

NO. 01-24-00042 CR

IN THE FIRST COURT OF APPEALS

FILED IN  
1st COURT OF APPEALS  
HOUSTON, TEXAS

10/18/2024 4:19:28 PM

**GILBERTO CASTILLO**

Appellant,

DEBORAH M. YOUNG  
Clerk of The Court

V.

**THE STATE OF TEXAS**

Appeal in Cause No. 22-CR-3892  
in the Galveston County Courts  
out of the 212<sup>th</sup> Criminal District Court

**APPELLANT'S BRIEF**

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**-ORAL ARGUMENT REQUESTED-**

## **IDENTITY OF THE PARTIES AND COUNSEL**

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Pursuant to Tex. R. App. P. 38.1(a), the following is a list of all parties to the trial court's judgment and respective trial and appellate counsel:

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212<sup>TH</sup> Judicial District Court  
Galveston County, Texas**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Oral argument would significantly assist this Court in the decision-making process because this case is a unique example of how a jury charge calls into question the fairness of this trial and the reliability of the result.

## **STATEMENT OF THE CASE**

**Nature of the case:** Appellant was charged by felony indictment with assault (CR 7).

**Course of proceedings:** After a plea of not guilty, a jury convicted Appellant (CR 82). The trial court assessed punishment at 7 years in prison with no fine. (CR 82).

**Trial court's disposition:** The trial court signed a judgment of conviction and sentence. (CR 82).

### **ISSUE PRESENTED**

Appellant suffered egregious harm from the jury charge because said charge did not include the correct claim necessary to argue a self-defense claim by using the language of *deadly* force. This resulted in the jury being confused as to whether they had the possibility of not convicting Appellant based off whether Appellant had a right to defend himself against nondeadly force against him.



## **STATEMENT OF THE FACTS**

This case was called by jury on December 5, 2023, in the 212<sup>th</sup> Judicial District Court, Galveston County before the Honorable James Shoemake, Galveston County, Texas.

Appellant, Gilberto Castillo was charged by indictment with felony assault with previous conviction. On day 1 of trial, Appellant was arraigned and he pled not guilty (RR Vol. 2, p. 170) and was convicted by a jury of his peers on December 7, 2024 and was sentenced to 7 years in the Texas Department of Criminal Justice. (CR 82, 95; RR Vol. 4, pp. 199).

The trial lasted for two days and ended with a guilty verdict and the trial court sentenced Appellant to 7 years in prison (CR 82, 95; RR Vol. 4, pp. 199).

On or about October 9, 2022, Appellant and his girlfriend, Imelda Pena, the complaining witness, were involved in some form of verbal and physical altercation at the home of Ms. Pena. (RR. Vol. 2, pp 188, 11-14). While in the driveway of Ms. Pena's home, it is undisputed that some type of altercation occurred. (RR. Vol. 2, pp 188, 11-14).

During the trial phase, the prosecution successfully convinced a jury that Appellant assaulted Ms. Pena and was ultimately convicted of felony assault and was punished to 7 years TDCJ. (RR Vol. 4, pp. 199).

Appellant's defense did argue that Appellant was outside of Ms. Pena's driveway, trying to escape the commotion but Ms. Pena tried to stop Appellant from leaving by hindering Appellant's ability to get inside of Appellant's vehicle and that is what caused the altercation. (RR Vol. 4, pp. 115, 20-2 & pp. 116, 1-16). The Appellant's defense failed.

## **ARGUMENT AND AUTHORITIES**

### **Introduction to the argument.**

#### **Standard of Review.**

An appellate court reviews evidentiary sufficiency challenges under the standard outlined in *Jackson v. Virginia*. *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). The court will consider the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Anderson v. State*, 416 S.W.3d 884, 888 (Tex. Crim. App. 2013).

