal Code Section 9.31 provides the conditions under which force (not deadly force) in self-defense is permissible. *Id.* § 9.31. As applicable here, "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." *Id.* § 9.31(a). Section 9.32 of the Penal Code, which authorizes deadly force in self-defense, provides as relevant to this case,

> (a) A person is justified in using deadly force against another:
>
> (1) if the actor would be justified in using force against the other under Section 9.31; and
>
> (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
>
> (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or
>
> (B) to prevent the other's imminent commission of . . . robbery[] or aggravated robbery.

Id. § 9.32. "The evidence does not have to show that the victim was actually using or attempting to use unlawful deadly force because a person has the right to defend himself from apparent danger as he reasonably apprehends it." *Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020) (citing *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996)).

"Self-defense is a confession-and-avoidance defense requiring the defendant to admit to his otherwise illegal conduct." *Id.* (citation omitted). Appellant therefore does not challenge the evidence that he killed Conley. Instead, he contends that the evidence was insufficient to support the murder conviction (and the jury's rejection of self-defense) because the evidence sufficiently showed that he was justified in using deadly force in self-defense. He argues that the following alleged evidence shows that he reasonably believed that he was in imminent danger, whether actual or apparent, when he shot Conley:

- Conley was robbing Appellant at nighttime;
- All three young men in the car participated in the robbery against Appellant;
- Appellant struggled with the others over the marijuana;
- Conley made "furtive motions" while trying to put the car in drive, which Appellant could have reasonably interpreted as movements to retrieve a weapon;
- Appellant would have known that the other three were likely armed or dangerous as they were confirmed gang members; and
- Appellant could have seen the bullet holes in Conley's car.

The State counters that Appellant's sufficiency analysis relies mostly on evidence outside the record and that the evidence in the record sufficiently supports Appellant's conviction. We agree.

First, the jury was entitled to find that Appellant did not reasonably believe that a robbery or attempted robbery was imminent when he shot Conley. "A person commits [a robbery] if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he . . . intentionally, knowingly, or recklessly causes bodily injury to another[] or . . . intentionally or knowingly threatens or places another in fear of imminent bodily injury or death." Tex. Penal Code Ann. § 29.02(a). Appellant told the detective investigating the shooting that when the incident occurred, he was still in the car or was in the process of exiting the car, and the other three were trying to hurt him, steal from him, and take his gun, but he gave no concrete details. The detective testified,

- The detective "wanted more specifics because [Appellant] was claiming that these people were trying to kidnap him. He said there was threats made [and] . . . they were making some movements[, but] he would never give [the detective] an explanation of what kind of threats [or] . . . movements."

- "[Appellant] never was able to provide [the detective] any detailed—any threats at all made towards him."

- Appellant did not give any details about anyone touching him.

- Appellant "never g[a]ve [the detective] specifics of what happened other than the fact that he felt threatened [and] like he was being kidnapped. He had the gun, and . . . the gun went off, almost like it was an

accidental discharge . . . . He never could . . . expla[in] . . . how and why the gun went off."

- Appellant told the detective that the others were reaching for his gun, but he never said they touched his gun or explained why he drew the gun.

- Appellant never mentioned anyone else in the car having a gun, did not indicate that anyone else in the car had a gun, and never gave any details about the threats and movements toward him that he had mentioned in the interview.

Patterson testified that no one in the car touched Appellant, made any threatening movement toward him, or said anything threatening to him while he was in the car and that Conley did not do anything threatening toward Appellant after Appellant exited the car. Patterson and Davis both testified that neither they nor Conley had a weapon. Patterson testified that he did not know Appellant had a gun until Appellant was out of the car and pointing the gun at Conley. Davis testified that he saw Appellant get out of the car and stand by Conley's window but did not see Appellant's gun until the gunshot. The detective testified that from his investigation, he believed that Appellant was standing outside the driver's door when he shot Conley. The jury was entitled to reject Appellant's statements in his police interview, to believe Patterson's evidence that no robbery occurred, and to conclude that if Appellant believed an attempted robbery or robbery was imminent—and not just the theft of his marijuana—that belief was not reasonable. *See Queeman*, 520 S.W.3d at 622.

