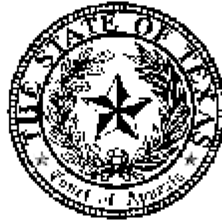
Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of August 10, 2000, are Withdrawn and Substituted with Majority and Dissenting Opinions filed May 17, 2001.



In The

Fourteenth Court of Appeals

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NO. 14-99-00070-CR

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ROBERT DEMOND LAVERN, Appellant

V.

THE STATE OF TEXAS, Appellee

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

MAJORITY OPINION ON REHEARING EN BANC

The appellant, Robert Demond Lavern, was charged by indictment with aggravated assault on a public servant. He was convicted by a jury and sentenced to confinement in the state penitentiary for a term of twenty-four years. Appellant contends: (1) the evidence is legally and factually insufficient to support the verdict; (2) the trial court erred in failing to instruct the jury on the law of self-defense; and (3) the trial court erred in failing to charge the jury on the lesser included offense of aggravated assault. We affirm.

The record reflects that on February 4, 1998, Houston Police Officers Ralph Chaison and Vonda Higgins were engaged in an undercover narcotics investigation. Their goal was to

purchase contraband without making an immediate arrest so as to infiltrate the neighborhood and first discover the identities of the local narcotics vendors. The officers drove a pickup truck to an apartment complex in southwest Houston. Leaving Higgins in the truck, Chaison approached two men who were standing inside the apartment fence. Waiving money in his hand, Chaison quickly negotiated the purchase of crack cocaine. Separated by a wrought iron fence, appellant handed the cocaine to Chaison in exchange for twenty dollars. 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 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 pulled up his jacket and reached for 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. Officer Chaison then drew a concealed handgun as appellant was attempting to draw his own weapon. Because appellant's weapon became entangled in his clothing, Chaison was able 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 may also have fired, but Chaison was not hit. Appellant hobbled 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 the bystander standing near appellant that he was a police officer and ordered him to the ground. The bystander obeyed the command and remained on the ground throughout the shootout. Chaison identified himself to appellant 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. While Chaison turned his attention to Higgins, appellant retreated, limping across an open driveway. Chaison held his fire, purposely allowing appellant to escape so he could attend to Higgins.

Sufficiency of the Evidence

Because Chaison was not in uniform and initially denied being a police officer, appellant contends in his first and second points of error that the evidence is both legally and factually insufficient to show he knew Chaison was a public servant.

Legal sufficiency is the constitutional minimum required by the Due Process Clause of the Fourteenth Amendment to sustain a criminal conviction. *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000). We consider all of the evidence whether properly or improperly admitted. *Chambers v. State*, 805 S.W.2d 459, 460 (Tex. Crim. App. 1991). Moreover, in determining legal sufficiency, we do not examine the fact finder's weighing of the evidence, but merely determine whether there is evidence supporting the verdict. *Clewis v. State*, 922 S.W.2d 126, 132 n.10 (Tex. Crim. App. 1996).

Here, the jury heard evidence that Chaison repeatedly announced to appellant that he was a police officer. Pursuant to his order, a companion standing near appellant got on the ground. Moreover, a resident of the apartment complex heard appellant telling Chaison he was "a cop." Accordingly, we find a rational jury could have found from this evidence that appellant knew Chaison was a police officer.

When reviewing claims of factual insufficiency, it is our duty to examine the jury's weighing of the evidence. *Id.* at 133, 134. In other words, we must view the evidence "without the prism of 'in the light most favorable to the prosecution'" and set aside the verdict if it is "so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust."

Id. at 129. Thus, when reviewing factual sufficiency challenges, appellate courts must determine "whether a neutral review of all of the evidence, both for and against the finding, demonstrates that the proof of guilt, although adequate if taken alone, is greatly outweighed by contrary proof." *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000).

Here, the appellant did not testify or offer any evidence in his defense. Moreover, there is nothing in the State's evidence to suggest that the jury's verdict was clearly wrong and unjust. Accordingly, appellant's first and second points of error are overruled.

Self-Defense Instruction

In his third point of error, appellant contends the trial court erred in overruling his request for an instruction on the law of self-defense. Appellant correctly maintains that the evidence shows Chaison was the first to both clear and fire his weapon. In fact, the record suggests that appellant was wounded before he ever fired his weapon. Thus, appellant claims he was entitled to a charge on self-defense.

A defendant is entitled to an instruction on any properly requested defensive issue raised by the evidence, regardless of 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). 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.).

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). Thus, if there was no evidence suggesting appellant responded to, or believed he was responding to, the use of *unlawful* force, he was not entitled to an instruction on self-defense.

The uncontroverted evidence shows *appellant was the first person to display a weapon*. Moreover, the law provides that a person has the right to reasonably defend himself from apparent danger. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). Chaison's apprehension that he was about to be shot was both reasonable and justified by the circumstances. 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 attempted to draw a handgun. While Chaison may have cleared his weapon before appellant, this simply shows Chaison was perhaps faster and more fortunate than appellant. Thus, Chaison's drawing of his own weapon was both a reasonable and *lawful* response to appellant's *unlawful* threat of deadly force.

Further, while Chaison may have fired first, he was not required to wait until appellant had begun firing before he could lawfully protect himself. *Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). 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. 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. *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 he could not legally resist Chaison's use of lawful force. *Johnson v. State*, 715 S.W.2d 402, 407-08 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd).

Finally, 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 law enforcement 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). Accordingly, we hold the trial court did not err in refusing appellant's request for an instruction on the law of self-defense. Appellant's third point of error is overruled.

Lesser-Included Offense

In his final point of error, appellant contends he was entitled to an instruction on the lesser-included offense of aggravated assault or "other lesser included offenses." A defendant is entitled to an instruction on a lesser-included offense where (1) the proof for the offense charged includes the proof necessary to establish the lesser-included offense and (2) there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

While aggravated assault is within the proof necessary to establish aggravated assault upon a public servant, the record is wholly devoid of any evidence showing aggravated assault to be "a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997). To warrant an instruction on a lesser-included offense there must be some *evidence* in the record that the defendant is guilty only of the lesser-included offense. *Rousseau*, 855 S.W.2d at 673. In other words, the legal test in such cases is not whether an appellate justice can by clever imagination conceive of an alternative offense; rather, the standard by which we must be guided is whether the record contains some conflicting *evidence* which, if believed, would permit a rational jury to find the defendant guilty only of the lesser-included offense. *Id*.

Here, there is no conflict in the evidence. The record shows Officer Chaison initially attempted to pass himself off as a felonious narcotics buyer. Appellant suspected he was a police officer, accused him of being a police officer, and attempted to shoot him *because he was a police officer*. There is simply no other logical explanation for appellant's conduct.

If appellant had offered any evidence, however feeble, that he did not know Chaison was a police officer and did not hear him identify himself as a police officer, appellant would unquestionably have been entitled to a charge on aggravated assault because some *evidence* would then be found in the record to support the instruction. Appellant, however, offered no evidence. Moreover, the evidence offered by the State did not conflict on this issue. Thus, no valid, rational alternative to the charged offense was raised by the evidence. Accordingly, appellant's fourth point of error is overruled.

The judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority and Dissenting Opinions filed May 17, 2001.

En Banc (Justices Yates, Anderson, Fowler, Edelman, Frost and Former Justice Amidei join this opinion. Senior Chief Justice Murphy joined the dissenting opinion.)[*]

Publish — TEX. R. APP. P. 47.3(b).

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[*] Senior Chief Justice Paul C. Murphy and Former Justice Maurice Amidei sitting by assignment.