In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-15-00023-CR

JOHN CHRISTOPHER IVY, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the County Court at Law No. 1
Hays County, Texas[1]
Trial Court No. 14-2249CR, Honorable Robert Updegrove, Presiding

October 17, 2016

MEMORANDUM OPINION

Before CAMPBELL and HANCOCK and PIRTLE, JJ.

This case is a remand from the Texas Court of Criminal Appeals. *See Ivy v. State,* No. PD-0119-16, 2016 Tex. Crim. App. Unpub. LEXIS 401, at *4 (Tex. Crim. App. Apr. 27, 2016) (per curiam) (not designated for publication). In our prior opinion, we held that the trial court erred in refusing to give a jury instruction on self-defense and that the error was not harmless. *See Ivy v. State,* No. 07-15-00023-CR, 2016 Tex. App.

[1] Pursuant to the Texas Supreme Court's docket equalization efforts, this case was transferred to this Court from the Third Court of Appeals. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

LEXIS 35, at *15 (Tex. App.—Amarillo Jan. 5, 2016, rev'd) (mem. op., not designated for publication). In the State's petition for discretionary review, it argued, for the first time, that the issue of self-defense was not raised because there was no evidence that appellant reasonably believed force was immediately necessary to protect himself from the complainant. *See* TEX. PENAL CODE ANN. § 9.31(a) (West 2011).[2] The Texas Court of Criminal Appeals agreed that the issue should be addressed and, therefore, vacated our judgment and remanded the case to this Court to address the State's argument. *See Ivy,* 2016 Tex. Crim. App. Unpub. LEXIS 401, at *4.

Factual and Procedural Background

The entire factual scenario is set forth in our original opinion. *See Ivy,* 2016 Tex. App. LEXIS 35, at *1-5. This incident arose out of a conflict between appellant and his girlfriend over her cell phone. The record reflects that the complainant was texting on her cell phone after she and appellant had sex. Believing that the complainant was "sexting" or sending nude photos of herself to others, appellant grabbed the cell phone away from her. The complainant followed appellant and tried to get the cell phone back. She caught up with appellant and pushed him and may have slapped him once or twice. Appellant pushed her to the ground and stepped on her stomach and ribs. The physical altercation continued a few minutes later when appellant pulled the complainant to the ground and struck her in the face twice. The complainant was later able to flee the residence. Appellant went to the home that complainant had fled to and left the cell phone.

[2] Further reference to the Texas Penal Code will be by reference to "section ____" or "§ ____."

The deputy sheriff who investigated the incident made contact with appellant on the phone. Appellant advised the deputy that the complainant had hit him in the face and busted his lip. When asked to meet with the deputy, appellant declined to do so. At trial, a friend of appellant's testified that he saw appellant an hour or so after the altercation and that appellant was shaken up, angry, and upset. The same friend testified that he observed a knot on the back of appellant's head and scratches on his arms. At the conclusion of the testimony, appellant requested a charge on self-defense. The trial court declined to give the requested charge.

Appellant presents two issues for our consideration on remand. First, appellant contends that there was sufficient evidence about his state of mind to require the submission of the self-defense instruction to the jury. Second, appellant contends that affirming the trial court's denial of the self-defense instruction would have a chilling effect on the appellant's exercise of his Fifth Amendment privilege. *See* U.S. CONST. amend. V. For the reasons hereinafter stated, we will affirm.

Jury Instruction

Standard of Review

As a reviewing court, we review allegations of jury charge error in a two-step process. *See Kirsch v. State,* 357 S.W.3d 645, 649 (Tex. Crim. App. 2012) (citing *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994)). First, we determine whether the jury charge given was erroneous. *See id.* (citing *Middleton v. State,* 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). Second, if we find error, we must then determine whether appellant was harmed. *See id.* When reviewing the question of

harm, the amount of harm necessary to require reversal depends on whether or not the appellant objected to the charge given by the trial court. *See Abdnor,* 871 S.W.2d at 732. In the case before the Court, the record reflects that appellant did object to the charge as given by the trial court. Because appellant did object to the charge as given, the amount of harm necessary to require reversal is "some harm." *See id.* That is to say an objected-to charge will require reversal as long as the error is not harmless. *See id.*

Applicable Law

Section 9.31(a) of the Texas Penal Code provides that "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." *See* § 9.31(a). The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense. § 2.03(c) (West 2011). For a defendant to be entitled to a self-defense instruction, there must be some evidence, when viewed in the light most favorable to the defendant, that will support the elements of the defense. *See Ferrel v. State,* 55 S.W.3d 586, 591 (Tex. Crim. App. 2001). A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether the evidence is strong or weak and regardless of what the trial court may think about the credibility of the defense. *See id.* "[A] defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true." *Shaw v. State,* 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007). More specifically, some evidence relating to defendant's state of mind or