The jury is the sole judge of the credibility of witnesses and the weight to afford testimony. *Montgomery v. State*, 369 S.W.3d 188, 192 (Tex. Crim. App. 2012). The jury may reasonably infer facts from the evidence presented, credit the witnesses it chooses, disbelieve any or all of the evidence or testimony proffered, and weigh the evidence as it sees fit. *Canfield v. State*, 429 S.W.3d 54, 65 (Tex. App.—Houston [1st Dist.] 2014, pet. ref’d).

#### **A. The Standard of Review for Jury Charge Error**

In determining whether there is a reversible error in the jury charge, this Court must first decide whether error exists and, if it does, whether and to what extent (if any) Appellant was harmed. *Middleton v. State*, 426 S.W.3d 450, 453 (Tex.Crim.App. 2003). Jury charge error to which no objection is made (such as the situation in this case) does not require reversal unless it is so egregious that Appellant was denied a fair and impartial trial. *Beasley v. State*, 426 S.W.3d 140, 144 (Tex.App.—Houston [1st Dist.] 2012, pet. ref’d). This type of charging error affects “the very basis of the case,” deprives the defendant of a “valuable right,” or “vitally affects a defensive theory.” *Hutch v. State*, 922 S.W.2d 166, 171 (Tex.Crim.App. 1996).

Appellant need not elicit direct evidence of harm to demonstrate she suffered egregious harm. *Castillo-Fuentes v. State*, 707 S.W.2d 559, 573 n. 2 (Tex.Crim.App. 1986). In some instances, an erroneous jury charge alone is sufficient to charge egregious harm. *Hutch* at 171. Whether Appellant suffered egregious harm from an unpreserved jury charge, is a legal conclusion to which this Court affords no deference. *State v. Ambrose*, 487 S.W.3d 587, 597 (Tex.Crim.App.2016).

When analyzing a jury-charge issue, an appellate court first determines if error exists. If there is error, the appellate court then considers whether an objection to the charge was made to preserve error because whether error was preserved determines the appropriate harm analysis to apply. When charge error is not preserved, the error may lead to reversal only if it created egregious harm, meaning that the error was so harmful that the defendant did not have a fair and impartial trial. When considering whether a defendant suffered egregious harm, a reviewing court must consider:

- (1) the entire jury charge;
- (2) the state of the evidence, including the contested issues and weight of probative evidence; 23
- (3) the argument of counsel; and

(4) any other relevant information revealed by the record of the trial as a whole.

The reviewing court examines the whole record for actual, not just theoretical, harm to the accused. *Herrera v. State*, 526 S.W.3d 800, 805 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d). An erroneous instruction is egregiously harmful if it denies a defendant a fair and impartial trial in that it goes to the very basis of the case, deprives the defendant of a valuable right, or vitally affects his defensive theory. *Herrera*, 526 S.W.3d at 805. Egregious harm is harm that deprives a defendant of a fair and impartial trial. *Price v. State*, 457 S.W.3d 437, 440 (Tex. Crim. App. 2015). Definitions in a charge must be examined in the context in which the defined terms appear and not in isolation. *Herrera*, 526 S.W.3d at 806.

The Court of Criminal Appeals has held that if a trial court signals that self-defense is the law applicable to the case, then “any flaw in the charge on self-defense amounts to an error in the charge.” *State v. Barrera*, 982 S.W.2d 415, 416 (Tex. Crim. App. 1998). In *Barrera*, “the failure to apply the law of self-defense to the facts of the case and to instruct the jury to acquit if they held a reasonable doubt on self-defense was error.” *Id.* Because appellant did not object to the trial

court's failure to include nature-of conduct language in the jury charge, the standard here therefore is egregious harm.

### **B. The Jury Charge Did Not Correctly Address Self-Defense**

The Texas Penal Code is very clear that: a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use of unlawful force. The actor's belief that the force was immediately necessary.....is presumed to be reasonable if the actor: (1) Knew or had reason to believe that the person against whom the force was used: a. Unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment; b. Unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or, c. Was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery or aggravated robbery; 33 (2)Did not provoke the person against whom the force was used; and (3)Was not otherwise engaged in criminal activity other than a Class C misdemeanor that is a violation of the law or ordinance regulating traffic at the time the force was used. See:

Tex.Pen.Code §9.31 In addition to the above, *supra*, case law makes it clear as to when a self-defense instruction should be used.

