

No. 14-24-00196-CR

In the Court of Appeals
for the
Fourteenth District of Texas

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DEBORAH M. YOUNG
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AVERY B. SMITH,
Appellant

v.

THE STATE OF TEXAS,
Appellee

No. 1679216 in the 208th District Court
Harris County, Texas

APPELLANT'S BRIEF

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Statement of the Case

Appellant Avery B. Smith was charged by indictment with the first degree felony offense of murder. CR7. Smith pleaded not guilty and a jury found him guilty. CR151. The jury made an affirmative finding on the punishment issue of sudden passion and assessed a sentence of eighteen years confinement. CR158-60. Smith filed timely written notice of appeal. CR173.

Statement of Facts

A. Background Facts

Smith was charged with murder after fatally shooting the complainant, Phoenix Lacy, in the parking lot of a Whataburger.

Shortly after midnight on May 28, 2020, witness Alix Cisneros placed an order at the drive-through of a Whataburger on FM 1960 West. 4RR34. While waiting for his order he heard a gunshot behind him. 4RR36. He looked back and saw a red Audi spin off, turning right onto Beaver Springs and into the Ponderosa subdivision. 4RR38. He did not see the license plate or the driver. 4RR39. He saw a man on the ground, trying to get up, on the passenger side of a red Mercedes. 4RR40. Cisneros's wife was frightened, so they left the drive-through and went to another Whataburger. 4RR41. Cisneros returned a few minutes later and spoke with police. 4RR42.

Whataburger manager Ashley Johnson received reports of someone passed out in the drive-through and went out to investigate. 4RR55. She saw a red Mercedes with the engine running and the driver's side door open, and a man on the passenger side leaning against the car. 4RR55-56. The man was very muscular with broad shoulder and big arms, and wearing a muscle shirt. 4RR93-94. He was unresponsive and Johnson could not find a pulse. She called 9-1-1. 4RR57. Johnson saw blood on the ground but no weapon. 4RR59-60, 68. The man was life-flighted to the hospital with a gunshot wound to his abdomen. 4RR60-61. Johnson provided the police with surveillance video from several angles. 4RR63.

HSCO Deputy Rachel Riojas was dispatched to the Whataburger. 4RR117. She identified the shooting victim as Phoenix Lacy from his identification. 4RR126. Lacy's ID stated that he was six feet, two inches and weighed 255 pounds. 4RR147-48. Riojas did not find a firearm in the Mercedes. 4RR126. Riojas spoke with Lacy while he was in the ambulance. He stated that the incident began a few miles away in Humble, that he did not know his attacker, and that he had been drinking. 4RR133. Riojas smelled alcohol on Lacy's breath. 4RR154.

Riojas viewed the surveillance video and determined that Lacy's Mercedes pulled into the Whataburger lot first, followed by the red Audi. SX7. The Mercedes stopped and the Audi moved forward into the drive-through lane. Then the Mercedes moved forward toward the drive-through lane. Both vehicles stopped. Lacy exited

the Mercedes, walked around the front of his car toward the Audi, and bent down next to the driver's side window. There was a muzzle flash and Lacy fell down. The driver of the Audi drove away. SX7.

Lacy was treated for a single gunshot wound to his abdomen. After five days and multiple surgeries, he died from complications resulting from damage to his internal organs. 4RR186-205. He was fifty-one years old. 4RR174. The autopsy showed that the bullet's path was from the front to the back of the torso and downward, consistent with being bent over at the time of the shooting. 4RR229-30.

HSCO investigators spoke with Lacy's wife and learned that Lacy made a deposit at a credit union near Humble just before the shooting. 5RR32-36. The investigators obtained surveillance videos from businesses near the Whataburger and viewed the two vehicles travelling on FM 1960 toward the Whataburger around 12:15 a.m. 5RR68. One video showed the Audi pass first; another showed the Mercedes passed first. 5RR138-42.