Second, even if the jurors found that Appellant and Conley struggled over the marijuana, they were also entitled to find that when Appellant shot Conley, Appellant did not reasonably believe that he was in apparent or actual imminent danger of Conley's using or attempting to use deadly force. Appellant told the detective that he and Conley were both grabbing for the marijuana while Appellant was in the back seat behind Conley. Appellant also told the detective that Conley and his friends were reaching for his gun at that time, but Appellant never told the detective that they touched his gun and never explained why his gun was out. In fact, Appellant told the detective that they never touched his gun because he fired the shot. Davis testified that after Appellant got out of the car, he grappled with Conley over the marijuana; they had a tug of war over it. Patterson testified that he did not remember there being a struggle over the marijuana. Again, Patterson and Davis both testified that neither they nor Conley had a weapon. The jury was therefore entitled to conclude that Appellant did not struggle with anyone, based on Patterson's testimony, or that if Appellant did struggle with Conley, Appellant did not shoot him out of a reasonable belief that he was in apparent or actual danger of imminent deadly force.

Third, the jury was entitled to reject Appellant's theory that he reasonably believed Conley was reaching for a weapon when Conley was reaching for the gearshift. Appellant did not mention the possibility of Conley's reaching for a weapon or reaching for the gearshift in his interview with the detective. Appellant's theory at trial was based on his alleged knowledge of Conley's gang membership or

criminal status, but the trial court did not admit evidence of Conley's gang membership or criminal status, and the jury did not hear any evidence that Appellant was aware of Conley's gang membership or alleged criminal history at the time of the shooting. Appellant told the detective that he did not know Conley or his friends. The jury also did not hear any evidence indicating that Appellant had seen the bullet holes on the right side of the car; he had sat in the left rear passenger seat. "The jury is not allowed to draw conclusions based on speculation even if that speculation is not wholly unreasonable." *Metcalf v. State*, 597 S.W.3d 847, 855–56 (Tex. Crim. App. 2020).

The jury was entitled to find that Appellant shot Conley because Conley was stealing the marijuana. Based on the applicable standard of review, we hold that the evidence sufficiently supported the jury's verdict and its implicit rejection of Appellant's claim of self-defense. We overrule his second issue.

B. Exclusion of Gang Evidence

In his first issue, Appellant argues that the trial court abused its discretion by excluding evidence about the gang affiliations of the three young men in the car because, he alleges, that evidence would have supported his self-defense theory. In response, the State argues that Appellant pointed to no evidence at trial that he knew the three men in the car were in gangs when he shot Conley, so the trial court properly excluded the evidence as irrelevant. We agree with the State.

We review a trial court's decision to exclude evidence for an abuse of discretion. *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000). A trial court does not abuse its discretion when its decision to exclude the evidence is within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Evidence is relevant if "it has any tendency to make a fact [of consequence to the trial] more or less probable than it would be" otherwise. Tex. R. Evid. 401. "In a criminal case, . . . a defendant may offer evidence of a victim's pertinent trait." Tex. R. Evid. 404(a)(3)(A). As our sister court has explained, "A pertinent trait is one that relates to a trait involved in the offense charged or a defense raised." *Soto v. State*, No. 04-09-00280-CR, 2010 WL 4273173, at *10 (Tex. App.—San Antonio Oct. 29, 2010, no pet.) (mem. op., not designated for publication) (citations and internal quotation marks omitted). *Pertinent* means pertaining to the issue at hand or relevant. *Id.* (citing *Black's Law Dictionary* (8th ed. 2004)).

Less than a week before the February 2019 trial, the State filed a *Brady*[2] notice stating that Officer Christopher Wells of the Fort Worth Police Department's gang intelligence unit had reported that Patterson was a documented member of the BCG gang and Joshua Conley was a documented member of the associated FOE gang. After the State rested its case in chief, Appellant reminded the trial court that in a

[2]*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

discussion off the record, the trial court had signaled that it would deny any evidence Appellant offered about gang affiliation as irrelevant. Appellant requested to make an offer of proof. For that offer of proof, Appellant called Officer Wells. Officer Wells testified in the hearing outside the jury's presence that Conley, Davis, and Patterson had all been documented by the Fort Worth police as gang members.

