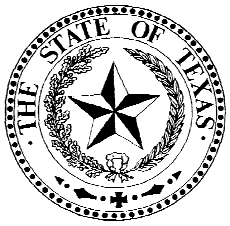
Affirmed and Opinion filed January 17, 2002.



In The

Fourteenth Court of Appeals

NO. 14-01-00255-CR

ALONZO SAMUEL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from 263rd District Court
Harris County, Texas
Trial Court Cause No. 822,123

O P I N I O N

Alonzo Samuel appeals a conviction for manslaughter[1] on the grounds that the trial court erred by failing to instruct the jury on: (1) the use of deadly force in self-defense; (2) the use of deadly force to protect property; (3) the requirement of a voluntary act for criminal culpability; (4) the State's burden of proof on extraneous misconduct admitted at the punishment phase; and (5) good conduct time. We affirm.

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[1] Although appellant was charged with murder, a jury found him guilty of manslaughter and assessed punishment of 16 years confinement and a $10,000 fine.

Use of Deadly Force

Appellant's first issue argues that the trial court erroneously denied his request to charge the jury on the use of deadly force in self-defense because: (1) the court's perception that self-defense is limited to situations of actual danger from the actual complainant was not legally defensible; (2) self-defense is no more inconsistent with appellant's testimony that he did not intend to pull the trigger than the manslaughter charge granted the State; and (3) the court's focus on appellant's use of the term "accident," to the exclusion of all other evidence, removed it from the contexts both of appellant's usage and common understanding. Appellant's second issue similarly contends that the trial court erred in refusing to charge the jury on the use of deadly force to protect property because he was entitled to such a charge in light of his belief that the use of deadly force was necessary to prevent a possible burglary.[2]

A defendant is entitled to an instruction on any properly requested defensive issue that is raised by the evidence, even if the evidence is weak, impeached, and not credible. *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). Conversely, if the evidence, viewed in a favorable light, does not establish the defense, an instruction is not required. *Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). The defendant's own testimony alone can be sufficient to raise a defensive theory requiring a charge. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996).

A person is justified in using deadly force against another if: (1) he would be justified in using non-deadly force;[3] (2) a reasonable person in the actor's situation would not have

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[2] Appellant requested that the charge include self-defense and defense of habitation. The trial court denied both noting, as to the latter, that appellant did not submit any evidence that he was trying to prevent somebody from robbing him or taking his property, thus making his charge request incompatible with his claim that it was an accidental shooting.

[3] A person is justified in using non-deadly force against another where he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. TEX. PEN. CODE ANN. § 9.31 (Vernon Supp. 2002).

retreated; and (3) he reasonably believes the deadly force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of robbery or aggravated robbery. TEX. PEN. CODE ANN. § 9.32(a) (Vernon Supp. 2002). However, the second requirement, concerning retreat, does not apply as against a person who is making an unlawful entry into the habitation of the actor. *Id*. § 9.32(b).

A person is justified in using deadly force against another to protect land or tangible, movable property where he: (1) would be justified in using non-deadly force;[4] (2) reasonably believes the deadly force is immediately necessary to prevent the other's imminent commission of burglary, robbery, or theft or criminal mischief during the nighttime; and (3) reasonably believes that: (A) the land or property cannot be protected by any other means; or (B) the use of non-deadly force would expose the actor or another to a substantial risk of death or serious bodily injury. *Id*. § 9.42 (Vernon 1994). A person has the same right to defend against apparent danger as actual danger, provided that it is a reasonable apprehension of danger as it appeared to him at the time. *Hamel*, 916 S.W.2d at 493.

