In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-10-00089-CR

RYAN PATRICK JOHNSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 102nd Judicial District Court
Bowie County, Texas
Trial Court No. 09F0319-102

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

Derrick Robinson and Ryan Patrick Johnson had been acquaintances and perhaps friends in the past. But, on December 17, 2008, Johnson shot and killed Robinson. Johnson was convicted by a jury for Robinson's murder and was sentenced to imprisonment for a period of ninety-nine years and fined $10,000.00. We affirm the trial court's judgment.

I. FACTUAL BACKGROUND

Johnson testified on his own behalf and gave the following account: Robinson called Johnson twice on the day Robinson was killed. When told by Johnson to stop calling, Robinson announced that he was outside Johnson's house. Johnson was alarmed because he did not give Robinson his telephone number and had moved to a new home. Johnson went outside and saw Robinson walking into his yard. When asked by Robinson why Johnson had been ignoring him, Johnson replied that he did not want to speak with Robinson and turned to go back in the house.[1] At that point, Robinson grabbed Johnson's wrist; Johnson pulled his wrist free, asked Robinson to leave, and went back inside. Robinson refused to leave. Alarmed at Robinson's refusal to leave, Johnson retrieved a gun from his mother's room and placed it in his coat pocket. When Johnson emerged from his home, Robinson was still outside and stated that he needed a few minutes to speak with Johnson. Johnson agreed, and the two met in a wooded area down the street from

[1]All of the witnesses agreed that Robinson was homosexual. Johnson testified that when he met Robinson, he thought Robinson was a female because he was dressed in female clothing and was called "Sadera." After discovering that Robinson was a gay male, Johnson stated he discontinued seeing Robinson. Other witnesses testified that Robinson and Johnson were "romantically involved."

Johnson's house. Robinson and Johnson conversed in the front seat of Robinson's vehicle; Robinson indicated he had feelings for Johnson, and Johnson indicated that he wanted Robinson to leave him alone. During the course of this conversation, Johnson pulled the gun out of his jacket in order to frighten Robinson and in order to emphasize the point that he wanted Robinson to leave him alone. After that, both Johnson and Robinson exited the vehicle, and Johnson began walking back to his car. In the meantime, Robinson opened the back of his vehicle and was "scrambling through some clothes or something in the back." Robinson then told Johnson that he was going to kill Johnson and his family. Johnson was looking at Robinson out of the corner of his eye and saw Robinson's arm raised. When Johnson turned around, he saw Robinson's arm go up and saw something in his hand, which he believed to be a gun.[2] Johnson panicked and accidentally fired at Robinson, killing him. Johnson fled, only to be arrested for Robinson's murder several months later.

II. ANALYSIS

On appeal, Johnson claims the jury in his case was not properly sworn, in violation of his right to a trial by jury under the United States and Texas Constitutions. Johnson further claims the punishment charge presents fundamental error because it permitted the jury to reject a finding of sudden passion, in the absence of unanimity, in violation of Article 37.07, Section 3(c) of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PROC. ANN. art. 37.07, § (3)(c) (Vernon Supp. 2010). We will examine each of Johnson's issues in turn.

[2]Robinson did not have a gun. The item he was holding was fingernail polish.

A. Jury Oath

In his first three appellate points, Johnson claims that even though the record reflects the clerk read the oath to the jury, the jury never assented to the oath and thus was not sworn. This, claims Johnson, is a violation of (1) Article 35.22 of the Texas Code of Criminal Procedure; (2) his right to trial by jury under the United States Constitution; and (3) his right to trial by jury under the Texas Constitution.

Article 35.22 of the Texas Code of Criminal Procedure provides:

> When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God".

TEX. CODE CRIM. PROC. ANN. art. 35.22 (Vernon 2006). The Texas Rules of Appellate Procedure create presumptions of regularity in lower court proceedings that require us to presume, among other things, that the jury was properly impaneled and sworn. TEX. R. APP. P. 44.2(c). We presume the jury was properly impaneled and sworn, unless such matter was disputed in the trial court or the record affirmatively shows the contrary. *See also Osteen v. State*, 642 S.W.2d 169, 171 (Tex. Crim. App. 1982); *Faison v. State*, 59 S.W.3d 230, 237 (Tex. App.—Tyler 2001, pet. ref'd). Here, there was no objection to a failure to administer the oath to the jury panel. Johnson maintains the record affirmatively demonstrates the jury was not properly sworn because it fails to reflect that the jury responded in the affirmative to the oath, citing the following excerpts

from the record:

> THE CLERK: You and each of you do solemnly swear that in the case of the State of Texas versus Ryan Johnson you will a true verdict render according to the law and the evidence, so help you God?
>
> THE COURT: Please be re-seated. Ladies and gentlemen, you've been given a juror badge . . . .