Appellant offered the evidence under Rule 401, contending that Conley's reputation in the community was relevant and that the gang evidence was also relevant to rebut the State's theory that Conley, Davis, and Patterson were not acting in concert because the "evidence show[ed] that they were connected and oftentimes . . . acted in concert together to rob people." Appellant also offered the gang evidence under Rule 404(a)(2) "as it pertain[ed] to the first aggressor in . . . self-defense and [the] victim's reputation . . . ."

Then the following dialogue occurred:

> THE COURT: [W]ith the evidence—in a light most favorable to your argument, okay, tell me how—assuming these individuals were gang members and acting in concert with one another to rob or steal drugs from [Appellant], . . . how knowledge of them being gang members makes that relevant to [Appellant's] deciding or making a decision to fire his weapon?
>
> [DEF. COUNSEL]: Well, it was three on one. Okay. And—
>
> THE COURT: The three on one is obvious with or without gang affiliation.

[DEF. COUNSEL]: But there's been a suggestion made that Joshua Conley just decided to do this on the spur of the moment, sort of a whim. I think that's relevant that these guys came over there to rob him.

THE COURT: Without weapons, correct? There's no evidence of any weapons.

[DEF. COUNSEL]: Well, we don't know. I mean, there's—there's no evidence that a weapon was recovered.

The State responded that

> a victim's propensity for violence is only admissible under [Code of Criminal Procedure Article] 38.36 to show [a] prior relationship between a defendant and victim or else through the first aggressor theory.
>
> The case law in first aggressor is clear that before prior bad acts are admissible, there must be some ambiguous or uncertain evidence of a violent or aggressive acts by the victim that tends to show that they were the first aggressor; and second, the proffered evidence of prior violent acts must be regarding specific prior violent acts and must tend to dispel whatever the ambiguity is or explain the victim's conduct.
>
> The gang evidence simply doesn't accomplish any of that, and so it shouldn't be admissible under either theory.

The trial court then asked for the State's response regarding "evidence of any kind of agreement or concert of" Conley, Patterson, and Davis. The prosecutor responded,

> [T]the testimony has been . . . uncontroverted in this regard that the victim picked up D'Mauri Patterson and Mikdrick Davis and at some point on the way told them of his preexisting plan to steal marijuana from [Appellant].
>
> There's simply been no evidence in the record that this was something that they all set out to decide to do together.

> Now, if at some point the victim notified them of that, Mikdrick Davis denied this. D'Mauri Patterson said that he did let them know he was going to do it regardless. There's been no evidence that this was a gang activity situation where they as fellow gang members were getting together to go and rip off [Appellant]. There's simply been no evidence of that[.]

The trial court then excluded the evidence.

Appellant's arguments in his brief rely on his having knowledge of the gang affiliations at the time of the shooting. However, there was no evidence that Appellant knew about the gang affiliations of the other three young men when he shot Conley. In the interview with the detective, Appellant stated that he had never met the three young men before the night of the murder. Also, during the hearing and without objection, the trial judge asked Officer Wells whether he was aware of Appellant having any knowledge of the other three young men's gang affiliations or their having any propensity for violence; Officer Wells answered that he was not aware of Appellant having any such knowledge. Finally, the trial court also asked defense counsel whether Appellant had any awareness when he shot Conley that Conley and the other two young men in the car "were gang members or in some other way prone to violence." Defense counsel admitted that he did not "believe so." Because nothing in the record shows that at the time of the offense, Appellant knew about the others' gang affiliations or that any of them had a propensity for violence, that evidence was not relevant for his theory of self-defense. The trial court therefore did not abuse its discretion by excluding the evidence. *See Allen v. State*, 473 S.W.3d

426, 449 (Tex. App.—Houston [14th Dist.] 2015), *pet. dism'd*, 517 S.W.3d 111 (Tex. Crim. App. 2017); *Smith v. State*, 355 S.W.3d 138, 155 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). We overrule Appellant's first issue.

