Reversed and Remanded and Majority and Dissenting Opinions filed August 10, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00070-CR

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ROBERT D. LAVERN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 774,597

M A J O R I T Y O P I N I O N

We once again address whether or not the record raises some evidence of self defense in an aggravated assault case. Robert D. Lavern appeals his conviction for aggravated assault of an undercover police officer. The plain clothed officer purchased $20 worth of drugs from appellant. A gunfight ensued in which first appellant was wounded then the undercover officer and his companion were also wounded. Appellant also raises a legal sufficiency and a factual sufficiency issue. We affirm on the sufficiency issues. We reverse and remand for the unwarranted refusal to submit to the jury the requested defensive issue of self defense.

Facts

Officer Ralph Chaison approached appellant waving $20. Chaison purchased two rocks of crack cocaine from him. Appellant and a male companion were standing on private property inside the security gates of a Houston apartment complex when Chaison and fellow Houston Police Officer Vonda Higgins arrived to conduct an undercover narcotics "buy-walk." The officers' intent was to make drug buys, investigate and infiltrate drug operations. The officers completely concealed their identities, wore plain clothes, and arrived in an unmarked Dodge pickup. Higgins remained in the vehicle.

After the drug buy, as Chaison walked away, appellant told him to put the crack in his mouth, questioning whether Chaison was police. Chaison told appellant he wasn't a police officer. The two men argued briefly whether Chaison was an officer. Chaison told appellant at least two times he was not police and that the drugs were for his companion in the truck. According to Chaison, appellant then stated, "you're the law and I'm not afraid of the law." Appellant is said to have lifted up his jacket which allowed Chaison to see a pistol in appellant's waistband. The two men were then between five and ten feet apart. Chaison said that he pulled his gun and fired in one smooth motion wounding appellant. At another point in the record, Chaison testified he went for his pistol at the same time appellant went for his and but appellant's pistol got hung up on his shirt. Another variation had Chaison firing when appellant's pistol cleared his waistband. Chaison also stated that he shot appellant in the leg with his first volley. Appellant then dropped to the ground and retreated, crawling behind a car. Chaison stated it was not until then, when appellant was wounded, that he was certain appellant first returned fire.

Self-Defense

Appellant contends that the trial court erred by refusing to charge the jury on self-defense. A defendant is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *See* TEX. PEN. CODE ANN. § 9.31. The force used by

a defendant must be reasonable as contemplated from the defendant's point of view. *See Hudson v. State*, 956 S.W.2d 103, 105 (Tex. App.–Tyler 1997, no pet.). A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence be strong, feeble, unimpeached, or contradicted. *See Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). The weight of the evidence supporting a defensive charge is immaterial. *See Woodfox v. State*, 742 S.W.2d 408, 410 (Tex. Crim. App. 1987). The defendant need not testify in order for the evidence to support a defensive charge. *Id.*

We agree that there was some evidence raising the issue of self-defense. The offense alleged in the indictment stated, in part, that appellant shot in the direction of complainant. During cross-examination, appellant elicited testimony from Chaison indicating that Chaison pulled his gun first, that he fired first, and that appellant did not return fire until after he was shot by Chaison and had retreated behind a car. Thus, there is evidence in the record that the charged offense did not occur until after Chaison shot appellant in the leg and that appellant had fallen to the ground and retreated. In light of the requirement that we view the evidence from appellant's point of view at the time of the offense, we hold the jury could find that appellant reasonably believed the force he used was immediately necessary to protect himself against the use or attempted use of unlawful force when he returned Chaison's fire. This is so even if appellant suspected or believed appellant was an officer. From appellant's point of view (or from the perspective of a disinterested bystander), there was evidence that appellant was protecting himself against the use or attempted use of deadly force or greater force than necessary. Chaison was attempting a drug buy, not an arrest, although sometime during the melee he states he recanted and yelled he was a policeman after all. Unfortunately, this was only after shots had been first fired. In other words, the police played the role of drug buyers until so late in the episode that gunfire had already been initiated by the police.