Johnson contends that because an "oath" is commonly defined[3] as "a solemn usu. formal calling upon God or a god to witness to the truth of what one says or to witness that one sincerely intends to do what one says,"[4] the oath requires an affirmation or response on behalf of the jurors.

The State contends that the issue of whether the oath was administered has been mooted by the filing of a supplemental reporter's record[5] which reflects that the clerk read the oath to the jury and that the jury was sworn as required by Article 35.22 of the Texas Code of Criminal Procedure. Given the affirmative showing in the supplemental reporter's record that the jury in Johnson's case

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[3]Article 3.01 of the Texas Code of Criminal Procedure states that words, phrases, and terms used in the Code "are to be taken and understood in their usual acceptation in common language, except where specially defined." TEX. CODE CRIM. PROC. ANN. art. 3.01 (Vernon 2005).

[4]MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 854 (11th ed. 2003).

[5]The supplemental reporter's record reads:

> THE CLERK: You and each of you do solemnly swear that in the case of the State of Texas versus Ryan Johnson you will a true verdict render according to the law and the evidence, so help you God?
>
> **(THE JURY WAS SWORN)**
>
> THE COURT: Please be re-seated. Ladies and gentleman, you've been given a juror badge . . . .

was, in fact, sworn, Johnson's first three points of error are overruled as moot. *See Wilson v. State*, 296 S.W.3d 140, 143 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Even if the issue of whether the jury was sworn in accordance with Article 35.22 was not rendered moot in this instance, there is no affirmative showing in the record that the jury oath was not properly administered. Therefore, it must be presumed the jury was properly impaneled and sworn. *See* TEX. R. APP. P. 44.2(c).

B. Jury Unanimity

In points of error four through six, Johnson maintains the punishment charge presents fundamental error by not requiring jury unanimity in finding *no* sudden passion in violation of (1) Article 37.07, Section 3(c) of the Texas Code of Criminal Procedure;[6] (2) the Texas Constitution; and (3) the United States Constitution. If the jury had found Johnson acted under the immediate influence of sudden passion[7] arising from adequate cause[8] when he killed

[6]Article 37.07, Section 3(c) of the Texas Code of Criminal Procedure provides:

> If the jury finds the defendant guilty and the matter of punishment is referred to the jury, the verdict shall not be complete until a jury verdict has been rendered on both the guilt or innocence of the defendant and the amount of punishment. In the event the jury shall fail to agree on the issue of punishment, a mistrial shall be declared only in the punishment phase of the trial, the jury shall be discharged, and no jeopardy shall attach. The court shall impanel another jury as soon as practicable to determine the issue of punishment.

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(c).

[7]"Sudden Passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation. TEX. PENAL CODE ANN. § 19.02(a)(2) (Vernon 2003).

Robinson, the crime would have been punished as a second-degree felony rather than a first-degree felony. TEX. PENAL CODE ANN. § 19.02 (Vernon 2003); *Trevino v. State*, 100 S.W.3d 232, 237 (Tex. Crim. App. 2003); *Bradshaw v. State*, 244 S.W.3d 490, 494 (Tex. App.—Texarkana 2007, pet. ref'd).

A claim of jury charge error is reviewed under the two-pronged test set forth in *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g), *overruled on other grounds by Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex. Crim. App. 1988). Under the first prong of the test, we are to determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If error is determined to exist, we must determine whether sufficient harm resulted from the error to compel reversal. *Id.* at 744. We initially evaluate the question of error.

When the issue of sudden passion is raised and submitted, the jury must unanimously agree that the defendant either did or *did not* act under the immediate influence of sudden passion arising from an adequate cause. *Sanchez v. State*, 23 S.W.3d 30, 33–34 (Tex. Crim. App. 2000); *Newton v. State*, 168 S.W.3d 255, 256 (Tex. App.—Austin 2005, pet. ref'd). This requirement stems from the statutory requirement that the jury "agree" unanimously as to both "the guilt or innocence of the defendant and the amount of punishment." *Sanchez*, 23 S.W.3d at 33 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(c)).

8"Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. TEX. PENAL CODE ANN. § 19.02(a)(1).