The defendant has the initial burden of producing some evidence to justify submission of a self-defense instruction. The State must then convince the jury beyond a reasonable doubt that the defendant did not act in self-defense. *Tidmore v. State*, 976 S.W.2d 724, 729 (Court of Appeals - Tyler 1998, pet. ref'd). A defendant is entitled to a jury charge instruction on any asserted defense if there is evidence from any source on each element of the offense that, if believed by the jury, would support a rational inference that the element is true. *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex.Crim.App. 2014).

As shown *supra* in this Brief, it was clear that enough evidence was introduced at trial where self-defense was included as part of the record and the jury had every right to consider whether self-defense should be a part of their decision-making process. In addition, a person has the right to defend himself from apparent danger to the same extent as he would if the danger were real. Thus, under certain circumstances, a person may use deadly force against another, even if the other was not actually using or attempting to use unlawful deadly force. The only requirement is that the person must be justified by acting against the danger as

he reasonably apprehends it. The reasonableness of a person's belief that force is immediately necessary is viewed from the person's standpoint at the time he acted. *Dugar v. State*, \_\_\_\_\_ S.W.3d \_\_\_\_\_ (Tex.App.—Houston [14th Dist] 2015, pet. filed 5-1-15 (No. 14-14-00245-CR 4-9-15)).

Once again, it was clear that enough evidence was introduced at trial where self-defense was included as part of the record and the jury had every right to consider whether self-defense should be a part of their decision-making process. Finally, a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect herself against the other's use or attempted use of unlawful force. Except, the use of force against another is not justified in response to verbal provocation alone.

If the actor provoked the other's use or attempted use of unlawful force, unless the actor abandons the encounter, or clearly communicates to the other her intent to do so reasonably believing she cannot safely abandon the encounter and the other nevertheless continues or attempts to use unlawful force against the actor.

As the record sets out below, the jury charge created an atmosphere for the jury which was not able for the jury to properly apply the law to the facts.

Unfortunately, the trial attorney in charge did not object to the jury charge as it



relates to the self-defense burden and claim, but this does not excuse what actually happened when the jury improperly convicted Appellant. The jury charge:

**“MR. BAEZ: I have, Judge; and after conferring with the State, I have nothing to add or recommend to the Jury Charge.” (RR Vol. 4, pp. 146, 12-14).**

"To prove that the Defendant provoked the other, the State must show that (1) the Defendant did some acts or used some words that caused the other person to attack the Defendant and (2) the acts or words by the Defendant were reasonably calculated to provoke the attack and (3) the Defendant did the acts or used the words for the purpose and with the intent that the Defendant would have a pretext for assaulting the other person or inflicting bodily injury on him. (RR Vol. 4, pp. 150, 14-22).

*-.... “it reasonably appeared to the Defendant that he was in danger and there was created in his mind a reasonable expectation of fear of bodily injury from the use of unlawful force at the hands of Imelda Pena and then acting upon such apprehension and reasonably believing that the use of deadly force on his part was immediately necessary to protect himself.” (RR Vol. 4, pp. 152, 16-22).*

-The correct jury charge should have stated that: “[a] person acts intentionally or with intent with respect to a result of his conduct when it is his conscious objective or desire to cause the result.”

-Further, the self-defense paragraph on the jury charge properly shifted the burden of proof to the Defendant, however, the State failed to put on any testimony proving or not proving beyond a reasonable doubt, Appellant’s self-defense claim.

