In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00150-CR

KALE STEPHEN KENT, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court Four
Tarrant County, Texas
Trial Court No. 1393282D; Honorable Michael Thomas, Presiding

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March 8, 2017

MEMORANDUM OPINION

Before QUINN, CJ., AND PIRTLE AND PARKER, JJ.

In January 2015, in a two-paragraph indictment, Appellant, Kale Stephen Kent, was charged with the offense of murder allegedly committed by (1) intentionally or

knowingly causing the death of Miles Miller,[1] or (2) intentionally committing an act clearly dangerous to human life, with the intent to cause serious bodily injury to Miller, which caused his death.[2] Both paragraphs alleged that he did so by shooting Miller with a firearm. In February 2016, a three-day jury trial was held. Appellant's primary defense against the murder charge was that he shot Miles in self-defense. The jury found Appellant guilty as charged (without differentiating whether he was guilty under section 19.02(b)(1) or (b)(2)) and sentenced him to confinement for twenty years. The judgment included a deadly-weapon finding. On appeal, Appellant asserts that (1) the evidence was insufficient to support the conviction because there was evidence beyond a reasonable doubt that he acted in self-defense and (2) the trial court erred by failing to apply the law of self-defense to the case in the jury instructions.[3] We affirm.

BACKGROUND

Prior to February 2014, Appellant was in a dating relationship with Amber Lynch. He and Amber lived with his parents until she became pregnant, at which time his parents asked her to leave. Amber then moved in with her mother, Melody Lynch. Also living at that residence was Melody's boyfriend, Miles Miller, and his father. Evidence showed

[1] *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). An offense under this section is a first degree felony. *Id.* at § 19.02(c)

[2] *See* TEX. PENAL CODE ANN. § 19.02(b)(2), (c) (West 2011). An offense under this section is a first degree felony. *Id.* at § 19.02(c).

[3] Originally appealed to the Second Court of Appeals, this appeal was transferred to this court by the Texas Supreme Court pursuant to its docket equalization efforts. TEX. GOV'T CODE ANN. § 73.001 (West 2013). Should a conflict exist between the precedent of the Second Court of Appeals and this court on any relevant issue, this appeal will be decided in accordance with the precedent of the transferor court. TEX. R. APP. P. 41.3.

that Miles was forty-five years old, steadily employed, and acted as the primary caregiver for his father. He was described as a non-violent man who occasionally drank alcoholic beverages. In June 2014, Amber gave birth to her and Appellant's child, Odin. Thereafter, she continued living with her mother, Miles, and Miles's father.

In November 2014, Appellant was employed at a motorcycle shop and Amber was attending massage school. Although they were no longer in a dating relationship, Amber would occasionally stay overnight at Appellant's parents' house on weekends to allow Odin to bond with his father and to meet Odin's childcare needs. Amber described her relationship with Appellant during this time as "very rocky," "stressful," and "on and off." Furthermore, she did not trust Appellant to properly care for Odin alone.

On November 14, Appellant and Amber dined out with Odin. As they were leaving the restaurant, Appellant kissed her and started talking about getting back together. Amber rebuffed his advances. After returning to his parents' house, Amber put Odin to bed. Appellant approached her for sex and she refused. Eventually, they went to bed together, with Odin between them. Appellant was upset and wanted to talk. He told her that he loved her and hated her at the same time. He also told Amber that a friend had told him she was texting sexy pictures to someone.

At some point in the evening, Appellant got out of bed and tried to access Amber's cell phone. When she tried to get the phone back, he would not give it up. At that time, Amber put her hands around his throat to show him that she was serious about wanting her phone back and he relinquished it. She then went to a guest bedroom, closed the

door, and sat with her back against it to prevent him from entering the room. Appellant followed her and made numerous attempts to push the door open. Amber responded that if he did not leave her alone, she was calling her mother to come get her and Odin. When Appellant failed to heed her warning, she called her mother. When Appellant learned that she had called her mother, he became angry and threatened that "if anyone comes over here, I'm going to f—ing kill them."

Amber's mother called her back and told her that Miles would be there to pick her up because she was babysitting. As Miles left the house, he was smiling and told Melody that he would be back in a bit. Amber began packing to go home, and during the next twenty minutes or so, Appellant followed her through the house saying he was sorry, asking her for another chance, while at the same time expressing anger and calling her names. Eventually, he returned to his room where Odin was lying on the bed and closed the door.