The jury charge in this case provided, in pertinent part:

> The punishment which you may assess is confinement in the Institutional Division of the Texas Department of Criminal Justice for life, or for any term of not more than 99 years or less than 5 years; unless you believe that the defendant caused the death under the immediate influence of a sudden passion arising from an adequate cause in which event you may assess confinement for not more than 20 years or less than 2 years. In addition, in either case, a fine not to exceed $10,000 may be imposed.
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> . . . .
>
> Now if you believe by a preponderance of the evidence that the defendant caused the death of the deceased while under the immediate influence of sudden passion arising from an adequate cause, you will assess punishment at confinement for not more than 20 years nor less than 2 years and you may impose a fine not to exceed $10,000.

In the final paragraph, the charge in this case instructs the jurors that the "verdict must be by a unanimous vote of all members of the jury." This charge is virtually identical to the charge given in *Newton*, 168 S.W.3d at 258.[9] The Austin Court of Appeals found this charge to be erroneous

[9]The charge in *Newton* provided:

> The punishment which you may assess is confinement in the Institutional Division of the Texas Dept. of Criminal Justice for life, or for any term of not more than 99 years or less than 5 years; unless you believe that the defendant caused the death under the immediate influence of a sudden passion arising from an adequate cause in which event you may assess confinement for not more than 20 years or less than 2 years. In addition, in either case, a fine not to exceed $10,000 may be imposed. The burden of proof is on the defendant to prove this issue by a preponderance of the evidence.
>
> . . . .
>
> Now if you believe by a preponderance of the evidence that the defendant caused the death of the deceased while under the immediate influence of sudden passion arising from an adequate cause, you will assess punishment at confinement for not more than 20 years nor less than 2 years and you may impose a fine not to exceed $ 10,000.

because the instruction did not condition the use of the five-to-life punishment range on a unanimous finding that the appellant did *not* act under the influence of sudden passion. *Id.* at 257. "Instead, the harsher punishment range was made applicable in the absence of a finding in appellant's favor." *Id*. The punishment charge in the instant case suffers from the same defect; the jury was never instructed that they were to impose first-degree felony punishment *only* if they unanimously agreed that Johnson *did not* act under the influence of sudden passion. As in *Newton*, this charge does not include a unanimity requirement directly relating to the selection of the proper punishment range, and as in *Newton*, the charge is erroneous.

The erroneous charge is not salvaged by the verdict forms, which are virtually identical to those submitted in *Bradshaw*, 244 S.W.3d 490.[10] Like *Bradshaw*, the verdict forms here do not

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Id. at 256–57.

The final paragraph of the charge in *Newton* instructed the jurors to select a foreperson "to preside at your deliberations and to vote with you in arriving at a unanimous verdict." *Id.* at 257.

[10]The verdict forms in *Bradshaw* provided:

> We, the jury, having found the defendant, Joe Bradshaw, guilty of murder, do further find that the defendant murdered Toy Bradshaw while under the immediate influence of sudden passion arising from an adequate cause and assess his punishment at confinement for _____ in the correctional Institutions Division of the Texas Department of Criminal Justice. (Any term of not more than 20 years or less than 2 years.) In addition, we assess a fine in the amount of $_____. ($0-10,000.00).
>
> . . . .
>
> We, the jury, having found the defendant, Joe Bradshaw, guilty of murder do not find that the defendant murdered Toy Bradshaw while under the immediate influence of sudden passion arising from adequate cause and assess his punishment at confinement for _____ in the correctional Institutions Division of the Texas Department of Criminal Justice. (Life or any term of not more than 99 years or less than 5 years). In addition, we assess a fine in the amount of $_____. ($0-10,000.00).

condition the punishment range on the absence of a finding. The verdict forms here, as in *Bradshaw*, do not require the jury to provide an explicit affirmative or an explicit negative ruling on sudden passion.[11] The issue of sudden passion is subsumed in each question. In *Bradshaw*, this Court observed that the verdict forms do not prevent the charge from being erroneous because the jury is not asked to find a lack of sudden passion, "but rather is merely instructed to assess the first-degree felony punishment range if it does not find Bradshaw acted with sudden passion." *Id.* at 497. As in *Bradshaw*, the verdict forms in this case do not prevent the charge from being erroneous.[12]

Here, the State concedes the punishment charge was erroneous because it "theoretically

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Bradshaw, 244 S.W.3d at 496.

