NO. 12-16-00289-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

RON DEVOR BARRETT, APPELLANT	***§***	***APPEAL FROM THE***
V.	***§***	***COUNTY COURT AT LAW NO. 2***
THE STATE OF TEXAS, APPELLEE	***§***	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Ron Devor Barrett appeals his conviction for "assault causing bodily injury family member." In three issues, Appellant argues he was harmed by the omission of self-defense and defense of property instructions in the jury charge. We affirm.

BACKGROUND

On or about October 16, 2015, Appellant was scheduled to meet Tiffany Pinkerton so that she could return his vehicle to him. Pinkerton had been borrowing the vehicle for several months after Appellant offered the vehicle to Pinkerton for traveling to and from work and taking their son to doctor's appointments. He later asked her to return the vehicle. When Pinkerton arrived on October 16, she exited the vehicle and began beating it with a sledgehammer.[1] She stated that she was stressed and angry about Appellant taking the vehicle back, so she took "it out on the truck." Appellant attempted to take the sledgehammer away from Pinkerton, and the two "tussled" over it. Ultimately, Appellant gained control of the sledgehammer and told his friend, Cedric Nobles, who had accompanied Appellant to meet Pinkerton, to grab it. Nobles testified

[1] The weapon is referred to in the record as both an "ax" and a "sledgehammer." For consistency, we refer to it as a sledgehammer throughout the opinion.

that he observed Pinkerton beating the truck and that Appellant fought for control of the sledgehammer.

After Appellant took the sledgehammer, Pinkerton walked away from him but continued yelling at him. Jeffrey Henry, who was in a parking lot across the street, heard the yelling and saw Appellant catch Pinkerton and punch her in the face twice. Pinkerton walked away again, and Appellant tackled her. Henry called 911 when it appeared that Appellant was attempting to choke Pinkerton. According to Henry, Appellant also kicked Pinkerton while she was on the ground.

Officer Robert Main of the Tyler Police Department responded to the 911 call. When he arrived on scene, Pinkerton and Appellant were both angry but no longer fighting. He spoke with both Pinkerton and Appellant. Appellant had scrapes and cuts on his elbows and hands, which Officer Main believed to be consistent with striking something several times. Pinkerton had a cut above her eye, several scrapes on her back, and one of her eyes was red, swollen and bleeding. Officer Main believed Pinkerton's injuries were consistent with being struck several times, and it appeared to him that her injuries were caused by Appellant striking her with his hands.

Appellant was charged by information with intentionally, knowingly, and recklessly causing bodily injury to Pinkerton, a person with whom he had or had had a dating relationship, by striking her with his hand or hands. Appellant pleaded "not guilty." At the close of evidence, Appellant requested jury charge instructions regarding self-defense and defense of property. The trial court refused to include those instructions in the charge. The jury found Appellant "guilty," and following a separate trial on punishment, assessed a sentence of six months confinement and a $2,000 fine. This appeal followed.

CHARGE ERROR

In his first issue, Appellant argues that the trial court erred in failing to include a self-defense instruction in the jury charge. In his second issue, Appellant contends the trial court erred by not including a defense of property instruction in the charge. In his third issue, he argues that he was harmed by these omissions.

Standard of Review

The review of an alleged jury-charge error in a criminal trial is a two-step process. ***Abdnor v. State***, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994). First, an appellate court must determine whether there was error in the jury charge. ***Id***. Second, if there is charge error, the court must determine whether there is sufficient harm to require reversal. ***Id***. at 731-32. The standard for determining whether there is sufficient harm to require reversal depends on whether the appellant objected. ***Id***. at 732. If the appellant objected to the error at trial, the appellate court must reverse the trial court's judgment if the error "is calculated to injure the rights of the defendant." TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006). This standard requires proof of no more than some harm to the accused from the error. ***Almanza v. State***, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984). An appellant who did not raise the error at trial can prevail only if the error is so egregious and created such harm that he has not had a fair and impartial trial. ***Id***. "In both situations the actual degree of harm must be assayed in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." ***Id***. In assessing whether the trial court erred by denying a requested defensive instruction, an appellate court must examine the evidence offered in support of the defensive issue in the light most favorable to the defense. ***Id.***

Applicable Law

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. TEX. PENAL CODE ANN. § 9.31(a) (West 2011). A person in lawful possession of property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's unlawful interference with the property. ***Id.*** § 9.41(a) (West 2011).

Chapter Nine of the Texas Penal Code (which contains the above-referenced sections 9.31 and 9.42) is entitled "Justification Excluding Criminal Responsibility." ***Id***. §§ 9.01–.63 (West 2011). It includes justifications such as necessity and public duty, and explains the justification aspects of protection of persons and property. ***Young v. State***, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999). If the conduct in question is justified under one of the provisions of Chapter Nine, it is a defense to prosecution. TEX. PENAL CODE ANN. § 9.02 (West

2011); *see* ***Young***, 991 S.W.2d at 838. However, a defendant is entitled to an instruction involving one of the justification defenses "only . . . when the defendant's defensive evidence essentially admits to every element of the offense including the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct." ***Shaw v. State***, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007). "[W]hen the defensive evidence merely negates the necessary culpable mental state, it will not suffice to entitle the defendant to a defensive instruction." ***Id***.

