Affirmed and Opinion filed February 17, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-00334-CR

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RENALDO GUADALUPE SMITH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Court at Law Number Two
Fort Bend County, Texas
Trial Court Cause No. 72,876

O P I N I O N

Appellant was charged by information with the misdemeanor offense of assault. A jury convicted appellant of the charged offense and the trial court assessed punishment at 180 days confinement, probated for one year and a fine of $400.00. Appellant raises two points of error. We affirm.

I. Motion for Instructed Verdict

The first point of error contends the trial court erred in overruling appellant's motion for an instructed verdict of acquittal at the conclusion of the State's case.

A. Standard of Review

To resolve this point of error, we must first establish the correct standard of appellate review. In *Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993), the Court of Criminal Appeals sorted through several cases that had differing holdings on the subject of appellate review of points of error dealing with the denial of a motion for instructed verdict. The Court concluded the language in *Madden v. State*, 799 S.W.2d 683, 686 (Tex. Crim. App. 1990), *cert. denied*, 498 U.S. 1301, 111 S.Ct. 902, 112 L.Ed.2d 1026 (1991), correctly stated the appropriate standard of appellate review and held: "A challenge to the trial court's ruling on a motion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the conviction." *Cook*, 858 S.W.2d at 470. Therefore, when considering a point of error contending the trial court erred in overruling a motion for instructed verdict, the reviewing court "will consider the evidence presented at trial by both the State and appellant in determining whether there was sufficient evidence." *Id*.

In determining whether the evidence is sufficient to support the conviction, we employ the standard announced in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and ask whether, viewing all of the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime charged. The standard is applicable to both direct and circumstantial evidence cases. *See Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App.1991).

Appellant concedes he assaulted the complainant but contends the assault was justified because he was acting in self defense and in defense of another. The jury was instructed on each defensive theory. *See* TEX. PEN. CODE ANN. §§ 9.31 and 9.41. In this context, the State does not have to disprove self-defense or defense of another beyond a reasonable doubt. In *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991), the Court of Criminal Appeals explained that the State has the burden of persuasion in disproving the evidence of self-defense, but that it does not have the burden of production, "i.e., one which requires the State to affirmatively produce evidence refuting the self-defense claim." *Ibid*. The issue of self-defense is an issue of fact to be determined by the jury. *Ibid; Jenkins v. State*, 740 S.W.2d 435, 438 (Tex. Crim. App. 1983). Defensive evidence that is merely consistent with the physical evidence will not render the State's evidence insufficient since the credibility determination of such evidence

is solely within the jury's province and the jury is free to accept or reject the defensive evidence. *See Saxton*, 804 S.W.2d at 914. A jury verdict of guilty is an implicit finding rejecting the defendant's self-defense theory. *See Saxton*, 804 S.W.2d at 914.

Therefore, the correct standard of appellate review to be applied by an appellate court in determining the sufficiency of the evidence to support a conviction when a justification issue has been raised is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the convicted offense beyond a reasonable doubt and also would have found against appellant on the justification issue beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914.

B. Factual Summary

With the foregoing standard in mind, we set forth the evidence in the light most favorable to the verdict. Shortly before noon on October 18, 1996, the complainant stopped at a convenience store and bought a pack of cigarettes. As he was driving from the parking lot, he saw appellant and his brother run toward the vehicle yelling. The complainant did not stop but instead drove to his home, which was approximately one mile away. Appellant and his brother followed the complainant and stopped in the front of his house after the complainant pulled into his driveway. When appellant pulled into his driveway, he saw either appellant or his brother standing at the driver's door of the truck.

As the complainant exited, he grabbed a jack handle from inside his vehicle because he felt threatened as he did not know what appellant and his brother wanted. The complainant began to walk toward the rear of his truck and told appellant and his brother to leave at least three times. As the brother began to back away, appellant ran toward the complainant. Appellant drew back his fist as he ran and his brother also began running toward the complainant. The complainant swung the jack handle and hit appellant, but appellant and his brother continued. The complainant's attempt to flee was unsuccessful; as the complainant tried to run away, appellant and his brother knocked the complainant to the ground, and kicked and beat him until neighbors arrived.

The complainant testified that any attempt to escape before using the jack handle would have been futile because the garage door was closed and there was a fence eight feet high enclosing the rear of his home. The complainant suffered a broken nose, a chipped tooth and bruising.

Two police officers testified the jack handle was capable of causing death or inflicting serious bodily injury.

Appellant testified he believed the complainant was going to strike his brother with the jack handle and to defend his brother, appellant ran toward the complainant and was struck with the jack handle. Appellant then testified he assaulted the complainant to disarm him thereby preventing the complainant from assaulting either appellant or his brother.

