

Affirmed and Opinion filed October 26, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-01151-CR

GARY LEE DEVER, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from 177th District Court
Harris County, Texas
Trial Court Cause No. 811,469**

OPINION

Gary Lee Dever appeals his conviction for murder on the ground that the evidence was insufficient to rebut his assertion of self-defense beyond a reasonable doubt. We affirm.

On April 14, 1999, appellant and Ronald Ballard were involved in an altercation at Ballard's drinking establishment. Appellant left the bar but returned moments later to resume the confrontation. Ballard, while holding a gun and standing inches from appellant's vehicle, instructed appellant to leave the establishment. Instead of leaving, appellant ran over Ballard, pinned him underneath his car, drug him down the road, drove back and forth over him several times, and then fled the scene. Ballard was

pronounced dead at the scene due to multiple blunt trauma. Appellant was convicted of murder and sentenced by a jury to forty years' confinement.

Appellant's point of error contends that the evidence was insufficient to support his conviction for murder because the State failed to disprove his self-defense claim beyond a reasonable doubt.¹

Although the State has the burden of *persuasion* in disproving self-defense, it does not have the burden of *production* in doing so. *See Saxton v. State*, 804 S.W.2d 910, 913 (Tex. Crim. App. 1991). Therefore, the State is not required to affirmatively produce evidence refuting self-defense, but only to prove its case beyond a reasonable doubt. *See id.* In other words, in reviewing the legal sufficiency of the evidence, we do not look to whether the State presented evidence which refuted appellant's self-defense theory, but only whether after viewing all the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against appellant on the self-defense issue beyond a reasonable doubt. *See id.* In reviewing factual sufficiency, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates that the proof of guilt is so obviously weak as to undermine confidence in the jury's determination, or that the proof of guilt, 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).

Appellant's use of deadly force was justified if, among other things, he reasonably believed that force was immediately necessary to protect himself or a third person against another's use or attempted use of unlawful deadly force, and if a reasonable person in the defendant's situation would not have retreated. *See TEX. PEN. CODE ANN. § 9.32* (Vernon 1994).

In this case, the evidence showed that the first confrontation between Ballard and appellant ended when appellant left the bar. However, appellant returned twice to continue the altercation. Upon appellant's last return to the bar parking lot, Ballard stood in front of appellant's vehicle, with a gun at his side, and asked appellant to leave. According to the testimony, appellant could have easily retreated by backing his vehicle or driving around Ballard. There is no evidence that a reasonable person in appellant's

¹ Because it is unclear from appellant's brief whether he is challenging legal sufficiency as well as factual sufficiency, we will address both as to the evidence regarding self-defense.

situation would not have done so. Under these circumstances, appellant has failed to demonstrate that the evidence supporting the jury's finding of guilt and rejection of his claim of self-defense is legally or factually insufficient. Accordingly, appellant's point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 26, 2000.

Panel consists of Justices Anderson, Fowler, and Edelman.

Do not publish — TEX. R. APP. P. 47.3(b).