In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-19-00230-CR

GARY ANTHONY COLE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 371st District Court
Tarrant County, Texas[1]
Trial Court No. 1572711D, Honorable Mollee Westfall, Presiding

June 29, 2020

MEMORANDUM OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant, Gary Anthony Cole, was convicted of assault on a public servant following a jury trial.[2] The jury found the habitual offender allegation to be true and assessed appellant's punishment at twenty-five years' incarceration in the Texas

[1] Originally appealed to the Second Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013).

[2] TEX. PENAL CODE ANN. § 22.01(a)(1), (b)(1) (West 2019). The offense is a third-degree felony if committed against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty. The applicable range of punishment was enhanced by appellant's prior felony convictions. TEX. PENAL CODE ANN. § 12.42(d) (West Supp. 2018).

Department of Criminal Justice, Institutional Division. On appeal, appellant argues the trial court erred by refusing to instruct the jury on self-defense. Finding no error, we affirm the judgment.

Background

In November of 2018, appellant, an inmate in the Tarrant County Corrections Center, was transferred to the suicide watch area in the center known as Unit 55B. Unit 55B is a special management unit that houses inmates with mental health concerns. Inmates assigned to this unit are housed in single cells and required to wear tear-proof clothing, referred to as an "SBC" gown.

Appellant was escorted to the unit in a wheelchair. However, wheelchairs are not permitted inside the individual cells of the unit because of safety concerns. Officer Kalonji Foster testified that appellant refused to comply with his requests to turn over his wheelchair and change into the SBC gown. Instead, appellant wanted to be taken to the medical floor. When Sergeant Chris Cochran arrived, appellant was upset and refused to enter his cell and change clothes. Sergeant Cochran explained to appellant that he would ask classification officers to change his housing assignment but he could not transfer appellant to another unit at that time.

When appellant remained uncooperative, Sergeant Cochran instructed Corporal Gillet and Officer Haber to remove appellant from his wheelchair and place him on the bunk inside the cell. Appellant resisted and began to fight the officers. In the process of getting appellant to the bunk, officers lifted appellant by his arms. Appellant took a swing at Officer Foster. One of the officers called a "code six, signal five" indicating an inmate/officer fight and other officers and medical personnel arrived at the unit. As

appellant tried to get off the bunk, Officer Foster pushed appellant back onto the bunk. During this interaction, appellant bit Officer Foster's torso area two or three times before appellant could be handcuffed. Officer Foster did not see any officer punch, kick, or strike appellant. Sergeant Cochran testified that, after the incident, appellant refused medical care and did not complain of any injuries.

Officer Foster was transported to the hospital where he received a tetanus shot and a prescription for antibiotics. According to Officer Foster, he felt pain and the bite marks are still visible on the left side of his torso. Photographs of Officer Foster's injuries were admitted as was a video recording of the altercation.

Appellant testified in his own defense. According to appellant, he was not asked to get out of his wheelchair. Appellant claimed that after Sergeant Cochran arrived, he was dumped out of his wheelchair and assaulted by Officer Foster. He denied biting Officer Foster or causing Officer Foster's injuries. When appellant was confronted with a grievance he had filed which indicated that he did bite Officer Foster, appellant claimed that he only bit Officer Foster's jacket. Appellant also testified that as a result of Officer Foster's assault, he received a "big old knot" on his head, a bloody nose, and threw up blood. However, appellant acknowledged that the video showed no blood on anyone involved.

During the charge conference, appellant's request for a self-defense instruction was denied. The jury found appellant guilty of assault on a public servant. The jury also found the habitual offender allegations true[3] and assessed appellant's punishment at

[3] *See* TEX. PENAL CODE ANN. § 12.42(d).

imprisonment in the Texas Department of Criminal Justice, Institutional Division, for twenty-five years.

Law and Analysis

In his sole issue, appellant contends the trial court erred in failing to include an instruction on self-defense in the jury charge.

Appellate review of purported jury charge error involves a two-step process. *Kirsch v. State,* 357 S.W.3d 645, 649 (Tex. Crim. App. 2012). First, we determine whether error occurred. Second, if error occurred, we analyze that error for harm. *Id.* Our consideration of the degree of harm necessary for reversal depends on whether error was preserved. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003) (en banc). The degree of harm is assessed "in light of the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel[,] and any other relevant information revealed by the record of the trial as a whole." *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (en banc). When the defendant properly objects to the error in the charge, reversal is required unless the error is harmless. *Id*.

An instruction of self-defense is appropriate when the issue is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Granger v. State,* 3 S.W.3d 36, 38 (Tex. Crim. App. 1999). In reviewing a trial court's decision not to include an instruction on a defensive issue, we view the evidence in the light most favorable to the defendant's requested submission. *Bufkin v. State,* 207 S.W.3d 779, 787 (Tex. Crim. App. 2006).

A person is justified in using force against another person "when and to the degree" the person "reasonably believes the force is immediately necessary" for protection against that other person's use or attempted use of unlawful force. TEX. PENAL CODE ANN. § 9.31(a) (West 2019). To be entitled to a defensive instruction, an accused must admit the conduct charged in the indictment and then offer evidence justifying the conduct. *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999) (en banc). Admitting the conduct, however, does not necessarily mean admitting the commission of every statutory element of the offense. *Jackson v. State*, 110 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). Instead, an accused who denies the State's specific allegations may still obtain a defensive instruction if he or she sufficiently admits the conduct underlying the alleged offense. *Young*, 991 S.W.3d at 838. Denial of the charged conduct is inconsistent with a claim of self-defense. *Sanders v. State,* 707 S.W.2d 78, 81 (Tex. Crim. App. 1986).

Here, the indictment alleged that appellant intentionally or knowingly caused bodily injury by biting Officer Foster, a person he knew was a public servant lawfully discharging an official duty. To be entitled to a self-defense instruction, appellant was required to admit that he intentionally or knowingly caused bodily injury by biting Officer Foster. Appellant emphatically denied biting Officer Foster, denied causing bodily injury to Officer Foster, and suggested that Officer Foster's injuries were not bite marks, but caused by falling on a table when officers were moving appellant into the cell. Appellant's denials are inconsistent with his claim of self-defense. *See id.*

Because appellant denied biting Officer Foster or causing him bodily injury, appellant denied committing the offense of assault on a public servant. *See Ex parte*

Nailor, 149 S.W.3d 125, 133 (Tex. Crim. App. 2004). Consequently, appellant was not entitled to a self-defense instruction. We overrule appellant's sole issue.

Conclusion

Finding no error in the trial court's jury charge, the judgment of the trial court is affirmed.

Judy C. Parker
Justice

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