Analysis

According to Appellant, he was entitled to the excluded jury charge instructions on self-defense and defense of property because (1) Pinkerton initiated aggressive actions by beating Appellant's vehicle and ppellant only approached Pinkerton thereafter; (2) after she walked away from Appellant, Pinkerton proceeded to fight Appellant when he made a comment about their son; and (3) Pinkerton did not recall being struck by Appellant.

Appellant's brief, however, contains no reference to any evidence in the record in which he admitted to any of the elements of the charged offense, including the culpable mental state of intentional, knowing, and reckless, and our independent review of the record reveals no such admission. To the contrary, Appellant's defense centered around two themes: (1) Pinkerton was hit with the sledgehammer by accident; and (2) Appellant did not hit Pinkerton with his hands or fists. For example, during his cross-examination and direct-examination of Pinkerton, the following exchanges occurred between Pinkerton and Appellant's trial counsel:

> Q: Now, at that time y'all got in a scuffle with that -- over that sledgehammer?
> A: Yes.
> Q: And in the process of scuffling over that sledgehammer, that is the injury you got caused to your eye, right?
> A: Yes.
> Q: Did Ron intentionally hit you with that sledgehammer and put that scar over your eye?
> A: No.
> Q: Did Ron knowingly cause that injury to your eye with that sledgehammer?
> A: No.
> Q: Did Ron recklessly cause that injury to you with that sledgehammer?
> A: No.
> Q: It was a situation where he was trying to take that sledgehammer away from you, y'all were scuffling, fell down, and the sledgehammer hit you in the eye?
> A: Yes.
> Q: Did Ron hit you with his fist to cause that injury?
> A: No.
> Q: That injury was caused with that sledgehammer when y'all were scuffling when he was trying to take it away from you?
> A: Yes.
> . . .

Q: When you got upset, did you attack him again?
A: Yes.
Q: You initiated the attack?
A: Yes.
Q: And when you attacked him, what did you do at that time? Did you physically attack him?
A: Yes.
…
Q: When y'all were into this scuffle where you initiated it, you attacked him, did he hit you with his fist, kick you or anything of that nature?
A: Not that I remember.
Q: Were y'all just tussling and rolling on the ground?
A: Yes.
…
Q: So he was protecting himself when you initiated the second assault on him?
A: Yes.
Q: And then the assault that took place at the shop when you got that cut over your eye, that was a result of you guys tussling over this sledgehammer?
A: Yes.
…
Q: So each time that an assault occurred, you initiated and caused both of those assaults?
A: Yes.
…
Q: And that is that these assaults were incurred by you and not by Ron?
A: Yes, that's why I got me a lawyer.
…
Q: How did you get that injury over your eye?
A: Wrestling over the ax.
Q: Was it with a closed fist?
A: No.
Q: Were you hit in the face several times with a closed fist?
A: No.
Q: So you are saying that the injury to your eye was caused by the ax?
A: Yes, sir.
Q: Tussling over the ax?
A: Yes, sir.
Q: Not being beaten by a fist?
A: No, sir.
…
Q: When y'all left the shop and y'all got into it again after you left the shop, who initiated – who initiated that physical contact?
A: Physical contact? I did.
Q: How did you initiate that physical contact?
A: I went at him.

The only evidence that Appellant admitted any involvement in the incident was Appellant's emphasis that the injury to Pinkerton's eye occurred when they were "tussling" over the sledgehammer. Throughout trial, including his opening and closing arguments, cross-examination, and defensive evidence, Appellant repeatedly denied Pinkerton suffered any injuries caused intentionally, recklessly, or knowingly by Appellant, as opposed to accidental injuries resulting from the tussle. Thus, rather than admitting the elements of the offense,

particularly the culpable mental state, Appellant consistently maintained that he was innocent of assault, that Pinkerton was the aggressor, and that Pinkerton's injury was accidental, namely a result of the tussle over the sledgehammer. He did not admit to intentionally and recklessly harming Pinkerton in any way. Consequently, Appellant was not entitled to a defensive instruction on defense of property or self-defense. *See* ***Shaw***, 243 S.W.3d at 659; *see also* ***Land v. State***, No. 06-16-00219-CR, 2017 WL 4158916, at *5 (Tex. App.—Texarkana Sept. 20, 2017, no. pet.) (mem. op., not designated for publication) (Land consistently maintained that he was innocent of aggravated assault and that victim's injuries resulted from victim running into the knife; thus, Land was not entitled to defensive instruction on deadly force to protect property); ***Williams v. State***, 314 S.W.3d 45, 51 (Tex. App.—Tyler 2010, pet. ref'd) (Appellant's version of events merely negated culpable mental state; he did not admit brandishing the knife to further or complete the theft, but testified that he threatened the victim to protect himself from an additional unlawful assault. Therefore, Appellant was not entitled to a self-defense instruction because he did not admit the essential conduct along with the requisite mental state).

Because the record does not show that Appellant either admitted, or through defensive evidence essentially admitted, to all of the elements of the charged offense including the culpable mental state, we conclude that the trial court did not err in refusing to give instructions on self-defense and defense of property. *See* ***Shaw***, 243 S.W.3d at 659. For this reason, we overrule Appellant's first and second issues and need not address his third. *See* TEX. R. APP. P. 47.1.

DISPOSITION

Having overruled Appellant's first and second issues, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered January 24, 2018.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JANUARY 24, 2018

NO. 12-16-00289-CR

RON DEVOR BARRETT,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the County Court at Law No. 2
of Smith County, Texas (Tr.Ct.No. 002-83264-15)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.