*"Therefore, if you find from the evidence beyond a reasonable doubt that the Defendant, Gilberto Castillo, intentionally, knowingly, or recklessly caused bodily injury to Imelda Pena as alleged and you find that the Defendant, Gilberto Castillo, did not provoke Imelda Pena as outlined above but you further find from the evidence as viewed from the standpoint of the Defendant at the time that the words or conduct or both of Imelda Pena, it reasonably appeared to the Defendant that he was in danger and there was created in his mind a reasonable expectation of fear of bodily injury from the use of unlawful force at the hands of Imelda Pena and then acting upon such apprehension and reasonably believing that the use of deadly force on his part was immediately necessary to protect himself against Imelda Pena's use or attempted use of unlawful force, intentionally, knowingly, or recklessly caused bodily injury to Imelda Pena, then you should acquit the Defendant on the grounds of self-defense; or if you have a reasonable doubt as to whether or not the Defendant was acting in self-defense on said occasion and under the circumstances, then you should give the Defendant the benefit of that doubt and say by your verdict not guilty. (RR Vol. 4, pp. 152, 8-25).*

### **What The Jury Charges Should Read:**

Further, the portion of the jury charge that discussed the State's burden should have read: The prosecution has the burden of proving the defendant guilty by proving each and every element of the offense charged beyond a reasonable doubt and that the prosecution has the burden of proving beyond a reasonable doubt that the Defendant did not act in self-defense and if it fails to do so, you must acquit the defendant. -Texas Pattern Jury Charges, Criminal Defenses section 32.2.

The Texas Criminal Pattern Jury Charge on "Defenses" provides a more clearly articulated burden of proof for self-defense. It states: Burden of Proof The defendant is not required to prove self-defense. Rather, the state must prove, beyond a reasonable doubt, that self-defense does not apply to the defendant's conduct. Texas Criminal Pattern Jury Charges—Defenses (2013), §B14.4, at 206§§. If such an instruction was given to the jury in this case, it would have been clear that the State — not Appellant — bore the burden of proof, and what exactly was to be proven. In conclusion, the trial court committed error since the jury instruction was confusing in various respects and did not clearly state the law regarding self-defense by stating that the defendant did not carry the burden of proof to prove that she acted in self-defense.

## CONCLUSION

Considering all the evidence in the light most favorable to the verdict, a rational jury could have determined beyond a reasonable doubt that Ms. Pena attempted to threaten Appellant with imminent bodily harm or threats; thus, his legal sufficiency challenge to his conviction should be overruled.

Trial counsel for Appellant failed to preserve error by objecting to the jury charge. However, even unpreserved charging error creates egregious harm if it affects the “very basis of the case,” “deprives the defendant of a valuable right” or “vitally affects a defensive theory.” *Hutch* at 171.

Further, the Almanza standard states that the question of whether the Appellant suffered egregious harm is assayed in the light of the entire jury charge, the state of the evidence, including contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed in the trial record as a whole. *Almanza* at 171.

In this instance, Appellant suffered egregious harm because the jury charge failed to sufficiently explain to the jury the concept of self-defense and further failed to explain to the jury that it was the prosecution’s burden to prove that Appellant did not act in self-defense.

This Brief has correctly outlined the standard for this Honorable Court in deficient jury charges and has further demonstrated to this court that the jury charge was deficient. As such, Appellant is entitled to have this case remanded to the Trial Court for a new trial.

**PRAYER**

For the foregoing reasons, your Appellant respectfully prays that this Honorable Court reverse the judgment of the Trial Court and remand this case for a new trial.

RESPECTFULLY,

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### **CERTIFICATE OF WORD COUNT AND COMPLIANCE**

Pursuant to Rule 9 of the Texas Rules Appellate Procedure, the undersigned counsel of record certifies that the brief contains 3,533 words.

Dated: October 18, 2024.

/s/Thalia M. Dubose  
Thalia M. Dubose

### **CERTIFICATE OF SERVICE**

I certify that I have served the forgoing document on the following attorney by electronic service through eFile.TXCourts.gov to Jack Roady, **Galveston County District Attorney's Office**, 600 59th Street, Suite 1001, Galveston, Texas 77551.

Dated: October 18, 2024.

/s/Thalia M. Dubose  
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