In this case, under the foregoing authorities, appellant would have been entitled to a charge instruction on use of deadly force only if there was evidence to support a reasonable apprehension on his part that the use of deadly force was necessary to protect himself or his property. The evidence that appellant relies upon to show the justification for his use of deadly force is the following. Appellant stated that burglars had stolen the stereo and VCR from his apartment just a day before the incident (but he had not reported the burglary because he believed that doing so would be useless). On the day of the offense, appellant returned home at 10:40 p.m. Afraid that burglars might have come back to steal more of his

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[4] A person in lawful possession of land or tangible, movable property is justified in using non-deadly force against another where the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property. TEX. PEN. CODE ANN. § 9.41(a) (Vernon 1994).

property, he turned on the lights in the apartment to check for possible intruders. After determining that no one was in the living room and kitchen, he went to his bedroom to get his shotgun and check the rest of the apartment. While appellant was checking the bathroom, he heard the front door open and feared that the burglars had returned. As he was running to the living room, he saw a movement coming directly toward him. Appellant claimed that he and the complainant bumped into each other as he was trying to run out of the apartment and that, *in a reflex reaction*, he then tightened his grip on the gun and it went off.[5] Appellant testified that he definitely did not intend to pull the trigger.

Contrary to appellant's contention, this evidence fails to show any real threat or reasonable apprehension of danger to appellant or his property, let alone a threat warranting the use of deadly force. In his haste upon hearing the front door open, appellant did not call out to the person, look at her from behind a wall or door, or otherwise attempt to determine whether the person in his apartment might actually pose a threat to him or his property.[6] Nor is there any evidence that he even fired the gun deliberately, let alone in response to any real or perceived threat. On the contrary, he testified that his first thought was to run out of the apartment and that he definitely did not intend to fire the weapon at the defendant. Because appellant has, thus, cited no evidence that would warrant an instruction on the use of deadly force in self-defense or to protect property, his first and second issues are overruled.

Voluntary Act

Appellant's third issue asserts that the trial court erroneously failed to charge the jury on the requirement of a voluntary act for criminal culpability because the evidence raised a fact issue concerning the voluntariness of appellant's conduct. Appellant further argues that,

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5 Appellant and the complainant were co-workers who had car pooled to work together. Appellant claimed that he did not know why the complainant had come to his apartment but speculated that she probably came to pay him back $15 she borrowed a week earlier.

6 To the extent that appellant contends the preceding night's burglary gave him justification to shoot anyone who came into his apartment on the night of the incident, we reject that contention.

although his counsel failed to specifically ask for a charge on voluntariness, his request for a charge on justification was sufficient to preserve error as it put the court on notice that he wanted a voluntary conduct charge.

Error relating to a jury charge may be preserved by asserting either an objection or a requested charge. *Vasquez v. State*, 919 S.W.2d 433, 435 (Tex. Crim. App. 1996). Such objections and requested instructions may either be submitted in writing or dictated to the court reporter before the charge is read to the jury[7] and must only be sufficient to apprise the trial court of the objection. *Chapman v. State*, 921 S.W.2d 694, 695 (Tex. Crim. App. 1996).

A person commits a criminal offense only if he engages in the prohibited conduct: (1) voluntarily; *and* (2) with the necessary culpable mental state. *Compare* TEX. PEN. CODE ANN. § 6.01(a) (Vernon 1994) *with id*. § 6.02. Thus, the issue of voluntariness is distinct from that of culpable mental state. *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997). Moreover, unlike culpable mental state, which is an element of the offense to be proved by the State, voluntariness is treated as a defensive issue which must be raised by the evidence and requested by the defendant to warrant an instruction to the jury. *See id*. at 279.

In this case, the trial court provided the proposed jury charge to appellant several days in advance of the charge conference. During the conference, appellant did not refer to section 6.01 or the concept of voluntariness, but nevertheless claims that the following exchange at the charge conference should have alerted the trial court that he was requesting an instruction on the requirement of a voluntary act:

> [Defense Counsel]: I would like to add the defense of justification. There is no culpability at all. That the State has failed to show that he intentionally, knowingly . . . took the shotgun and took the life of Janet Peters.
>
> The Court: What language do you propose?
>
> [Defense Counsel]: At the beginning of the Penal Code–

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[7] TEX. CODE CRIM. PROC. ANN. arts. 36.14, 36.15 (Vernon Supp. 2002).

