Affirmed and Opinion filed August 23, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00417-CR

KIRK HOGUE, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 790,458

O P I N I O N

Appellant, Kirk Hogue, approached police officers asking whether he could kill someone in response to a verbal death threat. Less than an hour later, appellant fatally shot complainant, Ricky Don Gilbreath, in response to Gilbreath's angry shove and – according to appellant – Gilbreath's attempt to choke him. A jury convicted appellant of murder and assessed punishment at sixty years' confinement. Appellant contends the trial court erred in entering judgment because (1) the evidence is legally and factually insufficient to support the verdict; specifically the State failed to disprove self-defense; (2) the prosecutor made an improper argument about the application of parole to the

assessment of punishment during closing arguments; and (3) the court gave an incorrect and misleading instruction regarding apparent danger. We affirm.

Background

This case centers on two men who clashed over their relationships involving three women. Complainant and Glenda Harvey cohabited together. Prior to their relationship, Harvey lived with appellant. After appellant and Harvey separated, he moved in with Harvey's next-door neighbor, Patti Clawson. Shortly after, appellant reconciled and moved in with his ex-wife, but regularly visited Clawson and Harvey. Because complainant believed that appellant was trying to break up his relationship with Harvey, the two men began arguing. Complainant told appellant's ex-wife that he believed appellant and Harvey were continuing a romantic relationship. In response, appellant's ex-wife told appellant to move out of her house. The tensions further escalated between appellant and complainant. According to Clawson and appellant, complainant repeatedly threatened to shoot and kill the appellant, attempted to run them off the road, and yelled threats to appellant in the middle of the night. Because of the threats, Clawson borrowed a pistol from her father.

On the day of the shooting, appellant stopped at a convenience store, approached two police officers and asked them if he could legally shoot someone that had verbally threatened to kill him. The officers responded that threats alone did not justify shooting someone. Appellant also called Clawson from the convenience store and told her to bring the pistol to him when he arrived at her house. Shortly later, appellant arrived at Clawson's house. As appellant waited outside, Clawson brought the pistol to appellant. Appellant hid it under some cords and hoses in the bed of the truck. He then sat on the tailgate and started doing paperwork for his business.

After noticing appellant in Clawson's driveway, complainant immediately confronted appellant. According to appellant, complainant pushed him in the chest, then grabbed him by the throat and shoved him down in the back of the truck. Appellant

pushed complainant away, slipped his arm to where the gun was hidden and put the gun in his back pocket. After appellant told him to go home, complainant lunged at him. Appellant then stepped back, pulled out the gun and fatally shot complainant in the chest.

According to eyewitnesses Don and Jodi Rogers, who were friends of complainant, complainant did not choke appellant, but only pushed him before appellant fired.

Legal Sufficiency

Appellant concedes the State's evidence established the essential elements of murder beyond a reasonable doubt. Nevertheless, he claims the evidence was legally insufficient to support a finding against his self-defense claim beyond a reasonable doubt. Self-defense is a justification for otherwise unlawful conduct. *Giesberg v. State,* 984 S.W.2d 245, 249 (Tex. Crim. App. 1998), *cert. denied*, 525 U.S. 1147 (1999). 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." TEX. PEN. CODE ANN. § 9.31 (Vernon Supp. 2000). A person has the right to defend against apparent danger to the same extent as if the danger was real. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996); *Torres v. State*, 7 S.W.3d 714 7 S.W.3d 712, 714 (Tex. App.—Houston [14th Dist.] 1999, pet.). The reasonableness of the defendant's belief that unlawful deadly force is being exerted against him must be judged from the defendant's standpoint at the instant he responds to the attack. *Bennett v. State*, 726 S.W.2d 32, 37 (Tex. Crim. App. 1986).

The State bears a burden of persuasion, and not a burden to produce evidence to affirmatively refute a defensive issue. *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). The issue of self-defense is a fact issue to be determined by the jury. *Id*. "A jury verdict of guilty is an implicit finding rejecting the defendant's self-defense theory." *Id.* In reviewing the legal sufficiency of the evidence where a defensive issue is raised, an appellate court views all evidence in the light must favorable to the prosecution and determines whether any rational trier of fact would have found the essential elements of

the offense beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt. *Id.; Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

In this case, appellant would have been justified in using deadly force against complainant (1) if appellant was justified in using force; (2) if a reasonable person in appellant's situation would not have retreated; and (3) when and to the degree he reasonably believed the deadly force was immediately necessary to protect himself against complainant's use or attempted use of unlawful deadly force. TEX. PEN. CODE ANN. § 9.32(a) (Vernon Supp. 2000).