Deputy Bryan Cross searched Vigilant, a license plate scan database, for a red Audi 4-door sedan within the model years matching the suspect's car. The database search returned a matching vehicle in the vicinity of the Whataburger at 11:00 a.m. on May 28, 2020. Cross obtained the Audi's license plate number from the Vigilant photo. 5RR157-61. The registered owner was Avery Smith. 5RR11. Deputy Cross obtained three addresses associated with the Audi from the Vigilant database and

then located the Audi at a residence. 5RR164. While conducting surveillance at the residence on June 15, 2020, Cross saw Smith and a female arrive and depart in a Mitsubishi. 5RR166-70.

The Mitsubishi was stopped for a traffic offense. Smith was the passenger and his girlfriend, Zaquiya Graham, was driving. 5RR186. Smith was arrested for traffic warrants. 5RR191. Smith disclosed that he had a gun in the glove compartment. 5RR194-95. Deputies collected a loaded .45 caliber Springfield. 6RR31.

HSCO investigators interviewed Graham. Graham testified that she and Smith were dating in 2020 and had a child together. 6RR42. She confirmed that he drove the red Audi and usually carried a gun in 2020. 6RR49-51. She recalled that he left her apartment in the Audi during the evening of May 28, 2020, then returned in the early morning hours looking scared. 6RR62, 67. He told her that he may have hurt someone at the Whataburger and asked her to check the news. She found a news story about the shooting and Smith confirmed that he was involved. 6RR65. Smith told Graham that he became frightened when a man approached his car screaming at him. He arranged to borrow her car a for few hours. 6RR62-68.

The Audi and the Mercedes were processed by HSCO investigators. Several unfired live .45 caliber bullets were found in the in the driver's side door panel pocket of the Mercedes. 6RR100-01. The bullets were covered in dirt and grime. 6RR101. In the Audi a live bullet, compatible with a .45 caliber Springfield, was

found under the front driver's seat. 6RR118. Gunshot residue (GSR) samples were collected from steering wheel, the left side of the dash, the interior of the front left driver's door, and the front left headliner. 6RR134. The GSR test results were consistent with being in close proximity to a firearm during discharge, a fired cartridge, or some other surface bearing GSR. 6RR156-64; SX103.

HCSO investigators obtained cell phone service provider records for Smith's and Lacy's phones and analyzed the location and call data. 6RR179. The records showed that there was no contact between the phones and that Smith was not in or near Humble before the shooting. 6RR212. There was no indication that the two cars were following each other before converging at the Whataburger. 6RR211-12.

The State introduced recorded jail phone calls from Smith to Graham from June of 2020. In the calls Smith told Graham not to talk to the police. 6RR70. He also told her that he wished he had gotten rid of the car, that the car had been listed on Craigslist, and that he could sign over his property to Graham. 5RR77; SX34.

B. Jury Instructions Concerning Provocation

The trial court submitted the law of self defense, instructing the jury that a person is justified in using deadly force against another if the person reasonably believes that "deadly force is immediately necessary to protect himself against the other person's use or attempted use of unlawful deadly force." CR143.

The trial court submitted a presumption of reasonableness instruction stating that a person's belief that deadly force was immediately necessary is presumed to be reasonable if:

1) The person knew or had reason to believe that the person against whom the deadly force was used:

a. Unlawfully and with force entered, or was attempting to enter unlawfully and with force, the Defendant'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 Defendant from the actor's habitation, vehicle, or place of business or employment;
or

c. Was committing or attempting to commit an aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

2) The person did not provoke the person against whom the force was used; and

3) The person was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time force was used.

The trial court submitted the following instruction on the duty to retreat:

A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force. You are not to consider whether the defendant failed to retreat.

CR143-44.

The trial court did not submit a definition for the term “provoke” as used in the presumption-of-reasonableness and duty-to-retreat instructions. There was no objection to its omission.

The jury decided against Smith on the issue of self-defense and found him of murder.