When Miles arrived, Amber opened the front door and let him inside. She told Miles to get her things, which were sitting by the front door, and proceeded upstairs to get Odin. In her testimony, Amber described Miles as concerned but not angry. He was unarmed. When Amber opened Appellant's bedroom door, he was standing by his bed pointing a gun in her direction. Odin was lying on the bed behind him. Appellant told her that she was not going to take Odin, and when she approached, Appellant began pushing her toward the door. She then situated herself in the door frame so that he was unable

to push her out of the room. Amber yelled to Miles that she needed his help and that Appellant was pointing a gun at her.

Miles started coming up the stairs, and as he entered the room, Appellant stepped back. By this time, Amber was three to four feet into the room when Miles entered behind her with his hands up. As soon as she was not standing between the two men, Appellant shot Miles. Miles was unarmed and silent when he entered the room. He was approximately five feet from Appellant when he was shot.[4] After he shot Miles, Appellant said, "I'm going to jail for life so I might as well kill myself." Amber screamed, picked up Odin, and called 911 as she left the room. Appellant's mother and father then entered the room and while his father held Appellant, his mother pried the gun from her son's hand. When officers arrived, Appellant was on the floor in a fetal position, distraught and repeating the phrase that someone was trying to take his baby. Appellant's firearm was discovered in a hall closet where his mother had placed the gun after removing it from Appellant's hand.[5]

Appellant's version of the events was markedly different from the State's evidence. Appellant described Miles as a person who drank heavily on weekends and used drugs. He also testified that he was afraid of Miles because Miles had stiff-armed or shoulder-

[4] Charles Clow, a firearm and tool-mark examiner with the Tarrant County Medical Examiner's Office, estimated that from his examination of the gunpowder spread on Miles's clothes, he was between two to six feet from Appellant when he was shot. Marc Andrew Krouse, Chief Deputy Medical Examiner, testified Miles was probably four feet from Appellant when he was shot. He also testified the trajectory of the bullet was slightly downward, "for one reason or another," and when the weapon was discharged, the handgun was in front of Miles. Miles's blood tests were negative for alcohol and drugs.

[5] Clow described Appellant's gun as a .45 caliber semi-automatic handgun.

checked him on occasion, picked him up by the throat, slammed him against a wall, and generally threatened him. Appellant did, however, state that although Miles had "put his hands on him" before, he never hurt him. Appellant further testified that on one occasion, he heard screaming from Miles's room, and when Miles and Melody emerged, they were bloodied and bandaged.

According to Appellant, he believed there was a possibility of reconciliation between him and Amber. He described their dinner on the evening of the shooting as pleasant. After they returned to his parents' house and put Odin to bed, he wanted some intimacy with Amber, but she rebuffed him, saying her stomach was hurting. When she went to the bathroom, he began to search her cell phone to find out if she was texting sexy pictures to someone. After he discovered some pictures on her phone that supported his suspicions, he confronted Amber. Amber then tried to choke him in order to get her phone back. Once she retrieved her phone, Amber went to a guest bedroom. He became angry, and when she would not open the door, he called her names. When she said she was calling for "backup," he returned to his room and called his mother to tell her that he needed help with Amber. Appellant also testified that he called Melody, who told him that Miles was on his way to pick up Amber and Odin and that he was extremely angry. Appellant denied making any type of threat, and he denied pointing his gun at Amber.

He testified that he heard his mother scream and heard a noise on the stairs outside his bedroom. He was aware Miles was in the house and believed something was

going to happen. He also felt threatened and afraid. After hearing the noise on the stairs, he reached for his handgun and "cocked it back." The next thing he knew Miles burst through the door. He told him to "keep out" but Miles continued walking toward Appellant and looked angry. According to Appellant, given their history, he was in fear for himself and his son. He did not remember pulling the trigger. He just recalled the bang, Miles's stumbling, and a chair falling over on the floor. The next thing he remembered was waking up in a jail cell wondering where he was.