"observable manifestations" of his state of mind at the time of the alleged act of self-defense must be adduced at trial in order to submit the issue to the jury. *See Alexander v. State,* No. 03-14-00290-CR, 2016 Tex. App. LEXIS 531, at *9 (Tex. App.—Austin Jan. 21, 2016, pet. ref'd) (mem. op., not designated for publication) (citing *VanBrackle v. State,* 179 S.W.3d 708, 713 (Tex. App.—Austin 2005, no pet.); *Reed v. State,* 703 S.W.2d 380, 385 (Tex. App.—Dallas 1985, pet. ref'd) (per curiam)). Section 9.31(a) "necessarily contemplates that the force used by a defendant must be reasonable as contemplated from the defendant's point of view." *Reed,* 703 S.W.2d at 384. "Thus, in order to justify the submission of a charge to the jury on the issue of self-defense, there must be some evidence in the record to show that the defendant was in some apprehension or fear of being the recipient of the unlawful use of force from the complainant." *Smith v. State,* 676 S.W.2d 584, 585 (Tex. Crim. App. 1984) (en banc). This requirement does not mean that the defendant must testify in order to raise a defense. *See VanBrackle,* 179 S.W.3d at 712; *Boget v. State,* 40 S.W.3d 624, 626 (Tex. App.—San Antonio 2001), *aff'd*, 74 S.W.3d 23, 31 (Tex. Crim. App. 2002). Defensive issues may be raised by the testimony of any witness, even those called by the State. *See Jackson v. State,* 110 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd).

Analysis

With the above stated standard of review and applicable law in mind, we now analyze the evidence to determine whether appellant was entitled to a jury instruction on self-defense.

The evidence before the trial court regarding appellant's injuries show that he received a knot on his head and some scratches on his arm. Appellant had the opportunity to discuss the altercation with the deputy, but declined to do so. Further, he visited with a friend about the altercation within an hour or so of the event. At that time, the friend described appellant as shaken up, angry, and upset. Missing from any of this evidence is anything that relates to appellant's state of mind or "observable manifestations" of his state of mind at the time of the altercation. *See Reynolds v. State,* No. 07-11-00500-CR, 2012 Tex. App. LEXIS 10501, at *9 (Tex. App.—Amarillo Dec. 19, 2012, no pet.) (mem. op., not designated for publication); *Reed,* 703 S.W.2d at 384. At best, all the testimony of appellant's friend indicates is the state of mind of appellant an hour or so after the incident. Nothing in the evidence, for example, demonstrates that appellant did not want to fight with the complainant or made some out-cry for help at the time of the incident or even subsequent to the incident. *See Smith,* 676 S.W.2d at 586-87 (holding that Smith's statement that he did not want to fight was an "observable manifestation" of his state of mind); *VanBrackle,* 179 S.W.3d at 714 (holding that a cry for help was an "observable manifestation" of appellant's state of mind).

From the record we learn that, during and immediately after the altercation, appellant tried to prevent the complainant from leaving the residence. First, appellant begged her not to leave and even ripped her clothes so she could not leave. When this did not deter the complainant from leaving, appellant stood in front of her car in an attempt to keep her from leaving. Then, he followed her to the house where the

complainant sought refuge, ultimately returning her cell phone to her. These actions are not the actions of one who is in fear of an assault by the other person.

The simple fact that the complainant may have struck appellant first provides no clue as to the state of mind of appellant at that point in time. Nothing in the evidence would show that appellant had any fear of the complainant or otherwise felt it necessary to force her to the ground and stand on her stomach and ribs on the first occasion or shove her to the ground and strike her twice in the face on the second occasion in order to protect himself.

Because we find no evidence to support the proposition that appellant's use of force against the complainant was immediately necessary to protect himself, even when viewed in the light most favorable to appellant, the trial court did not err in refusing the requested charge on self-defense. *See Alexander,* 2016 Tex. App. LEXIS 531, at *9. Accordingly, appellant's first issue is overruled.

Fifth Amendment Considerations

By his second issue, appellant contends that our affirmance of the trial court's denial of his request for a self-defense instruction would have a chilling effect on the exercise of the Fifth Amendment privilege by other similarly situated defendants. The essence of appellant's contention is that, under the facts of this case, the evidence boils down to a she-said, he-said situation. However, the he-said is missing because appellant chose not to testify. The record reflects that appellant had been recently convicted of sexual assault of a child and, therefore, appellant and trial counsel made a tactical decision that appellant should not testify. This leads to appellant's conclusory

statement regarding the effect our affirmance would have on other's assertion of Fifth Amendment privilege.

This argument misses the mark because it fails to take into consideration the fact that a defendant does not have to testify to be entitled to a self-defense instruction. *VanBrackle,* 179 S.W.3d at 712; *Boget,* 40 S.W.3d at 626. The requirement is only that some evidence from some source be introduced that relates to appellant's state of mind at the time of the incident. *See Reynolds,* 2012 Tex. App. LEXIS at *9; *Reed,* 703 S.W.2d at 384. Thus, it is not a denial of appellant's right to his Fifth Amendment privilege, rather, it is the state of the evidence actually produced before the trial court that determines whether appellant gets his requested self-defense instruction. Appellant has not directed the Court to any cases holding that the granting or denial of a self-defense instruction turns on whether a defendant elects to testify. Further, we have found none. Accordingly, we overrule appellant's contention to the contrary.

Conclusion

Having overruled both of appellant's contentions, we affirm the judgment of the trial court.

Mackey K. Hancock
Justice

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