

Harris v. State, No. 01-20-00140-CR (Tex. App.-Houston [1st Dist.]. Dec. 15, 2022)

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Issue & Answer. This case involves a self-defense jury instruction in a fact pattern where the defendant was likely engaging in criminal activity before shooting and killing the victim. The trial court provided the jury with this unrequested instruction which the defendant contends was not applicable to the facts of the case. Under these circumstances, when a jury sends a note indicating that it is confused by the instruction, was the trial court required to substantively instruct the jury that they can consider self-defense even when the presumption of reasonableness is inapplicable? **No.**

Facts. This is an en banc reconsideration of a panel decision from May 26, 2022. The en banc court withdraws its previous opinion, vacates its judgment, and issues this opinion and judgment in its stead.

"This is a murder case arising from a drug-related shooting." Officers responded a shots-fired dispatch and discovered a deceased man with a single gunshot wound to the back of the head. Witnesses told officers that the victim and the defendant had been in an argument over a drug deal which escalated to the shooting. The drug deal occurred at an intermediary's apartment. When the victim arrived, he told the intermediary that he was carrying a firearm, intended pay for drugs with counterfeit bills, and would steal the drugs if necessary. According to the testimony of the intermediary, these facts were never conveyed to the defendant. Nonetheless, it seems that the defendant discovered that the money was fake, attempted to shut down the drug deal, and attempted to leave. The victim intercepted the defendant and pinned him against the wall. When the victim purportedly turned to reach for a gun, the defendant drew his own gun and shot the victim in the back of the head.

Because the defendant presented some evidence of self-defense, the trial court instructed the jury on the defense of deadly force self-defense. The court's instruction included "(1) definitions of the relevant statutes, (2) the burden of proof for self-defense, (3) relevant statutory definitions, (4) law of the issue of retreat, and (5) the presumption that deadly force is per se reasonable when the defendant is not otherwise engaging in criminal activity. During deliberations, the jury submitted a written question to the trial court asking: "In reference to Section 3, Page 14, does the admitted commission of a crime, sale of a controlled substance, negate the basis of a claim of self-defense?" The defendant urged the trial court to respond "no." The trial court instructed the jury to refer to the jury charge for answers.

Analysis. A trial court may supplement its jury charge with further instructions on the law when the jury requests additional guidance. When the trial court chooses to substantively respond to a jury question it is considered a supplemental jury instruction governed by the same rules that govern jury instructions. This means the trial court must limit its answer to setting forth the applicable law. The answer to the jury's question ("does the admitted commission of a crime . . . negate the basis of a claim of self-defense") is not found in statute. Non-statutory instructions are generally impermissible

unless necessary to clarify the law and can be given without drawing the jury's attention to a particular type of evidence. The defendant claims the supplemental instruction (a substantive response to the jury) was required because the court's original charge erroneously set out the law on the presumption of reasonableness and confused the jury. The defendant contends that it was undisputed that he was in fact engaged in a drug deal and thus the presumption-of-reasonableness instruction was not supported by the evidence. The defendant contends that the jury became confused as to whether it could find the defendant's conduct reasonable without relying on the presumption. The defendant's argument fails in its assessment of the "undisputed" nature of his criminal activity. The defendant made a few suggestions throughout the course of trial attempting to distance himself from the criminal activity. Moreover, the purported drugs were never tested and proven to be drugs. Thus, the presumption of reasonableness was properly submitted. Given that the instruction on the presumption of reasonableness accurately stated the law, the submission of the instruction and the trial court's subsequent refusal to give a substantive response to the jury's question were not in error.

Dissenting (Farris, J.). There was no evidentiary dispute about whether the defendant was engaging in criminal activity – everyone agreed. The submission of the instruction regarding the presumption of reasonableness only served to confuse the jury. The court's failure to respond substantively to the jury question compounded its error.

Dissenting (Goodman, J.). The jury's question-whether engaging in criminal activity negates self-defense altogether-illustrated the confusion caused by the court. Answering the question in the negative would not have endorsed or diminished either party's theories.