Clarissa Kent, Appellant's mother, testified that prior to Miles going up the stairs leading to Appellant's bedroom, she told him not to go. Miles had responded that if Appellant was threatening Amber, he was going upstairs and pushed past her. After Miles went upstairs, she heard Amber screaming. On rebuttal, Detective Tim Paulson, who conducted Clarissa's videotaped interview after the incident, testified that in her statement, she said that she was not too far behind Miles when he went upstairs, and Appellant must have shot him as soon as he entered the bedroom.

ISSUE ONE—SUFFICIENCY OF THE EVIDENCE TO REJECT CLAIM OF SELF-DEFENSE

STANDARD OF REVIEW

Appellant's first issue contends the evidence was insufficient to support his conviction because there was evidence beyond a reasonable doubt that he acted in self-defense. In addressing this issue, it is important to note that Appellant does not challenge the sufficiency of the evidence to support the jury's verdict when it comes to the essential

elements of the offense of murder. Instead, he challenges the sufficiency of the evidence to support the jury's implicit rejection of his claim of self-defense.

In an appeal from a murder conviction in which a claim of self-defense has been raised, whenever an appellant challenges the sufficiency of the evidence to support the jury's implicit rejection of a self-defense claim "we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found . . . against appellant on the self-defense issue beyond a reasonable doubt." *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991) (citing TEX. PENAL CODE ANN. § 2.03(d) and *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979)). Accordingly, we review Appellant's sufficiency of the evidence challenge under the standard enunciated in *Jackson.* *See Jackson*, 443 U.S. at 318-20. *See also Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010). Under that standard, we will uphold the verdict unless, after giving proper deference to the fact finder's role, a rational fact finder would have had a reasonable doubt as to Appellant's claim of self-defense.

In making that determination, we must consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from that evidence. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). In that regard, circumstantial evidence is as probative as direct evidence, and circumstantial evidence alone can be

sufficient to allow a rational juror to form a reasonable doubt based on a claim of self-defense. *See Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

As a reviewing court, we must defer to the fact finder's credibility and weight determinations because the fact finder is the sole judge of credibility of the witnesses and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899; *Kirk v. State*, 421 S.W.3d 772, 776-77 (Tex. App.—Fort Worth 2014, pet. ref'd). We may not re-evaluate those weight and credibility determinations or substitute our judgment for that of the fact finder. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The *Jackson* standard defers to the fact finder to resolve any conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from "basic facts to ultimate facts." *Jackson*, 443 U.S. at 319.

The issue of self-defense is a fact issue to be determined by the fact finder, and the fact finder is free to accept or reject any defensive evidence on the issue. *See Saxton*, 804 S.W.2d at 913-14. *See also Wise v. State*, 364 S.W.3d 900, 903 (Tex. Crim. App. 2012) (stating the fact finder "exclusively determines the weight and credibility of the evidence"). If a jury finds the defendant guilty, then it implicitly finds against any defensive theory. *Saxton*, 804 S.W.2d at 914. When the record supports conflicting inferences, we presume the jury resolved the conflicts in favor of the verdict, and we defer to the jury's conclusion. *Jackson*, 443 U.S. at 319 (stating that it is the fact finder's duty to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from

basic facts to ultimate facts"). *See Balderas v. State*, 517 S.W.3d 756, 766 (Tex. Crim. App. 2016), *cert. denied*, 137 S. Ct. 1207, 197 L. Ed. 2d 251 (2017).

SELF-DEFENSE

At trial, Appellant relied on sections 9.31, 9.32, and 9.33 of the Texas Penal Code which provide, in relevant part, that a person is justified in using force or deadly force against another when and to the degree the actor reasonably believes that force or deadly force is immediately necessary to protect the actor or a third person against the other's use or attempted use of unlawful or deadly force. TEX. PENAL CODE ANN. §§ 9.31(a), 9.32(a)(1)-(2)(a), 9.33 (West 2011); *Elizondo v. State*, 487 S.W.3d 185, 197 (Tex. Crim. App. 2016). Here, Appellant also relied on the defense of necessity which provides, in relevant part, that conduct is justified if a person believes the conduct is immediately necessary to avoid imminent harm. TEX. PENAL CODE ANN. § 9.22(1) (West 2011).[6]

A defendant has the initial burden of production and must bring forth some evidence to support a claim of self-defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton*, 804 S.W.2d at 913. Once the defendant has satisfied his initial burden of production, the State bears the ultimate burden of persuasion to disprove the raised defense. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913-14. While the State is not required to produce evidence specifically refuting a claim of self-defense, it