The Court: Give me some language, counsel.

[Defense Counsel]: Justification, 9.02, justification as a defense. It is a defense to prosecution that the conduct in question is justified under this chapter. The conduct in question is whether or not he intentionally and knowingly shot Mrs. Peters.

The Court: That's what you want the defense to prosecution that the conduct in question is justified under 9.02? You have totally lost the court.

[Defense Counsel]: It says clearly that it is a defense and I would suspect that a jury would be entitled to the case law right here that explains it. That the elements – if the State has failed to prove intent and knowingly that the crime was committed with those two elements by beyond a reasonable doubt, then there is no criminal culpability and it's a civil matter.

The Court: That's denied. The section under 9.02 reflects the various defenses that are available under nine . . . .

[Defense Counsel]: Essentially it is denied if the elements are not proven beyond a reasonable doubt, which is for the fact finder to determine?

The Court: Well, certainly the charge will say they must be convinced beyond a reasonable doubt of the defendant's guilt. What else am I supposed to say? . . . . Well, I'm certainly trying to be amenable to you, sir, but I don't see what you are asking for.

[Defense Counsel]: I am asking for a charge that is drafted that says that there is no criminal culpability and therefore he's not guilty.

The Court: That sounds like a directed verdict to me.

[Defense Counsel]: If he doesn't – if the State does not – fails to prove its burden beyond a reasonable doubt.

Because: (1) the requirement of voluntary conduct is distinct from that of culpable mental state or the defense of justification, and (2) defense counsel's comments pertained, at most, to justification and culpable mental state, and not to voluntary conduct, the above exchange

did not fairly apprise the trial court of any request for an instruction on voluntariness, and thus preserved no complaint regarding the exclusion of such an instruction.

Appellant nevertheless contends that even if he failed to preserve this complaint, the exclusion of an instruction on voluntary conduct so egregiously harmed him as to require reversal. However, the egregious harm standard does not apply to a trial court's failure to submit *defensive* instructions. *Posey v. State*, 966 S.W.2d 57, 60-64 (Tex. Crim. App. 1998). Because appellant failed to request an instruction on the requirement of a voluntary act, his third issue is overruled.

Extraneous Misconduct

Appellant's fourth issue argues that the trial court erred in not instructing the jury on the State's burden of proof regarding extraneous misconduct admitted at the punishment phase because it is the court's duty to give such an instruction regardless of whether it is requested by either side. Appellant contends that the failure to include this instruction was harmful in that it bolstered the State's insinuations that he had intended to kill the complainant because of some ripple in their relationship.

When reviewing charge errors, we must determine, first, whether error actually exists in the charge, and, second, whether sufficient harm resulted from the error to require reversal. *Hutch v. State*, 922 S.W.2d 166, 170-71 (Tex. Crim. App. 1996). Before evidence of extraneous misconduct may be considered in assessing punishment, the misconduct must be proved beyond a reasonable doubt. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (Vernon Supp. 2002); *see also Huizar v. State*, 12 S.W.3d 479, 483-84 (Tex. Crim. App. 2000). As appellant correctly points out, a trial court is required to *sua sponte* instruct the jury on this burden of proof. *See Huizar*, 12 S.W.3d at 483-84. Thus, the trial court's failure to give such an instruction, even though not requested, was error. *See id*.