C. Jury-Charge Error

In his third issue, Appellant asserts that the trial court committed egregious jury-charge error under *Almanza*[3] by including inapplicable statutory language in the self-defense charge. The abstract portion of the jury charge contained the following language on self-defense,

> [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.
>
> 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 stated above, and when and to the degree he reasonably believes that such deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force.
>
> The use of force is not justified in response to verbal provocation alone.
>
> "Reasonable belief" means a belief that would be held by an ordinary and prudent person in the same circumstances as the defendant.
>
> "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.

[3] *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g).

> *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 to defend himself. If you find from the evidence that the defendant was such a person, or if you have a reasonable doubt thereof, in determining whether the defendant reasonably believed that the use of deadly force was necessary, you may not consider whether the defendant failed to retreat.*

[Emphasis added.]

Appellant argues that by including the italicized language in the jury charge, the trial court failed to distinctly set forth the law applicable to the case because the italicized language stated that Appellant had no duty to retreat if the evidence showed that he was not engaged in criminal activity at the time deadly force was used, but Appellant was undisputedly engaged in the criminal activity of selling marijuana. Because of that instruction, Appellant argues, the jury could have concluded that he needed to show that he *had* tried to retreat to justify his use of deadly force. Thus, Appellant contends that the jury could have convicted him even if he proved self-defense because of the absence of evidence that a reasonable person would not have retreated. The State argues in response that the jury charge correctly tracked the statute and that the jury could consider Appellant's failure to retreat in deciding whether he reasonably believed shooting Conley was immediately necessary to defend himself. We hold that the trial court did not err because the jury charge tracked the self-defense statute.

The trial court must charge the jury on the law applicable to the case. Tex. Code Crim. Proc. Ann. art. 36.14. Although the trial court has no obligation to

charge the jury on defenses absent a defendant's request, when the trial court sua sponte instructs the jury on a defense (here, self-defense), that issue becomes the law applicable to the case, and the trial court must instruct on it correctly. *Mendez v. State*, 545 S.W.3d 548, 552–53 (Tex. Crim. App. 2018); *Vega v. State*, 394 S.W.3d 514, 515, 519 (Tex. Crim. App. 2013); *Barrera v. State*, 982 S.W.2d 415, 416–17 (Tex. Crim. App. 1998). Any error is then subject to egregious harm analysis under *Almanza*. *Mendez*, 545 S.W.3d at 553. However, when we determine that there is no charge error, our analysis ends. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012).

A trial court does not err by tracking the statute in the jury charge. *Martinez v. State*, 924 S.W.2d 693, 699 (Tex. Crim. App. 1996); *Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994). Appellant concedes that the challenged language tracks the statute. *See* Tex. Penal Code Ann. § 9.32(c), (d). This court and others have concluded that the superfluous inclusion of the "no-duty-to-retreat" presumption in the abstract portion of the charge is not error because it tracks the statute. *Whitney v. State*, 396 S.W.3d 696, 703 (Tex. App.—Fort Worth 2013, pet. ref'd); *see also Salazar v. State*, No. 04-18-00532-CR, 2019 WL 2996959, at *5 (Tex. App.—San Antonio July 10, 2019, pet. ref'd) (mem. op., not designated for publication); *Shannon v. State*, No. 08-13-00320-CR, 2015 WL 6394922, at *7 (Tex. App.—El Paso Oct. 21, 2015, no pet.) (not designated for publication); *Russell v. State*, No. 03-12-00440-CR, 2014 WL 1572473, at *4 (Tex. App.—Austin Apr. 18, 2014, pet. ref'd) (mem. op., not designated for publication). Accordingly, we hold that the trial court did not err by

including the complained-of language in the jury charge. We overrule Appellant's third issue.

III. CONCLUSION

Having overruled Appellant's three issues, we affirm the trial court's judgment.

/s/ Mike Wallach
Mike Wallach
Justice

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Tex. R. App. P. 47.2(b)

Delivered: July 2, 2020