The State argues that appellant was not entitled to a self-defense issue because, as a matter of law: (1) appellant provoked Chaison; (2) appellant was the aggressor; and (3) appellant could not have reasonably believed Chaison was using unlawful deadly force. *See* TEX. PEN. CODE ANN. § 9.31(b)(4). We disagree these points were conclusively established.

First, the State did not conclusively prove appellant provoked Chaison. The question of whether a defendant's acts were reasonably calculated to cause an attack by the victim so as to trigger the provocation doctrine is ordinarily a question of fact for the jury. *See Smith v. State,* 965 S.W.2d 509, 517 (Tex. Crim. App. 1998). The rule of law is that if the defendant provoked another to make an attack on him so that the defendant would have a pretext for killing the other under the guise of self-defense, the defendant forfeits his right of self-defense. *Id*. Here, appellant's intent to provoke Chaison was not established as a matter of law. The events giving rise to appellant's gunfire unfolded very rapidly out of an argument between two men whose paths had just crossed for the first time moments before Appellant did not know Chaison from Adam, had not met or spoken until seconds before. Therefore, at best, there was a fact issue whether appellant had any premeditated intent to provoke Chaison into firing at him. Appellant's acts may have entitled the State to a charge on "provoking the difficulty" in response to defendant's self-defense issue, but it did not as a matter of law preclude the self-defense issue. The State's cases of *Coble v. State,* 871 S.W.2d 192 (Tex. Crim. App. 1993), and *Dyson v. State,* 672 S.W.2d 460 (Tex. Crim. App. 1984) are not in point. In both cases, the court of criminal appeals held self-defense was precluded as a matter of law because the undisputed evidence showed the defendants had a premeditated intent to kill or provoke confrontation with the victim. *See Coble,* 871 S.W.2d at 202; *Dyson,* 672 S.W.2d at 463-64. To all appearances this was a not a drug bust, but rather an ordinary drug buy. The officer portrayed himself as a drug user, not a law abiding citizen. In conducting the drug buy Chaison testified unequivocally he only sought information, not an arrest. Chaison initiated the contact, the purchase, then continuously and vehemently denied he was a police officer.

There was also some evidence appellant was not the aggressor. As discussed, Chaison himself provided testimony that he fired at appellant first, wounded him, and that appellant did not return fire until after he had retreated behind the car. Thus, a reasonable jury could find that appellant was not the aggressor at the time he returned fire. For the same reasons, there was some evidence that, viewed from his perspective, appellant could have reasonably believed

Chaison was using more force than necessary in the encounter. We therefore hold that there was some evidence to require a self-defense issue.

The dissent reasons that there was insufficient evidence for a jury to conclude that the force being used against appellant was unlawful, thus he was not entitled to a self-defense charge. However, we note that the relevant consideration is not whether the force used against appellant was, in fact, lawful, but whether there was some evidence the appellant reasonably believed it was unlawful. *See Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App. 1980) (question not whether there is any evidence that complainant's use of force unlawful; appellant entitled to self-defense instruction if any evidence he reasonably believed that complainant's use of force unlawful). Additionally, despite the requirement we view the evidence in the light most favorable to the appellant, the dissent nonetheless goes on to analyze much of the evidence in a manner inconsistent with this standard. For instance, the dissent views the evidence in the light most favorable to the State by incorrectly assuming, as a matter of law, that appellant heard Chaison identify himself as a police officer. It implicitly makes this conclusion even though Chaison admitted at trial that the gunfire was "so very loud" and the two men were separated by a significant distance after they both retreated. Unequivocally, the record reveals the police identification came after Chaison had fired at appellant and appellant returned fire which hence seriously undermines the materiality of the dissent's appraisal.