In making his self-defense claim, appellant focuses on complainant's alleged threats and violent acts leading up to the deadly confrontation, as well as complainant's acts during the confrontation. Appellant contends he reasonably believed that complainant was attempting to use unlawful force against him based on complainant's increasing aggression toward him the week before the shooting. Appellant claims on the day of the shooting, complainant's aggression escalated to shoving and choking. According to appellant's trial testimony, the following events transpired immediately before the shooting. Complainant walked directly to appellant, who was sitting on the tailgate of his truck, parked in front of Clawson's house. Appellant stood up and said, "What's going on, Rick?" Complainant started to elaborate on how appellant messed up his life and told appellant to sit down. Appellant refused and complainant commanded him to sit again. Complainant grabbed appellant by the throat and shoved him down in the back of the truck. Appellant pushed complainant away, slipped his arm to where he had hidden the pistol and put it in his back pocket. Appellant stood up and complainant backed away a little bit on the curb. Appellant held out his hand and told complainant to stay away and then to go home but complainant lunged at him. Appellant could not see complainant's hands and he thought complainant was going to shoot him so he fired the pistol at complainant. Appellant maintains when it became apparent that complainant was beyond reason and was about to attack him again, he shot complainant once, to defend himself

against what he reasonably believed to be immediate danger.

These are, of course, material considerations, but they do not tell the whole story. Militating against appellant's claim of lawful self-defense is the "rest of the story."[1]

Appellant approached police officers asking if he could kill a person in response to a verbal threat. The officers said no. Less than an hour later, appellant placed himself outside with a weapon near complainant's house and shot complainant. Appellant's testimony reflects that just before shooting complainant, he had fought off complainant's attack and had recovered from an alleged choking to the degree that he was able to stand face to face with complainant and to ask complainant to back off. Complainant had never confronted appellant with a weapon, yet, when complainant lunged at him, appellant thought he might have a weapon, so he shot him. Appellant testified at trial that he thought complainant was armed, but conceded that he did not tell that to police in his original statement. Although appellant's original statement indicated that complainant threw him over the truck, placed his hands around appellant's neck and choked him, appellant also conceded at trial that complainant did not throw him over the truck and did not choke him for more than a split second. Appellant also conceded that his original statement indicated that he picked up the pistol from the back of the truck and placed it in his right back pocket as he stood up when complainant initially approached him. Appellant claims this account in his original statement was a misstatement that he failed to correct. Finally, Clawson conceded she told police in her sworn statement that when appellant walked away with the weapon, he remarked "Rick has f--ked up my whole family and marriage."

In light of the evidence, the jury could conclude that (1) appellant was not truthful at trial about his state of mind and about material events, such as his assertion that complainant choked him; (2) by approaching the officers about the permissible use of deadly force, appellant was planning a confrontation with complainant that presupposed the use of deadly force; (3) although appellant was within his rights to sit outside on the

[1] Saying attributable to the venerable radio commentator, Paul Harvey.

tailgate of his pickup, his actions demonstrated he was not truly in fear of complainant, but that he was setting up a confrontation in which he alone would be armed; (4) appellant did not reasonably believe that shooting complainant in the chest was immediately necessary to protect himself against complainant's use of force, nor, for that matter, that complainant's acts amounted to the use or attempted use of deadly force. Accordingly, we find the evidence is legally sufficient to support the jury's finding that appellant was not justified in using deadly force against complainant. This issue is overruled.

Factual Sufficiency

Appellant also contends the evidence is factually insufficient to support the jury's verdict. Specifically, appellant maintains that no one observed the entire struggle between appellant and complainant; consequently, the State had no direct evidence that appellant did not act in self-defense. Appellant also claims the jury should have inferred from his conversation with police minutes before the shooting that he was only trying to determine how he could legally defend himself. Based on this, appellant argues, the jury's rejection of his self-defense claim was contrary to the overwhelming weight of the evidence.

Self-defense is subject to a factual sufficiency review. *Tucker v. State*, 15 S.W.3d 229, 235 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). In conducting a factual sufficiency review, we consider whether a neutral review of all the evidence, both for and against the finding that appellant did not act in self-defense, demonstrates that the proof that he did not act in self-defense is so obviously weak as to undermine confidence in the jury's determination, or the proof that he did not act in self-defense, although adequate if taken alone, is greatly outweighed by contrary proof. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

Don Rogers testified at trial that complainant did not choke appellant. However, appellant states this witness testified on cross-examination that he was not paying attention to his wife during the altercation, but that when the shot was fired, his daughter was in his wife's arms. Because Jodi Rogers, Don's wife, testified that she had just picked up their

daughter from the vehicle when she saw appellant shoot complainant, appellant argues the jury should have inferred that Don turned his attention away from the men to look at his wife and their daughter and therefore, did not see the entire altercation. Without an eyewitness account of the altercation, appellant contends, the State had no direct evidence of whether appellant shot complainant in self-defense. We disagree.