Issue Presented

The trial court erred in failing to include a definition of provocation in the jury instructions.

Summary of the Argument

The trial court erred in submitting two instructions on the law of self defense that contained the term “provoke” without supplying a definition. Provocation in the context of self defense has a narrow technical meaning: acts done or words used for purpose and with the intent that the defendant would have a pretext for inflicting harm upon others. This definition is essential to correctly apply the law of self defense. Without a definition, the jury could not properly determine whether Smith was entitled to a presumption of reasonableness on the use of deadly force or whether it could consider a failure to retreat in determining reasonableness. Smith suffered actual harm because the State’s arguments advanced the common broader meaning of “provoke” (to incite anger) and urged the jury to convict Smith because he “provoked” the complainant by cutting in the drive-through line. The harm is

egregious because it vitally effected the sole defensive theory and made the case for guilt clearly and substantially more compelling.

Argument

A. Standard of Review

In reviewing a jury charge issue, an appellate court's first duty is to determine whether the charge contains error. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996).

If the jury charge contains error, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003). The court will reverse if an error was properly preserved by objection and is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). If, as in this case, the defendant did not object to it, reversal is required only if the error is so egregious that the appellant was deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171.

B. The omission of a definition for “provoke” was error.

It is well settled that the trial court is required to instruct the jury about the law applicable to the case. Tex. Code Crim. Proc. Ann. art. 36.14 (West 2007). The trial court must instruct the jury as to statutory defenses, affirmative defenses, and justifications when they are raised by the evidence and requested by the defendant. *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Oursbourn v. State*,

259 S.W.3d 159, 179–80 (Tex. Crim. App. 2008); *Walters v. State*, 247 S.W.3d 204, 208–09 (Tex. Crim. App. 2007).

When a trial court submits the law of deadly force in self defense under Texas Penal Code §§ 9.31 and 9.32, the charge should additionally ask the jury to decide whether, in light of the circumstances of the case, the accused was entitled to a presumption of reasonableness as to his asserted belief that the use of deadly force was immediately necessary under § 9.32(b). *Villarreal v. State*, 453 S.W.3d 429, 434 (Tex. Crim. App. 2015). That section requires the jury to determine whether the actor “did not provoke the person against whom the force was used.” Tex. Pen. Code Ann. § 9.32(b)(2).

The trial court must also instruct the jury on the whether it may consider failure to retreat in the reasonableness determination, as set out in Texas Penal Code § 9.32(c) and (d):

(c) A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.

(d) For purposes of Subsection (a)(2), in determining whether an actor described by Subsection (c) reasonably believed that the use of deadly force was necessary, a finder of fact may not consider whether the actor failed to retreat.

Tex. Pen. Code Ann. § 9.32(c), (d); *Morales v. State*, 357 S.W.3d 1, 5 (Tex. Crim. App. 2011).

The trial court submitted presumption-of-reasonableness and duty-to-retreat instructions, but failed to provide a definition for “provoke” as used in the two instructions.

Generally, words that are not defined by statute and have no legal or technical meaning should not be defined in the jury charge. *Green v. State*, 476 S.W.3d 440, 445 (Tex. Crim. App. 2015). Terms not legislatively defined are typically to be understood as ordinary usage allows, and jurors may thus give them any meaning which is acceptable in common parlance. *Medford v. State*, 13 S.W.3d 769, 772 (Tex. Crim. App. 2000).

But terms that have a technical legal meaning need to be defined if “there is a risk that the jurors may arbitrarily apply their own personal definitions of the term or where a definition of the term is required to assure a fair understanding of the evidence.” *Middleton v. State*, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003). In *Medford*, the Court of Criminal Appeals held that, while the penal code contained no definition for “arrest,” it is a technical term with an established definition in common law, so it would be improper for jurors to apply any acceptable meaning of the term. 13 S.W.3d at 772.

