IN THE
TENTH COURT OF APPEALS

No. 10-19-00123-CR

ERIC DWIGHT HENDRIX,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the County Court
Limestone County, Texas
Trial Court No. 38821

MEMORANDUM OPINION

In three issues, appellant, Eric Dwight Hendrix, challenges his conviction for assault, a class A misdemeanor. *See* TEX. PENAL CODE ANN. § 22.01(a)(1), (b) (West Supp. 2019). Because we overrule all of Hendrix's issues on appeal, we affirm.

I. THE TRIAL COURT'S EXCLUSION OF THE VICTIM'S PRIOR FELONY CONVICTION

In his first issue, Hendrix asserts that trial court abused its discretion by excluding the complainant Michael Hayes's 2003 felony conviction for obstruction/retaliation.

Specifically, Hendrix contends that the probative value of the impeachment evidence substantially outweighs its prejudicial effect because the issue of self-defense rested on the credibility of the State's witnesses and Hendrix.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse-of-discretion standard. *Henley v. State*, 493 S.W.3d 77, 82-83 (Tex. Crim. App. 2016). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* at 83. Before an appellate court may reverse the trial court's decision, "'it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree.'" *Id.* (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008)).

B. Applicable Law

Trial commenced in this case on April 1, 2019. Hendrix sought to impeach Hayes with his 2003 felony conviction for obstruction/retaliation for which he successfully completed three years of probation. Texas Rule of Evidence 609(b) sets out when convictions that are more than ten years old are admissible:

> **(b) Limit on Using the Evidence After 10 Years.** This subdivision(b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

TEX. R. EVID. 609(b).

The language of Rule 609(b) acknowledges that the admission of convictions—even those over ten years old—will have a prejudicial effect. *Id.* Therefore, to be admissible, the probative value of the convictions must *substantially* outweigh that prejudicial effect. *Id.*; *see Meadows v. State*, 455 S.W.3d 166, 170-71 (Tex. Crim. App. 2015). In this case, we cannot say that the trial court abused its discretion by concluding that the probative value of Hayes's 2003 felony conviction did not substantially outweigh the prejudicial effect.

Hendrix relies on *Theus v. State* for the contention that Hayes's 2003 felony conviction was admissible because its probative value as impeachment evidence outweighed any prejudicial effect. 845 S.W.2d 874, 880 (Tex. Crim. App. 1992). In *Theus*, the Court of Criminal Appeals listed the following non-exclusive factors to consider when weighing the probative value of convictions against their prejudicial effect when a defendant testifies: (1) the impeachment value of the prior crime; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history; (3) the similarity between the past crime and the offense being prosecuted; (4) the importance of the defendant's testimony; and (5) the importance of the credibility issue. *Id.* (noting also that "[t]he application of these factors to a particular case cannot be performed with mathematical precision because several of the factors relevant to assessing probative value themselves cut in different directions . . ." (internal citations & quotations omitted)). The underlying principles are the same even when the witness is

someone other than the defendant. *See Lucas v. State*, 791 S.W.2d 35, 51 (Tex. Crim. App. 1989); *see also Moore v. State*, 143 S.W.3d 305, 312-13 (Tex. App.—Waco 2004, pet. ref'd). We accord the trial court "wide discretion" when weighing the factors and when deciding whether to admit a prior conviction. *Theus*, 845 S.W.3d at 881.

The *Theus* analysis is conducted within the framework of Texas Rule of Evidence 609(a). *Id.* at 879. Because rule 609(b) explicitly addresses convictions older than ten years, rule 609(a) necessarily addresses the admission of convictions of ten years or less. TEX. R. EVID. 609. And under rule 609(a), the probative value of the convictions must simply (not substantially) outweigh the prejudicial effect. *Id.* at R. 609(a).

C. Discussion

In his brief, Hendrix concedes that the first two *Theus* factors weigh against admissibility. Specifically, Hendrix admits that obstruction/retaliation does not involve deception; thus, the impeachment value of the prior crime is low. *See Johnson v. State*, 271 S.W.3d 756, 764 (Tex. App.—Waco, 2008, pet. ref'd) ("Here, because the prior conviction involves violence rather than deception, the impeachment value of the conviction is low, and thus the first factor does not favor the admissibility of the evidence."); *see also Butler*, 890 S.W.2d 951, 955 (Tex. App.—Waco 1995, pet. ref'd). Furthermore, as Hendrix acknowledges, the temporal remoteness of Hayes's 2003 conviction weighs against admissibility because more than ten years have elapsed since the conviction and release from probation and the trial of this matter, and because Hendrix did not proffer

additional evidence of subsequent criminal conduct on Hayes's part. *See Johnson*, 271 S.W.3d at 764; *see also Butler*, 890 S.W.2d at 955.