[6] In his brief, Appellant asserts that the same evidence at trial supporting his other justification defenses proves the defense of "necessity" as a matter of law. *See* TEX. PENAL CODE ANN. § 9.22(1) (West 2011). In making this contention, however, Appellant fails to offer a clear and concise argument with appropriate citations to authority. *See* TEX. R. APP. P. 38.1(h). In fact, other than citing section 9.22, he offers no citation to any other authority.

must prove its case beyond a reasonable doubt. *Id.* Self-defense is an issue of fact to be determined by the fact finder and a jury verdict of guilty is an implicit finding rejecting a defendant's self-defense theory. *Id.*

ANALYSIS

Here, Appellant asserts he proved as a matter of law that he was justified in shooting Miles because he feared Miles due to past threats, that Miles angrily "burst" into his room, and Miles had a reputation for drinking heavily on weekends. We disagree with Appellant's view of the evidence at trial and his analysis of the standard of review.

When evaluating the sufficiency of the evidence, we must presume the fact finder resolved any conflicts in the evidence in favor of the verdict and defer to that resolution. *Brooks*, 323 S.W.3d at 912. Other witnesses at trial painted a picture of Miles as a non-violent man who only drank occasionally, treated Amber and her mother with respect, and did not use drugs. When Miles left the house to pick up Amber and Odin, Melody described him as smiling and predicting he would be back soon. After he arrived at Appellant's house, Amber described Miles as concerned but not angry. When she went upstairs to get Odin, Miles waited with her things by the front door. It was not until she yelled down to Miles that Appellant had a gun on her that Miles went upstairs. Amber testified that Miles was silent and unarmed when he entered the room. As he entered Appellant's room, Appellant stepped back and shot Miles without hesitation.

From this record, a rational fact finder could have rejected Appellant's claim of self-defense. The evidence establishes that, when Appellant found out that Amber had called

her mother to come get her and Odin, he threatened to "f—ing kill" anyone who tried to take his son. Appellant testified that, knowing Miles was in the house, he retrieved his handgun from under the bed, and cocked the gun.[7] He also testified that Miles entered the room with his hand or hands above his head—a sign that the fact finder could have interpreted as supplication, surrender, or a defensive gesture. Amber testified that after the shooting, Appellant said he was "going to jail for the rest of his life"—a logical consequence if he intended to shoot Miles, without provocation, as soon as he entered the room. Furthermore, there was no evidence that Appellant exhibited or felt any fear of Miles before, during, or after he shot him.

Viewing the evidence summarized above in a light most favorable to the verdict, we conclude that a rational fact finder could have found Appellant guilty of murder beyond a reasonable doubt by choosing to believe the evidence favoring conviction and by choosing to disbelieve any evidence favoring Appellant's claim of self-defense. *Smith v. State*, 352 S.W.3d 55, 63 (Tex. App.—Fort Worth, 2011, no pet.). *See Gaona v. State*, 498 S.W.3d 706, 709-10 (Tex. App.—Dallas 2016, pet. ref'd); *Kirk*, 421 S.W.3d at 780-81. Appellant's first issue is overruled.

ISSUE TWO—FAILURE TO PROPERLY INSTRUCT THE JURY

Appellant next asserts that the trial court erred by failing to properly instruct the jury on the presumptions of reasonableness contained in Texas Penal Code sections 9.31

[7] Samantha Swearingen, crime scene investigator, testified that when she recovered Appellant's gun from where his mother had placed it, the gun was "cocked back—ready to shoot" with one bullet in the chamber and five in the magazine. From this evidence, a fact finder could infer that Appellant cocked his gun after he shot Miles in anticipation of quickly firing at Miles a second time.

and 9.32. *See* TEX. PENAL CODE ANN. §§ 9.31(a), 9.32(b) (West 2011). These presumptions state that an actor's belief that force or deadly force was immediately necessary is presumed to be reasonable if the actor knew or had reason to believe that the person against whom the force was used unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation. *Id.* Appellant did not, however, object to the omission of this instruction to the jury.