C. Analysis

The evidence, viewed in the light most favorable to the verdict, reveals the complainant, while in his driveway, was assaulted by appellant and his brother. Appellant argues the assault was justified because he was acting in self defense and in defense of his brother. The jury was instructed on each justification. *See* TEX. PEN. CODE ANN. §§ 9.31 and 9.41.[1] Appellant contends the State failed to rebut these defensive theories beyond a reasonable doubt.

As noted above, the State is not required to affirmatively produce evidence to rebut defensive claims. Rather, the State bears the burden of proving appellant assaulted the complainant beyond a reasonable doubt. *See Hull v. State*, 871 S.W.2d 786, 789 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd) (citing *Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App.1991). Consequently, we look not to whether the State presented evidence that rebutted each defensive theory, but rather we must determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of assault beyond a reasonable doubt, and if so, the trier of fact would thereby have implicitly found against appellant on the self-defense issue beyond a reasonable doubt. *See Hull*, 871 S.W.2d at 789 (citing TEX. PEN. CODE ANN. § 2.03(d)); *Saxton*, 804 S.W.2d at 914. In this setting, we must remember that the jury is the sole judge of the credibility of

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[1] The trial court denied the State's requested charge on provoking the difficulty. *See* TEX. PEN. CODE ANN. § 9.31(b)(4).

the witnesses. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied*, 488 U.S. 872, 109 S.Ct. 190, 102 L.Ed.2d 159 (1988). The jury may believe or disbelieve all or part of any witness's testimony. *Id*. Appellant's testimony alone will not conclusively prove self-defense as a matter of law. *See Letson v. State*, 805 S.W.2d 801, 805-06 (Tex. App.—Houston [14th Dist.] 1990, no pet.).

On the basis of the facts set forth above, we find a rational jury could have found the essential elements of the charged offense of assault beyond a reasonable doubt and implicitly found beyond a reasonable doubt against appellant on the issues of self defense and defense of a third person. Therefore, we find the evidence is sufficient to support appellant's conviction. Consequently, the trial court did not err in overruling appellant's motion for instructed verdict. The first point of error is overruled.

II. Jury Instruction

The second point of error contends the trial court erred in not further instructing the jury after it began deliberating.

A. Factual Summary

As noted above, the trial court instructed the jury on the law of self-defense and defense of another. As a part of that instruction, the charge defined unlawful as follows: "'Unlawful' means criminal or tortious, or both, and includes what would be criminal or tortious but for a defense not amounting to justification or privilege." *See* TEX. PEN. CODE ANN. § 1.07(a)(48).

After the charge was read and the jury began its deliberations, the jury sent a note asking: "Is it lawful or unlawful for [the complainant] to use the jack handle to hit somebody who won't leave his property?" Appellant requested the trial court instruct the jury that such conduct of the complainant was unlawful. The trial court denied the request and instructed the jury: "Please refer to the charge and continue deliberating."

B. Argument and Analysis

Appellant argues the trial court erred in not informing the jury the complainant's conduct was unlawful. In support of this argument, he relies upon article 36.16 of the Texas Code of Criminal Procedure, which provides in relevant part: "After the argument begins no further charge shall be given to

the jury unless required by the improper argument of counsel or *the request of the jury*[.]" (emphasis added) The State responds that to provide the instruction requested by appellant would be a comment on the weight of the evidence. We agree.

As a general rule, once the jury has been properly instructed and later submits a question, the trial court should simply refer the jury to the court's charge. *See Ash v. State*, 930 S.W.2d 192, 196 (Tex. App.—Dallas 1996, no pet.); *Ishmael v. State*, 688 S.W.2d 252, 262 (Tex. App.—Fort Worth 1985, pet. ref'd). A trial court should never give the jury an instruction that constitutes a comment on the elements of the alleged offense, or assumes a disputed fact. *See Richardson v. State,* 766 S.W.2d 538, 542 (Tex. App.—Houston [14th Dist.] 1989, pet. ref'd). A charge that assumes the truth of a controverted issue is a comment on the weight of the evidence and is erroneous. *See Whaley v. State*, 717 S.W.2d 26, 32 (Tex.Crim.App.1986); *Richardson*, 766 S.W.2d at 541.

In the instant case, the trial court properly defined "unlawful." Utilizing that definition, the jury was obliged to determine whether the complainant's conduct of using the jack handle was, in fact, unlawful. However, this was the precise question the jury asked the trial court to answer. As the jury's question involved a disputed fact, an answer would have constituted a comment on the weight of the evidence. Consequently, we hold the trial court correctly responded to the jury's question by referring the jury to the charge. The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed February 17, 2000.

Panel consists of Justices Anderson, Hudson and Baird.[2]

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

[2] Former Judge Charles F. Baird sitting by assignment.