“Provoke” as used in the context of Penal Code self defense has acquired a particular technical legal meaning that the jurors would not be presumed to know. The Court of Criminal Appeals defined provocation in this context as acts or words

that are “reasonably calculated to provoke the attack” and “used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.” *Smith v. State*, 965 S.W.2d 509, 513 (Tex. Crim. App. 1998). The legal definition has roots in common law estoppel theory and is founded upon the legal maxim that “one cannot willingly and knowingly bring upon himself the very necessity which he sets up for his own defense.” *Smith*, 965 S.W.2d at 513–14, quoting *Sorrell v. State*, 74 Tex. Crim. 505, 169 S.W. 299, 307 (1914).

In *Kennedy v. State*, No. 13–13–00416–CR, 2015 WL 3637917, at *8 (Tex. App.—Corpus Christi–Edinburg June 11, 2015, pet. ref’d) (not desig. for pub.), the court of appeals recognized that “provoke” in the self defense context has a technical legal meaning that is much narrower than its common meaning. The defendant appealed the denial of his requested definition of provocation as acts done or words used “for purpose and with the intent that the defendant would have a pretext for inflicting harm upon others.” *Id.* at *7. The State argued that provocation is a term of common usage to which the jury could assign any meaning in common parlance. Rejecting this argument, the court of appeals observed that the *Smith* decision set out a specialized definition for provocation applicable only to assertions of the self defense justification in criminal proceedings. *Id.* at *8. The court of appeals further acknowledged that the legal, technical definition of provocation is “far more restrictive than common, dictionary meaning.” *Id.* at *9. The dictionary (Merriam

Webster) defines “to provoke” as “to incite to anger” or “to stir up purposely.” *Id.* But the legal definition of provocation requires acts or words on the part of the defendant that are used as a “pretext for inflicting harm upon another.” *Id.* Assuming without deciding that the omitted definition was error, the court of appeals found that the defendant was not harmed because there was “overwhelming evidence” that the defendant provoked the encounter under the narrow legal definition by brandishing his weapon during a traffic stop and then firing forty-five shots at a police officer. *Id.* at *9.

In *Hill v. State*, 05-18-01011-CR, 2020 WL 2124520 (Tex. App.—Dallas, May 5, 2020, no pet.) (not desig. for pub.), the defendant appealed the omission of a definition for provocation in the context of presumption-of-reasonableness and duty-to-retreat instructions. The court of appeals recognized that under *Smith* provocation should be defined in a specialized manner in the context of self defense. *Id.* at 12, citing *Smith*, 965 S.W.2d at 513. But the court found no error or harm under the facts of the case because there was no evidence or argument that the defendant acted or spoke in a way that could have provoked the complainant. *Id.* at *12. “Accordingly, even if the jury had been instructed in accordance with *Smith*, it is unlikely that it would have any effect on the verdict by making it more likely that the jury would have found in favor of appellant’s defense of a third person theory.” *Id.*

These cases found no harm because there was either no evidence or overwhelming evidence satisfying the element of provocation, according to its specialized meaning. In this case, the failure to define “provoke” was harmful error because the issue was disputed. In response to the defense argument that there was no provocation (7RR57-58), the State pointed to specific evidence that Smith “provoked” the encounter, namely, his purportedly aggressive driving in the drive-through of the Whataburger. 7RR65, 67-69. This argument was based on the common broad meaning of provoke, to incite or stir up anger. The jury needed the narrow legal definition to properly apply law of self defense because there was no evidence that, by passing Lacy’s car in the Whataburger parking lot, Smith was implementing a larger plan to create a pretext to kill Lacy.

Unlike *Hill* and *Kennedy*, this case is one in which the legal definition of “provoke” was necessary. Both factors identified in *Middleton* are at play: there was a risk that the jurors would apply the broader common definition, and the narrow legal definition was “required to assure a fair understanding of the evidence.” See *Middleton, supra*, 125 S.W.3d at 454. The trial court erred in failing to submit the technical legal definition of “provoke” and thereby allowing the jury to apply the broader definition in common parlance.