However, because appellant failed to object to this error, he must show that it caused him to suffer egregious harm in order to secure a reversal on this ground. *See Mann v. State*, 964 S.W.2d 639, 641 (Tex. Crim. App. 1998). "Egregious harm" exists when the error was

so harmful as to deny the defendant "a fair and impartial trial." TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981); *Barrera v. State*, 982 S.W.2d 415, 417 (Tex. Crim. App. 1998). To determine whether appellant suffered egregious harm, the error must be viewed in light of the entire jury charge, state of the evidence, argument of counsel, and any other relevant information revealed by the record as a whole. *Mann*, 964 S.W.2d at 641.[8] Any harm suffered must be actual and not merely theoretical. *Dickey v. State*, 22 S.W.2d 490, 492 (Tex. Crim. App. 1999).

In this case, the record reveals conflicting testimony regarding the extraneous offenses. Taneka Leassear, appellant's ex-girlfriend, testified that appellant struck her twice in the face with his fist during an argument at her house. Because appellant refused to leave,

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[8] *Compare Allen v. State*, 47 S.W.3d 47, 51-53 (Tex. App.—Fort Worth 2001, pet. ref'd) (holding that appellant was not egregiously harmed by the trial court's failure to instruct on reasonable doubt at punishment stage because there was enough evidence at the guilt stage of trial to support appellant's sentence as well as clear-cut evidence that appellant committed the extraneous offenses and the jury's sentence was within the punishment range for attempted murder), *Brown v. State*, 45 S.W.3d 228, 231-32 (Tex. App.—Fort Worth 2001, pet. ref'd) (finding that appellant was not egregiously harmed by the trial court's failure to give a reasonable doubt instruction because there was little doubt of appellant's connection with most extraneous offenses and the jury gave appellant probation for one offense and assessed punishment at the low end for his other offense), *Huizar v. State*, 29 S.W.3d 249, 251 (Tex. App.—San Antonio 2001, pet. ref'd) (reasoning that appellant did not suffer egregious harm because the sentence imposed was within the range of punishment), *Arnold v. State*, 7 S.W.3d 832, 835 (Tex. App.—Eastland 1999, pet. ref'd) (holding that appellant was not egregiously harmed by court's failure to instruct because the record reveals that appellant pleaded guilty to all four offenses committed, the victim testified to two extraneous offenses, the punishments assessed were at the lower end of the range, and appellant did not contend that the evidence was insufficient to prove beyond a reasonable doubt that he committed the extraneous offenses, but only that the instruction was not given), *Gholson v. State*, 5 S.W.3d 266, 271 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (reasoning that appellant did not show egregious harm because the jury had a proper instruction on reasonable doubt regarding unadjudicated acts at the guilt stage and the punishment charge was given to the jury on the same day as the guilt charge, the State proved the extraneous offenses with uncontroverted evidence, appellant did not contend on appeal that if a proper instruction had been given, the evidence was insufficient to prove beyond a reasonable doubt he committed the extraneous offense, nor did appellant submit evidence that, if he had requested the reasonable doubt instruction, the jury would have disregarded the extraneous offense evidence), *and Fails v. State*, 999 S.W.2d 144, 148 (Tex. App.—Dallas 1999, pet. ref'd) (finding that appellant was not egregiously harmed because, although he denied hitting the victim, he admitted to pleading guilty to the probated extraneous offense), *with Ellison v. State*, 51 S.W.3d 393, 397 (Tex. App.—Texarkana 2001, pet.) (holding that appellant was egregiously harmed because his sentence could have been substantially affected by evidence that he committed hate crimes).

she called the police at that time. On another occasion, Leassear claimed that appellant hit her in the face while she was sitting in her boyfriend's car outside a club. Appellant disputed hitting Leassear during the argument at her house but claimed that it was her who attacked him and that he merely pushed her away. Appellant also denied ever hitting Leassear at the club but testified that they were involved in an argument and that Leassear actually struck him with the car door.