Skipping to the fourth and fifth factors, we note that, as the victim of the assault. Hayes's testimony was important to the case. However, the record also contains testimony from eyewitness Lawrence Jeter, a coworker of both Hayes and Hendrix, who corroborated most of Hayes's testimony about a conversation that occurred between Hendrix and Hayes on October 31, 2017, and the eventual assault that occurred on November 1, 2017. The jury also heard testimony from Captain Mark Roark of the Limestone County Sheriff's Office and Investigator Shane James of the Limestone Sheriff's Office who testified about eyewitnesses—a total of five—who offered descriptions of the assault that were consistent with Hayes's version of the events. Additionally, the jury observed photographs taken after the assault of both Hayes and Hendrix that provided further evidence corroborating Hayes's testimony.

Given the testimony of Jeter, Captain Roark, and Investigator James, as well as the photographs taken, Hayes's credibility as a witness, though important to the State's case-in-chief, was not the sole means upon which the jury could have decided the case. In other words, this evidence appears to lessen the probative value of the proposed impeachment evidence and, thus, results in the fourth and fifth factors weighing against admissibility. Although the third *Theus* factor may arguably weigh in favor of

admissibility, it is immaterial given that Hendrix has not proven that any of the other four *Theus* factors weigh in favor of admissibility of the proposed impeachment evidence.

This is not the case where all the factors should have inexorably led the trial court to but one ruling. According the trial court "wide latitude," we hold that it did not abuse its discretion when it ruled that the probative value of Hayes's 2003 felony conviction did not *substantially* outweigh its prejudicial effect. *See* TEX. R. EVID. 609(b); *see also Henley*, 493 S.W.3d at 82-83; *Theus*, 845 S.W.2d at 881. We therefore overrule Hendrix's first issue.

II. SELF-DEFENSE & THE JURY CHARGE

In his second issue, Hendrix contends that the trial court failed to specifically instruct the jury, as recommended by the Pattern Jury Charges, that the State bore the burden of disproving self-defense beyond a reasonable doubt. Hendrix further asserts that this omission caused him egregious harm.

A. Applicable Law

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003).

If error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Conversely, if error was not preserved at trial by objection, as was the case here, a reversal will be

granted only if the error presents egregious harm. *Id.* To obtain a reversal for jury-charge error, Hendrix must have suffered actual harm and not just merely theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986). However, because we conclude that the charge was not erroneous in this case, we do not conduct a harm analysis in this issue. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (citing *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012)).

B. Discussion

Article 36.14 of the Code of Criminal Procedure requires the trial court to deliver to the jury "a written charge distinctly setting forth the law applicable to the case." TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007); *see Taylor v. State*, 332 S.W.3d 483, 486 (Tex. Crim. App. 2011). This duty exists even when defense counsel fails to object to inclusions or exclusions in the charge. *See Taylor*, 332 S.W.3d at 486. As such, the trial court may have to sua sponte instruct the jury on the law applicable to the case. *Id.*

Self-defense is a fact issue to be determined by the jury, and a jury verdict of guilt is an implicit finding that it rejected a defendant's self-defense theory. *Saxton v. State*, 804 S.W.2d 910, 913-14 (Tex. Crim. App. 1991). For self-defense claims, the defendant has the burden of producing some evidence to support the claim. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). If the defendant produces some evidence, the State has the "burden of persuasion to disprove the raised defense." *Id.* The State's burden does not

require the production of additional evidence; rather, "it requires only that the State proves its case beyond a reasonable doubt." *Id.*; *see Saxton*, 804 S.W.2d at 913.

In this case, the trial court provided several pages of instruction in the jury charge regarding self-defense. In particular, the application portion of the jury charge regarding self-defense provided the following:

> Now, if you find from the evidence beyond a reasonable doubt that on the occasion in question the Defendant, Eric Dwight Hendrix, did strike Michael Hayes, as alleged in the indictment, but you further find from the evidence, as viewed from the standpoint of the Defendant at the time, that from the words or conduct, or both of Michael Hayes, it reasonably appeared force on his part was immediately necessary to protect himself against Michael Hayes's use or attempted use of unlawful force at the hands of Michael Hayes, and that acting under such apprehension and reasonably believing that the use of force on his part was immediately necessary to protect himself against Michael Hayes's use or attempted use of unlawful force, then you should acquit the Defendant on the grounds of self-defense; or, if you have a reasonable doubt as to whether or not the Defendant was acting in self-defense on said occasion and under the circumstances, then you should give the Defendant the benefit of the doubt and say by your verdict, not guilty.
>
> If you find from the evidence beyond a reasonable doubt that at the time and place in question the Defendant did not reasonably believe that he was in danger of bodily injury, or that the Defendant, under the circumstances as viewed by him from his standpoint at the time, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against Michael Hayes's use or attempted use of unlawful force, then you should find against the Defendant on the issue of self-defense and find the Defendant guilty of the offense as alleged in the indictment.

On appeal, Hendrix alleges that the trial court erred by failing to instruct the jury that the State bears the burden of disproving his self-defense justification beyond a

reasonable doubt, following the Pattern Jury Charge instruction for self-defense, which provides as follows: "The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct." Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Criminal Pattern Jury Charges: Criminal Defenses* PJC 31.17 (2015).