While the jury was free to disbelieve Don, they were also free to believe that he observed every significant act that occurred during the encounter. *See Jones v. State*, 944 S.W.2d 642, 648 (Tex. Crim. App. 1996) (evaluation of factual sufficiency should not intrude upon the fact finder's role as the sole judge of the weight and credibility given to any witness's testimony). Even if the jury accepted appellant's inference that Don did not observe the entire struggle between the two men, that inference alone would not be sufficient to justify reversal. Don's looking away for a split second did not require the jury to accept that, in that split second, complainant choked him. For that matter, with all the inconsistencies in appellant's statements, the jury could simply have disbelieved appellant's assertion that complainant choked him, regardless of what Don observed. The same is true of appellant's argument that the jury should have believed that he asked the officers about shooting someone in response to a verbal threat so that he could legally defend himself. As noted above, in light of all the evidence, the jury could believe that appellant was not inquiring about the use of deadly force as a justification to legitimately defend himself, but was seeking a rationalization to kill complainant under the pretext of self-defense. *See Hemphill v. State*, 505 S.W.2d 560, 562 (Tex. Crim. App. 1974) (intent is a question of fact to be determined by the trier of facts from all the facts and circumstances in evidence).[2] Appellant's factual sufficiency issue is overruled.

Erroneous Instruction

[2] If we were to accept appellant's self-serving viewpoint and overturn the jury's finding, it seems we would be encouraging anyone in a hostile relationship to perfect this question to police to prove his motives were innocent when he later killed his antagonist.

Next, appellant contends the trial court erred by giving the jury an erroneous instruction on apparent danger in violation of the Due Course of Law provision of Article I, Section 19 of the Texas Constitution and the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.[3]

The jury was instructed on apparent danger, in pertinent part:

> In determining the existence of real or apparent danger, you should consider all facts and circumstances in the case in evidence before you. . . . You are instructed that you *may* consider all relevant facts and circumstances surrounding the offense, if any, and the previous relationship existing between the accused and Ricky Don Gilbreath, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any.

(Emphasis added.) Appellant claims that the use of "may" in the charge is a significant departure from the accepted jury instruction used for apparent danger because it did not "require" the jury to consider the two men's past relationship. We disagree.

First, the instruction sets out the correct law on apparent danger. The instruction also states, prior to the complained-of language, that the jury "should consider all facts and circumstances in the case in evidence. . . ." This language thus *requires* that the jury consider *all* the evidence, which necessarily includes the parties' past relationship. Thus, the jury was bound under the instruction to consider evidence of appellant's and complainant's past relationship. Accordingly, we find that the charge adequately instructed the jury to consider all the evidence.

We also note that appellant failed to object to the charge, thus he must show the error was fundamental in order to complain about it on appeal. *Almanza v. State*, 686

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[3] Appellant makes no argument and cites no authority that the protection afforded by the Due Process Clause of the Fifth and Fourteenth Amendments differs from that of the Due Course of Law provision in the Texas Constitution in regard to defective jury instructions. We note that the Texas Due Course of Law provision has never been held to provide any greater protection than that afforded by the Due Process Clause of the United States Constitution. *See Safari v. State*, 961 S.W.2d 437, 441-42 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd untimely filed). Accordingly, we consider the two issues together.

S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *Webber v. State*, 29 S.W.3d 226, 231–32 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd). Fundamental error in the jury charge is error that is so egregious and causes such harm as to deprive the accused of a fair and impartial trial. *Id.* Assuming "may" were erroneously included, appellant was nonetheless given a charge that properly laid out the law and instructed them that they "should" consider all the evidence, which we presume it did. *See Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (a jury is presumed to follow a court's instructions). It is axiomatic that a reviewing court will not condemn a jury charge unless it is misleading as a whole. *Vuong v. State*, 830 S.W.2d 929, 940 (Tex. Crim. App. 1992). Even if improper, we do not perceive that the use of the term "may" would mislead the jury to believe that it could willy nilly cast that evidence aside, as appellant suggests. There are no other complaints about the charge. Thus, there is no showing of egregious harm. We overrule this issue.

Improper Jury Argument

Finally, we address appellant's complaint that the prosecutor made an improper argument about the application of parole to the assessment of punishment during closing arguments. However, appellant failed to object to the argument. The court of criminal appeals has squarely held that a failure to object to improper argument waives the issue on appeal. *Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) (defendant's failure to object to a jury argument forfeits his right to complain about the argument on appeal); *see also Ladd v. State*, 3 S.W.3d 547, 569 (Tex. Crim. App. 1999) (same holding under current rules of appellate procedure). Thus, because appellant did not object to the State's argument, he waived error. TEX. R. APP. P. 33.1. Accordingly, we overrule this issue.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed August 23, 2001.

Panel consists of Justices Fowler, Wittig and Draughn.[*]

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

[*] Senior Justice Joseph L. Draughn sitting by assignment.