We also note that the dissent emphasizes the moment at which appellant initially revealed his weapon. However, the evidence viewed in the light most favorable to appellant would indicate that appellant did not fire his weapon, and thus did not commit the offense, until after he had been shot and had retreated behind the car. Even though we believe appellant was unjustified in initially showing his weapon, appellant was not necessarily barred as a matter of law from defending himself in light of the events subsequent to his showing his gun. While the appellant hardly presents a sympathetic figure,[1] in this context we are nonetheless mandated

[1] Like the dissent, we deplore the grievous and paralyzing injury sustained by Officer Higgins. Every day, hundreds of brave and dedicated officers and deputies risk their lives and limbs. These outstanding (continued...)

to view the evidence in the light most favorable to him. And if we do so by detached application of the required principles, we believe we have no choice but to conclude he was improperly denied a self-defense charge.

Because appellant properly objected to the absence of self-defense in the charge, reversal is required if the error was calculated to injure the rights of the defendant. *See Hamel v. State*, 916 S.W.2d 491, 494 (Tex. Crim. App. 1996); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) Appellant was positively implicated as the shooter at trial. Because of this, the failure to include self-defense foreclosed appellant's only chance of an acquittal. We therefore conclude the trial court's error was calculated to injure appellant's rights. We sustain appellant's self-defense issue.

Legal Sufficiency

Appellant argues that the evidence was legally insufficient evidence to prove that he knew appellant was a police officer. In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict to determine if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A legal sufficiency review is in sharp contrast to the significantly lower level of evidence requiring a jury instruction. The evidence at trial showed appellant himself accused Chaison of being "the law." There was also evidence from Chaison and two bystander witnesses that Chaison shouted he was a police officer several times during the gunfight. Though it was not conclusively established that appellant heard Chaison, this and appellant's own words provided legally sufficient evidence for a rational jury to conclude beyond a reasonable doubt that appellant knew Chaison was a police officer. We therefore overrule appellant's legal sufficiency issue.

Because we find the trial court committed reversible error by failing to include a self-defense issue, we need not address appellant's remaining issues. *See* TEX. R. APP. P. 47.1.

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[1] (...continued)
people fight crime on our behalf and ultimately to uphold the rule of law.

The judgment of the trial court is reversed and remanded for a new trial.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed August 10, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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

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D I S S E N T I N G O P I N I O N

Section 9.31 of the Texas Penal Code provides that a person is "justified in using force against another when and to the degree 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. 2000) (emphasis added). Because there is no evidence suggesting appellant responded to, or believed he was responding to, the use of *unlawful* force, he was not authorized to use deadly force in his own defense. For this reason, I respectfully dissent.

A defendant is entitled to an instruction on any properly requested defensive issue raised by the evidence, regardless whether the evidence is weak or strong, unimpeached or contradicted, or credible or not credible. *See Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999); *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). The issue before us, therefore, is whether the evidence, viewed in the light most favorable to appellant, is sufficient to raise the issue of self-defense. *See Preston v. State*, 756 S.W.2d 22, 24 (Tex. App.–Houston [14th Dist.] 1988, pet. ref'd).

Here, the only evidence regarding the shootout came from the State's witnesses. While a non-testifying defendant may be entitled to a charge on self-defense, it is rare for the defense to be raised when the defendant fails to testify. *See Alaniz v. State*, 865 S.W.2d 529, 532 (Tex. App.–Corpus Christi 1993, no pet.).

Officer Chaison testified the transaction initially seemed like an ordinary undercover narcotics transaction. Separated by a wrought iron fence at an apartment complex, Chaison purchased two rocks of crack cocaine from appellant. As Chaison attempted to turn and walk away, appellant said, "Hey, put it in your mouth." Appellant repeated the demand and added, "If you're not the police, put it in your mouth." Chaison replied, "Don't put that jacket on me," and explained that the cocaine was for the girl (Officer Higgins) who was waiting in his truck. Appellant then said, "You're the law and I'm not afraid of the law."