Appellant does not argue that the evidence of his extraneous misconduct was either insufficient to prove it beyond a reasonable doubt, lacking in credibility, or materially impeached. Nor has appellant set forth authority, evidence, reasoning, or other considerations suggesting that, if a reasonable doubt instruction had been given, the jury would likely have disregarded the extraneous offense evidence or otherwise imposed a lighter sentence.[9] To the extent the jury merely found his testimony more credible than that of Leassear, no reasonable doubt instruction would seemingly have been necessary to cause the jury to weigh the evidence and decide punishment accordingly. Moreover, although appellant complains that the evidence bolstered the State's insinuations that he had intended to kill the complainant, any such bolstering would not render the error harmful unless the evidence had not been proved beyond a reasonable doubt. Because appellant has thus failed to demonstrate that he suffered egregious harm as a result of the trial court's failure to instruct the jury on the State's burden at the punishment phase to prove extraneous misconduct beyond a reasonable doubt, his fourth issue is overruled.

Good Conduct Time

Appellant's fifth issue contends that the trial court's failure to instruct the jury on good conduct time in accordance with article 37.07, section 4(a) of the Texas Code of Criminal Procedure deprived him of due process and due course of law. Appellant further claims that this omission caused him egregious harm because it deprived him of the exact

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[9] The maximum period of confinement for appellant's offense was 20 years. TEX. PEN. CODE ANN. § 12.33 (Vernon 1994). The confinement imposed in this case was 16 years.

guidance the Legislature sought to provide by enacting article 37.07, section 4(a) in an effort to prevent juries from resorting to completely unfounded speculation about how much time a defendant would actually serve based upon the punishment the jury assessed.

It is mandatory that a trial court charge the jury with the statutory good conduct time and parole instruction provided in Article 37.07, section 4(a) of the Texas Code of Criminal Procedure.[10] In this case, the trial court altered the statutory language by deleting the portions pertaining to good conduct time because it is not applicable to appellant's offense.[11] However, as in the preceding point of error, because appellant failed to object at trial to the charge error, it is reversible only if appellant can show that it caused him egregious harm. *Mann*, 964 S.W.2d at 641. Again, any such harm must be real rather than merely theoretical. *Dickey*, 22 S.W.2d at 492.

The harm that appellant asserts in this issue is purely theoretical and fails to suggest why a jury might actually impose a greater sentence due to the lack of an instruction.[12]

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10 TEX. CODE CRIM. PROC. ANN. art. 37.07, § 4(a) (Vernon Supp. 2002); *Donoho v. State*, 39 S.W.3d 324, 331 (Tex. App.—Fort Worth 2001, pet. filed); *Hill v. State*, 30 S.W.3d 505, 507 (Tex. App.—Texarkana 2000, no pet.); *Hyde v. State*, 970 S.W.2d 81, 89 (Tex. App.—Austin 1998, pet. ref'd).

11 *See Jimenez v. State*, 992 S.W.2d 633 (Tex. App.—Houston [1st Dist.] 1999) (holding that good conduct time instruction required by article 37.07 is unconstitutional as applied to an offense for which good conduct time is not applicable but did not cause egregious harm), *aff'd on other grounds*, 32 S.W.3d 233 (Tex. Crim. App. 2000).

12 A failure to instruct the jury on parole or good conduct time would intuitively seem to have no adverse affect but, if anything, would operate to a defendant's advantage in preventing a jury from imposing a greater sentence to offset the effect of possible parole or good conduct time. One court has nevertheless held that the omission of a parole instruction could be harmful to a defendant in that, if it were given, it might influence jurors to assess less time if they learned from the instruction that the defendant would serve longer than they expected before being eligible for parole. *See Myres v. State*, 866 S.W.2d 673, 674 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). However, in the absence of a parole instruction, the jury would have no basis for considering parole at all, and would thus have to shorten the entire sentence to the time it wanted the defendant to actually serve rather than imposing a longer sentence to allow for reduction by parole if the instruction were given.

Because appellant's fifth issue thus fails to demonstrate egregious harm, it is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed January 17, 2002.

Panel consists of Justices Yates, Edelman, and Wittig.[13]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[13] Senior Justice Don Wittig sitting by assignment.