C. The harm is egregious and reversal is required.

Because Smith did not object to the errors, reversal is required only if the errors are so egregious that he was deprived of a fair and impartial trial. *Almanza*, 686 S.W.2d at 171. The record must show that the defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Id.* at 174.

In examining the record to determine whether such harm occurred, a reviewing court considers (1) the entire jury charge, (2) the state of the evidence, including the contested issues and weight of probative evidence, (3) the argument of counsel and (4) any other relevant information revealed by the record of the trial court as a whole. *Almanza* at 171.

1. The entire jury charge

The jury charge required the jury to determine whether Smith reasonably believed deadly force was immediately necessary. Under the instructions, Smith was entitled to a presumption of reasonableness if he had reason to believe that Lacy was attempting to forcefully enter or remove him from his vehicle. CR143-44. Smith was entitled to this presumption only if the jury found that he “did not provoke” Lacy. CR144.

Additionally, the instructions required the jury to determine whether it could consider Smith’s failure to retreat in determining the reasonableness of his belief that

deadly force was immediately necessary. Under this instruction, if the jury found that Smith “provoked” Lacy, the jury could consider his failure to retreat.

These two instructions were essential to the determination of the sole contested issue of self defense. But nothing in the jury charge indicated that the term “provoke” had a particular legal meaning, narrower than its common meaning. The jury could not understand and properly apply these instructions without understanding the narrow legal definition of provocation.

2. The state of the evidence

The sole contested issue was self defense. There were no witnesses to the events leading up to the shooting; the jury had to rely almost exclusively on surveillance video to determine what happened and whether the shooting was justified. The surveillance video showed the two vehicles attempting to enter the drive-through lane at the same time. Lacy apparently became irrationally enraged. He exited his vehicle and approached Smith, who remained in his vehicle. Lacy was at Smith’s window and bending down when Smith shot him.

The State had the burden disproving beyond a reasonable doubt that Smith was justified in fearing death or serious bodily injury when Lacy approached him aggressively in the context of an apparent road-rage incident. The evidence showed that Lacy was a muscular man, over six feet tall, weighing over 250 pounds, with big arms and broad shoulders, and wearing a muscle shirt. 4RR93. Smith was

approximately five-foot-six. 5RR104. Lacy admitted he had been drinking; he had the odor of alcohol on his breath. 4RR154. Smith's girlfriend Graham testified that Smith told her he became frightened when a man approached his car screaming. 6RR67. She also testified that the Audi was 22 years old and that sometimes it was difficult to get the manual transmission in gear to move forward. 6RR79.

Because it is well-known that violence can escalate quickly during a road-rage incident, the evidence provided a compelling basis for self defense. A person is not required to wait until he is actually attacked before he may lawfully protect himself. *Dugar v. State*, 464 S.W.3d 811, 818 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). “A person has the right to defend himself from apparent danger to the same extent as he would if the danger were real.” *Id.*; *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). 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. *Id.*; *Jones v. State*, 544 S.W.2d 139, 142 (Tex. Crim. App. 1976).

But without a definition for “provoke,” the jury likely found that Smith's use of force was unjustified because he could have retreated. The State presented video and photo exhibits depicting the location of the Lacy's vehicle and elicited testimony from Deputy Riojas that there was room plenty of space in the parking lot for a car to drive around the Mercedes. 4RR138-39; SX7, 19, 22. The failure to properly

define “provoke,” where consideration of retreat depended on the provocation determination, was harmful.

Additionally, the evidence plausibly supported a finding of a presumption of reasonableness based on Lacy attempting to forcefully enter or remove Smith from his vehicle, as long as Smith had not “provoked” Lacy. Without a definition for “provoke” the jury was likely to find that the presumption was not applicable.