Under *Almanza v. State*, 686 S.W.2d 157, 171-72 (Tex. Crim. App. 1985), the degree of harm required for reversal depends on whether the error was preserved in the trial court. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Because Appellant did not object to the charge as given by the trial court, even if we were to assume the failure to instruct on these presumptions was error, reversal is required only if that error was fundamental in the sense that it was so egregious and created such harm that the defendant was deprived of a fair and impartial trial. *See Almanza*, 686 S.W.2d at 171-72. *See also Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009).

Charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. *See Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). Egregious harm is a "high and difficult standard which must be borne out by the trial record." *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013) (citations omitted). Under this standard of review, we will not reverse a conviction unless the defendant has suffered "actual rather than theoretical harm." *Cosio v. State*, 353 S.W.3d 766, 777 (Tex. Crim. App. 2011). In examining the

record to determine whether charge error has resulted in egregious harm to a defendant, we consider (1) the entire jury charge, (2) the state of the evidence, including the contested issues and the weight of the probative evidence, (3) the final arguments of counsel, and (4) any other relevant information revealed by the trial record. *Id.* (citing *Olivas v. State*, 202 S.W.3d 137, 144 (Tex. Crim. App. 2006)).

With respect to the entirety of the jury charge, we find that this factor weighs in favor of a finding of egregious harm.[8] There was nothing in the charge that alerted the jury to the fact that it could presume Appellant had a reasonable belief the use of force or deadly force was necessary. That said, we afford less weight to this factor because a complete jury charge on the presumptions would have also permitted the jury to conclude that the presumption was inapplicable based on the facts of this case. *See Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015). Because the applicability of the presumption is dependent on the evidence that was adduced at trial, we now consider that evidence, and as further explained below, we conclude that the omitted charge did not deprive Appellant of a fair and impartial trial.

[8] In its instructions to the jury, the trial court included instructions detailing the law that applies to a defendant's claim that his use of deadly force was justified by self-defense. *See* TEX. PENAL CODE ANN. §§ 9.31(a), 9.32(b) (West 2011). Regarding the general law of self-defense, the instructions correctly informed the jury that a person is "justified in using force against another when and to the degree he reasonably believes force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force." *See* § 9.31(a). Additionally, the instructions were correct in stating that, in the context of a defendant's use of deadly force, a person is justified in using such force "if the actor would be justified in using force against the other in the first place [under Penal Code 9.31] and when the actor reasonably believes that such deadly force is immediately necessary to protect oneself against the other person's use or attempted use of unlawful deadly force." *See* § 9.32(a).

A reasonable construction of the evidence showed that Miles did not enter Appellant's habitation unlawfully or by force. Instead, a reasonable fact finder could have determined that he arrived at the residence and was allowed entry at the request of a lawful occupant—Amber. Furthermore, the evidence showed that he arrived at the residence for the express purpose of retrieving Amber and Odin and was unarmed. He was at the foot of the stairs, waiting by the front door—concerned but not angry. He did not proceed upstairs until he heard Appellant was pointing a gun at Amber. From this evidence, the jury could infer that Appellant went up the stairs to protect Amber and Odin—not to perpetrate any violence on Appellant. That he entered the room silently, unarmed with his hands above his head further supports this inference.

Appellant, on the other hand, was angry, hurling insults at Amber, and threatening to kill anyone who came to his parents' house to pick her and the baby up. Moreover, he was prepared to fire on Miles as soon as he entered the room and did. *See Villarreal*, 453 S.W.3d at 436 ("the mere existence of conflicting testimony surrounding a contested issue does not necessarily trigger a finding of egregious harm").

Furthermore, Amber described Appellant as bemoaning the consequences of his act after shooting Miles and officers described him as lying on the floor repeating that persons were going to take his baby. There was no contemporaneous evidence that Appellant believed he acted in self-defense or was fearful of Miles. The evidence was just the opposite.

Thus, in view of the entire trial record showing Appellant's defensive evidence was weak when viewed together with the other evidence, we cannot conclude there was substantial evidence that Appellant was harmed because of any omission of a presumption-of-reasonableness instruction or that such an instruction would likely have altered the outcome as to the question of whether he acted in self-defense. Accordingly, having reviewed the entire record, we conclude that it fails to indicate the existence of egregious harm. Appellant's second issue is overruled.

CONCLUSION

The trial court's judgment is affirmed.

Patrick A. Pirtle
Justice

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