Several of our sister courts have addressed a similar contention. *See Wilson v. State*, No. 11-16-00163-CR, 2018 Tex. App. LEXIS 4513, at **4-7 (Tex. App.—Eastland June 21, 2018, no pet.) (mem. op., not designated for publication); *Goodson v. State*, No. 05-15-00143-CR, 2017 Tex. App. LEXIS 3226, at **35-38 (Tex. App.—Dallas Apr. 12, 2017, pet. ref'd) (mem. op., not designated for publication); *Savoy v. State*, No. 14-15-00637-CR, 2016 Tex. App. LEXIS 12356, at *13 (Tex. App.—Houston [14th Dist.] Nov. 17, 2016, pet. ref'd) (mem. op., not designated for publication). We agree with our sister courts that this language, while preferable, was not necessary when viewed in light of the entire charge. *See Wilson*, 2018 Tex. App. LEXIS 4513, at **4-7; *Goodson*, 2017 Tex. App. LEXIS 3226, at **35-38; *Savoy*, 2016 Tex. App. LEXIS 12356, at *13.

The charge provided that Hendrix was entitled to a presumption of innocence and that: "In all criminal cases the burden of proof is on the State." The charge also stated:

> The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

> The prosecution has the burden of proving the Defendant guilty, and it must do so by proving each and every element of the offense charged beyond a reasonable doubt; and if it fails to do so, you must acquit the defendant.

When read together, the charge cannot be said to have placed the burden on Hendrix to prove that he acted in self-defense. *See Luck v. State*, 588 S.W.2d 371, 375 (Tex. Crim. App. 1979) ("Clearly, when the charge is viewed as a whole, it placed the burden on the State to show beyond a reasonable doubt that appellant was not acting in self-defense."); *see also Wilson*, 2018 Tex. App. LEXIS 4513, at **7-8; *Goodson*, 2017 Tex. App. LEXIS 3226, at **35-36; *Savoy*, 2016 Tex. App. LEXIS 12356, at **13-14. Therefore, we cannot conclude that the trial court erred in failing to sua sponte give the instruction Hendrix proposes on appeal. We overrule Hendrix's second issue.

III. FACTUAL SUFFICIENCY OF THE EVIDENCE

In his third issue, Hendrix argues that the evidence is factually insufficient to support the jury's rejection of self-defense. The Court of Criminal Appeals, in *Brooks v. State*, abandoned the factual-sufficiency standard in criminal cases. *See* 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (concluding that there is "no meaningful distinction between the *Jackson v. Virginia* legal sufficiency standard and the . . . factual-sufficiency standard, and these two standards have become indistinguishable" and holding the following: "As the Court with final appellate jurisdiction in this State, we decide that the *Jackson v. Virginia* standard is the only standard that a reviewing court should apply in determining whether the evidence to support each element of a criminal offense that the State is

required to prove beyond a reasonable doubt. All other cases to the contrary, including *Clewis*, are overruled."); *see also Martinez v. State*, 327 S.W.3d 727, 736 (Tex. Crim. App. 2010). This Court has repeatedly considered and rejected the arguments presented by Hendrix. *See, e.g., Wilkins v. State*, No. 10-16-00233-CR, 2018 Tex. App. LEXIS 1575, at **7-8 (Tex. App.—Waco Feb. 28, 2018, pet. ref'd) (mem. op., not designated for publication) (citing *Thomas v. State*, No. 10-17-00049-CR, 2017 Tex. App. LEXIS 10981, at **5-6 (Tex. App.—Waco Nov. 22, 2017, pet. ref'd) (mem. op., not designated for publication); *Burns v. State*, No. 10-16-00357-CR, 2017 Tex. App. LEXIS 5946, at *8 (Tex. App.—Waco June 28, 2017, pet. ref'd) (mem. op., not designated for publication); *Garcia v. State*, No. 10-16-00045-CR, 2017 Tex. App. LEXIS 195, at *6 (Tex. App.—Waco Jan. 11, 2017, pet. ref'd) (mem. op., not designated for publication)).

Based on the foregoing and the fact that, as an intermediate appellate court, we are required to follow binding precedent in cases decided by the Court of Criminal Appeals, we are not persuaded to consider Hendrix's factual-sufficiency argument in this proceeding. *See State v. DeLay*, 208 S.W.3d 603, 607 (Tex. App.—Austin 2006) ("As an intermediate appellate court, we lack authority to overrule an opinion of the court of criminal appeals"), *aff'd sub nom., State v. Colyandro*, 233 S.W.3d 870 (Tex. Crim. App. 2007). We overrule Hendrix's third issue.

IV. CONCLUSION

Having overruled all of Hendrix's issues on appeal, we affirm the judgment of the trial court.

JOHN E. NEILL
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed July 29, 2020
Do not publish
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