3. The arguments of counsel

Defense counsel argued that Smith did nothing to provoke Lacy in the sense that there was “nothing to indicate that he was looking to cause a confrontation.” 7RR57-58.

In response, the State argued repeatedly and emphatically that Smith “provoked” Lacy by passing the Mercedes while approaching the drive-through lane:

Now, I disagree with defense counsel’s argument that the defendant did nothing to provoke him. I absolutely disagree with that. And I’m going to play that video here for you in just a second. But this is a screenshot of that main parking lot video. Remember there’s two angles that I provided to you. And we can clearly see the complainant’s vehicle pull into the parking lot first, followed by the defendant’s vehicle. We can clearly see that. And then you’ve heard lots of testimony how this is COVID. The restaurant is not opened. Everybody knows that. You can’t go inside. The only way you can get food at Whataburger is to go into that drive-thru. And yet the defendant tries to skip him midline.

There’s your provocation, people. That’s it right there. And, in fact, he does drive forward and go around him.

7RR65.

The State also argued that this “provocation” meant that Smith had a duty to retreat:

Now, defense counsel is going to say, well he didn’t have a duty to retreat because he did nothing to provoke him. I think that he provoked him. I absolutely think that the defendant provoked him. And so in that case, you can consider it. You can consider whether or not he had other options. And he did. ... If I’m in fear, if I’m so afraid of this man walking up to my car, am I going to have my window rolled down? Am I just going to sit there waiting? No. I’m going to drive away. I’m going to get myself out of that situation. I’m going to back up, which there was plenty of room to do, I’m going to drive around the vehicle, which there was plenty of room to do. While you’re watching the surveillance video, you will see multiple cars driving around his car. There’s plenty of room for cars to drive around. It wasn’t immediately necessary, and his actions were not reasonable.

7RR67-69.

The State’s argument advanced the broadest possible meaning of provocation: that by merely passing a car in a parking lot, Smith forfeited his statutory self-defense rights on the presumption of reasonableness and no duty to retreat. Under the State’s interpretation, anything that could incite anger or frustration would be provocation.

Had the jury been instructed that “provoke” means something much narrower and more specific, the State would not have been able to characterize cutting in line as provocation. The Court of Criminal Appeals has made clear that provocation requires proof that the accused sought out the victim as part of a “ruse” to create a

reason to kill the victim in self-defense. *See Elizondo v. State*, 487 S.W.3d 185, 203–04 (Tex. Crim. App. 2016) (where the evidence showed that the defendant did not know the victim and there was no evidence of a plan to create a pretext to claim self-defense, there was insufficient evidence of provocation). There was no evidence that Smith sought out Lacy, a man he did not know, with a plan to goad him into attacking him. There was no evidence that Smith “orchestrated a set of events as a ploy to kill” Lacy. *See id.*

Because the trial court failed to define “provoke,” the jury was likely persuaded by the State’s arguments the Smith provoked Lacy, that Smith should have retreated, and that Smith’s use of force was thus unreasonable. If the jury had been supplied with a definition, it would have found no provocation, and hence no duty to retreat.

Egregious harm occurs if the error (1) affects the very basis of the case, (2) deprives the defendant of a valuable right, (3) vitally affects a defensive theory, or (4) makes the case for guilt or punishment clearly and substantially more compelling. *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex. Crim. App. 2006); *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996). The record must show that the defendant has suffered actual, rather than merely theoretical, harm from jury charge error. *Almanza* at 174.