As the two men stared at each other, appellant reached down and pulled up his jacket, revealing an automatic pistol in his waistband. Chaison testified that after twenty years of police experience, including four shootouts, he had no doubt that appellant was going to shoot him based upon his statements, actions, and demeanor. Chaison then drew a concealed handgun as appellant attempted to draw his own weapon. Fortunately, appellant's weapon became entangled in his clothing, allowing Chaison to clear his weapon first. After appellant cleared his waistband, but before he was able to point the muzzle of his weapon at Chaison,

Chaison opened fire, striking appellant in the leg. Appellant also fired and took cover behind a parked car while Chaison retreated behind a small tree.

An extended gun battle then ensued with appellant firing two round bursts from beneath the automobile. To conserve ammunition, Chaison attempted to return one round for every two fired by appellant. Chaison yelled to a bystander standing near appellant that he was a police officer and ordered him to get on the ground. The bystander obeyed the command and remained on the ground throughout the shootout. Chaison identified himself at least three times as a police officer. Appellant, however, continued to fire in two round bursts.

During this time, Chaison also yelled to his partner, Officer Higgins, instructing her to call for additional police units. Shortly thereafter, when Higgins attempted to come to the aid of her partner, appellant shot her in the neck, paralyzing her for life. As appellant hobbled across an open driveway, Chaison held his fire, purposely allowing him to escape so he could attend to Higgins.

The majority asserts three arguments in support of a self-defense charge: (1) Chaison pulled his gun first; (2) Chaison fired his gun first; and (3) appellant did not return fire until after he was shot by Chaison. However, it is undisputed that appellant was the aggressor.

First, the uncontroverted evidence shows *appellant was the first person to display a weapon*. While Chaison may have cleared his weapon before appellant, this simply shows Chaison was faster, more experienced, or luckier than appellant. A person has the right to defend from apparent danger to the same extent as he would have had the danger been real, provided he acted upon reasonable apprehension of danger as it appeared to him at the time. *See Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). Moreover, Chaison's apprehension that he was about to be shot was justified. Appellant had just committed a felony offense by selling him cocaine. Appellant at first suspected and then announced that Chaison was a police officer. Appellant articulated his disdain for the police and ominously

displayed a handgun. Thus, Chaison's drawing of his own weapon was both a reasonable and lawful response to appellant's unlawful threat of deadly force.

Second, while Chaison may have fired first, he was not required to wait until appellant had begun firing before protecting himself. *See Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). The record simply shows that while Chaison's response was lawful and quick, appellant's ill-conceived action was both unlawful and lagging. It is undisputed that Chaison did not fire until appellant's weapon had cleared his waistband. Believing it was immediately necessary to protect himself from appellant's attempted use of unlawful deadly force, Chaison was entitled to respond with deadly force. *See* TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2000). Thus, while Chaison may have fired the first shot, he was completely within his rights to strike the first blow. *See Sheppard v. State*, 545 S.W.2d 816, 819 (Tex. Crim. App. 1977). Appellant, on the other hand, had no right of self defense because there is no right to self-defense where the force used by another is lawful. *See Johnson v. State*, 715 S.W.2d 402, 407-08 (Tex. App.–Houston [1st Dist.] 1986, pet. ref'd).

Third, while appellant may have been hit before he fired, the undisputed evidence shows that after both men had taken cover appellant continued firing, even *after* Chaison identified himself at least three times as a police officer and *after* he had yelled to his partner to summon other units. Thus, even after appellant's position behind the automobile was relatively secure, he continued to employ deadly force against Chaison and Higgins. In fact, he never abandoned his use of deadly force until Higgins had been tragically wounded.

A defendant is not entitled to a charge on self-defense where there is no dispute that he provoked the other's use or attempted use of force. *See Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). The majority mistakenly holds that a jury could find appellant reasonably believed the force he used was immediately necessary to protect himself against the use or attempted use of unlawful force when he returned Chaison's fire. There is simply no evidence to support such a holding.

I would find the trial court did not err in refusing appellant's requested instruction on self-defense and, thus, must respectfully dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority and Dissenting Opinions filed August 10, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).