[11]The verdict forms in this case provide as follows:

> We, the jury, having found the defendant, RYAN PATRICK JOHNSON, guilty of Murder, as charged in the indictment, assess his punishment at confinement for ____ years in the Institutional Division of the Texas Department of Criminal Justice. (Any term of more than ninety-nine years or life or less than five years.) In addition, we assess a fine in the amount of $_____. ($0-$10,000.00).
>
> . . . .
>
> We, the jury, having found the defendant, RYAN PATRICK JOHNSON, guilty of murder, do further find the defendant cause [sic] the death of the deceased under the immediate influence of sudden passion arising from an adequate cause. We therefore assess his punishment at confinement for _____ years in the Institutional Division of the Texas Department of Criminal Justice (Any term of not more than 20 years or less than 2 years.) In addition, we assess a fine in the amount of $ _____ ($0 - $10,000.00)

[12]In *Barfield v. State*, 202 S.W.3d 912, 917 (Tex. App.—Texarkana 2006, pet. ref'd), this Court held that the submission of sudden passion as a special issue "asking only whether [the jury] found Barfield acted under the immediate influence of sudden passion" in conjunction with the general unanimity instruction was sufficient to guarantee a unanimous finding. *Id.* at 918.

allowed the jury to make a non-unanimous decision as to sudden passion." Because Johnson failed to raise his jury-unanimity objection at trial, we will reverse only if we find the charge error caused Johnson "egregious harm." *See Neal v. State*, 256 S.W.3d 264, 278 (Tex. Crim. App. 2008). "Jury 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." *Allen v. State*, 253 S.W.3d 260, 264 (Tex. Crim. App. 2008). When charge error causes a jury to render a less-than-unanimous verdict on an issue on which unanimity is required, the charge error is egregiously harmful. *See Ngo*, 175 S.W.3d at 750–52; *Swearingen v. State*, 270 S.W.3d 804, 812 (Tex. App.—Austin 2008, pet. ref'd). The egregious harm standard requires a finding of actual, not merely theoretical, harm to the accused. *Almanza*, 686 S.W.2d at 174. Egregious harm is a difficult standard to meet and must be determined on a case by case basis. *Ellison v. State*, 86 S.W.3d 226, 227 (Tex. Crim. App. 2002).

Johnson contends that charge error has been found to be egregiously harmful by the Texas Court of Criminal Appeals where there was evidence of a lack of unanimity, citing *Sanchez*, 23 S.W.3d at 34. In this case, unlike *Sanchez*, in which the defendant presented evidence that the jury verdict was *not* unanimous, there is no evidence in this case that the jury verdict was not unanimous. Johnson acknowledges that this Court has previously held that where there is no evidence of a lack of unanimity by the jury, harm resulting from this type of an erroneous punishment charge is not egregious. *Bradshaw*, 244 S.W.3d at 498. Johnson nevertheless urges

this Court to follow the holding of the Dallas Court of Appeals in *London v. State*, 325 S.W.3d 197 (Tex. App.—Dallas 2008, pet. ref'd). There, the punishment charge on sudden passion provided: "An affirmative ('yes') answer on the issue submitted must be unanimous, but if the jury is not unanimous in reaching an affirmative answer, then the issue must be answered 'no.'"[13] This punishment charge affirmatively directed jurors to make a negative finding on the issue of sudden passion if they were unable to reach a unanimous decision on that issue.

As in *Bradshaw*, here (1) there was no affirmative direction to the jurors to make a negative finding on the issue of sudden passion in the absence of unanimity, (2) the charge contained a general instruction that the verdict must be unanimous, and (3) there is no evidence that the verdict was not unanimous. Under these circumstances, the argument that the verdict may not have been unanimous is theoretical only. The degree of harm demonstrated by an appellant must be actual, not merely theoretical. *Almanza*, 686 S.W.2d at 174; *Bradshaw*, 244 S.W.3d at 498. The error was not so egregious as to vitally affect a defensive theory or make the case for conviction or punishment clearly and significantly more persuasive.[14]

III. CONCLUSION

We affirm the judgment of the trial court.

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[13]The punishment charge in *London* was identical to the punishment charge in *Sanchez*, which charge was determined by the Texas Court of Criminal Appeals to be erroneous. *London*, 325 S.W.3d at 207.

[14]The main defensive theory asserted by Johnson was self-defense. The jury was instructed on this defensive theory in the charge submitted to it during the guilt/innocence phase of the trial.

Jack Carter
Justice

Date Submitted: January 11, 2011
Date Decided: January 26, 2011

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