- **actual and non-theoretical:** There is little doubt that the jury considered the State’s argument advancing the broadest possible meaning of “provoke” in convicting Smith. The jury was required to determine whether Smith “provoked” Lacy in order to decide two issues, both critical to the ultimate issue of self defense: whether Smith was entitled to a presumption of reasonableness and whether he had no duty to retreat. The State used the surveillance video in closing argument to point out the exact moment that constituted “provocation.” The jury asked for the surveillance video during deliberations. CR140.
- **affects the very basis of the case:** Self defense was the sole contested issue, which the State had the burden to disprove. As argued by the State, the jury’s core determination on self defense—whether Smith reasonably believed deadly force was immediately necessary—hinged on the jury’s finding as to provocation.
- **deprives the defendant of a valuable right:** Under the Penal Code, a defendant is entitled a presumption of reasonableness as to his belief that deadly force is immediately necessary in certain situations, including when the complainant is forcefully attempting to enter or to remove the defendant from his vehicle, as long as the defendant does not provoke the complainant and is not engaged in crime. Additionally, a person who has a right be in a

location has no duty to retreat, as long as he did not provoke the complainant and is not engaged in crime. *See* Tex. Penal Code § 9.32(b)-(d). These rights are dependent on the jury’s understanding of the specific legal meaning of “provoke.” Smith was deprived of his right to a fair adjudication of his sole defense.

- **makes the case for guilt clearly and substantially more compelling:**

Without a definition, the jury was likely to find against Smith on the issues of presumption-of-reasonableness and duty-to-retreat. The State argued explicitly that Smith forfeited these rights by “provoking” Lacy by cutting in line in the drive-through. The State further argued that, because Smith could have retreated by driving around Lacy’s vehicle, his use of force was unreasonable and unnecessary. If the jury had been instructed on the meaning of provocation, it would be clearly and substantially more likely to find that (1) Smith had no duty to retreat and that it could not consider whether he retreated, and (2) Smith’s actions were entitled to a presumption of reasonableness. A finding against of Smith on either of these issues would make the case for guilt clearly and substantially more compelling.

Egregious harm was found in a similar analysis in *Dearing v. State*, No. 11-12-00105-CR, 2014 WL 2810121 (Tex. App.—Eastland June 12, 2014, no pet.) (not desig. for pub.), an aggravated assault case. The complainant testified that the

defendant opened her door and shot him while he was in the yard. *Id.* at *1. According to the defendant's statement, she shot the complainant when he kicked in her door and entered her home. *Id.* On appeal, the defendant argued that the trial court erred when it failed to instruct the jury, under Penal Code § 9.32(c) and (d), that in determining whether her belief was reasonable that deadly force was immediately necessary, it could not consider whether she failed to retreat. The State argued that she was not entitled to the instruction because the evidence showed she provoked the complainant. *Id.* at *2.

The *Dearing* court noted that the “concept of provocation is often misunderstood in the self-defense context.” *Id.* at *3. In this context, provocation “requires that the act was done, or ... words were used, for the purpose and with the intent that the defendant would have a pretext for killing the victim.” *Id.*, quoting *Smith*, 965 S.W.2d at 518. The court of appeals found there was no evidence of this type of provocation, so the trial erred in omitting the duty-to-retreat instruction from the jury charge. *Id.* at *5.

Analyzing the record for egregious harm, the *Dearing* court observed that the duty to retreat issue was critical to jury's assessment of reasonableness of the defendant's belief that force was immediately necessary. *Id.* at *3. The court noted that the evidence was contested on the key issue of reasonableness and not overwhelming for either party. *Id.* at *5. Because the issue of a duty to retreat “vitally

Appellant's defensive theory of self-defense," the court found that it could not rule out egregious harm and reversed. *Id.*

The harm here is essentially the same. While the trial court did submit an instruction on the duty to retreat, it failed to define a term essential to understanding and applying the that instruction, as well as the presumption-of-reasonableness-instruction. Without the legal definition for "provoke," the jury undoubtedly applied the broad common definition advanced by the State, and thus misapplied the law the law of self defense in convicting Smith. The harm is egregious.

Prayer

Appellant respectfully requests that the Court reverse his conviction and remand for a new trial.

Respectfully submitted,

/s/ Adam Banks Brown

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This document has been served on the following parties electronically through the electronic filing manager on February 11, 2025.

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/s/ Adam Banks Brown

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