Affirmed and Opinion filed February 10, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00993-CR

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KELLY ARTHUR SMITH, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the County Court at Law no. 2
Fort Bend County, Texas
Trial Court Cause No. 72,875

O P I N I O N

A jury convicted Kelly Arthur Smith, appellant, of assault. The trial court assessed his sentence at 180 days in jail, probated for one year, and a $400 fine. In one point of error appellant contends the trial court erred in not granting his request for an instructed verdict based on self-defense. We affirm.

The standard of review applicable to a motion for directed verdict is the same as that used in reviewing the sufficiency of the evidence. *Havard v. State*, 800 S.W.2d 195, 199 (Tex. Crim. App. 1989). A complaint that the trial court erred in overruling a motion for directed verdict is treated as an attack on the sufficiency of the evidence to sustain the

conviction. *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993) (quoting *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990)).

Because appellant did not testify, and because there were no other witnesses to the start of the encounter, we have only Savelli's testimony to guide us. Savelli testified that the confrontation started at a store about a mile from his house, when Smith and his twin brother "came running up and hollering things" at him in the parking lot. Savelli drove past the pair, who then got in their car and chased him to the driveway in front of his parents' house. The two blocked him in with their vehicle; and one walked up to the driver's side door while the other stood at the end of the driveway. Savelli said he grabbed a jack handle, got out of his pickup truck, and told the pair to leave and that they were tresspassing. He said one brother backed up, but the other brother rushed at him with fist cocked, so he hit that brother with the jack handle. At that point, he said, both brothers jumped on him and started beating and kicking him. The attack stopped only when a neighbor with a pistol ordered them to leave. Appellant was clearly the aggressor from the grocery store until after Savelli was beaten. There is no evidence that appellant acted in self-defense.

A person is justified in using force against another when he reasonably believes the force is immediately necessary to protect himself against the other's use of unlawful force. TEX. PEN. CODE ANN. § 9.31(a) (Vernon Supp. 2000). However, the use of force against another is not justified if the actor provoked the use of force, unless the actor clearly communicates his intent to abandon the encounter and the other persists in the use of unlawful force. *Id.* at § 9.31(b)(4).

In order for an appellate court to hold that self-defense was established as a matter of law, the testimony must be uncontradicted, with no issue for the fact finder's determination. *Whitfield v. State*, 492 S.W.2d 502, 504 (Tex. Crim. App. 1973); *Williams v. State*, 710 S.W.2d 828, 829 (Tex. App.–Dallas 1986, pet. ref'd). We ask first whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; then we ask whether any rational trier of fact could have found at least one of the essential elements

of self-defense disproved beyond a reasonable doubt. *Collins v. State*, 754 S.W.2d 818, 821 (Tex. App.–Houston [1st Dist.] 1988, pet. ref'd). We view the evidence in the light most favorable to the verdict. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The sufficiency of the evidence is measured against the offense defined by a hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App.1997). Such a charge would include one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restricts the State's theories of liability, and adequately describes the particular offense for which the defendant is tried." *Id*. The jury was charged on self-defense but was not instructed on the theory of provoking the difficulty.

Examining the verdict in the light most favorable to the verdict, we find that a rational jury could have found that appellant provoked the use of force and did not clearly communicate his intent to abandon the encounter. The jury is, after all, the ultimate authority on the credibility of witnesses and the weight to be given to their testimony. See TEX. CODE CRIM. PROC. ANN. Art. 38.04 (Vernon 1979); *Penagraph v. State*, 623 S.W.2d 341, 343 (Tex. Crim. App. [panel op.] 1981). We overrule Smith's point of error and affirm the judgment of the trial court.

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Ross A. Sears
Justice

Judgment rendered and Opinion filed February 10, 2000.
Panel consists of Justices Robertson, Sears, and Cannon.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, Bill Cannon sitting by assignment.