Case No. 05-14-00085-CR

IN THE COURT OF APPEALS

FIFTH DISTRICT OF TEXAS

JOSE RAMON CRUZ,
Appellant

v.

THE STATE OF TEXAS,
Appellee.

Appealed from the 204th Judicial District Court of Dallas County, Texas
Trial Court Cause Number F12-24443-Q
The Honorable Lena Levario, Presiding

JOSE RAMON CRUZ'S APPELLANT'S BRIEF

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APPELLANT REQUESTS ORAL ARGUMENT

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STATEMENT OF CASE

On November 14, 2012, the State indicted Jose Cruz for the murder,[1] on October 1, 2012, of Dihn Ngo. [CR 9]. Cruz elected to have a jury determine his guilt and innocence and his punishment. [CR 99].

Trial commenced on January 14, 2014. [5 RR 5]. On that day, the jury was selected and sworn. [5 RR 177]. The State commenced and completed its case-in-chief the following day. Cruz's case-in-chief lasted until the next day when the defense rested. [7 RR 148]. Cruz requested a self-defense instruction in the jury charge, but the trial court denied the request and the jury charge did not include such an instruction. [CR 100−04; 7 RR 170].

On January 21, 2014, the jury found Cruz guilty of murder and sentenced him to serve 35 years in the custody of the Texas Department of Corrections. [CR 105; 111].

Cruz filed his notice of appeal on January 21, 2014. [CR 116].

[1] TEX. PENAL CODE § 19.02.

STATEMENT REGARDING ORAL ARGUMENT

Cruz requests oral argument. This case turns on a careful analysis of the facts and the law. Accordingly, Cruz believes that oral argument will facilitate this Court's decisional process.

ISSUES PRESENTED

Did the trial court commit reversible error when it denied Cruz a self-defense instruction in the jury charge? A trial court must include a requested-statutory defense when there is some evidence to support the requested defense. Here, there was evidence that met the low threshold for the inclusion of a requested defense. The trial court, however, announced at least four reasons for not including this requested defense. Did the trial court err?

STATEMENT OF FACTS

On November 14, 2012, the State indicted Jose Cruz for the October 1, 2012 murder of Dihn "Danny" Ngo.[2] [CR 9]. Cruz retained his own counsel and elected to have a jury determine his punishment. [CR 16; 17; 99].

Trial commenced on January 14, 2014. [5 RR 5]. The attorney for the State called eight witnesses, three of whom were present at the scene of the shooting when the shooting occurred. [6 RR 17; 24; and 79]. Cruz testified on his own behalf and called two other witnesses. [6 RR 272; 283; 7 RR 129; 143].

As his first witness, the attorney for the State called Hieu Duong, Dinh "Danny" Ngo's youngest brother. [6 RR 24]. Duong testified that Ngo was "not really" a calm person and that he "gets agitated pretty easily,. . . " [6 RR 57; 58]. According to Duong, on the afternoon of the shooting that he, Ngo, and others started drinking around 3:00 or 4:00. [6 RR 30−31; 56]. According to Duong's testimony, sometime that evening Cruz approached this group and asked to purchase beer from them, but they refused to sell beer to him. [6 RR 32]. Later that same evening Cruz returned and asked for a second time to purchase beer from Duong's group. [6 RR 62].

[2] *Id.*

In response to questions from the attorney for the State, Duong testified to the events that immediately preceded the shooting. Specifically, Duong testified that, "[Ngo] was about to get into the Honda Civic and pull it up, and, you know, we were about to call it a night. So he had the door open. He was standing right next to it, and the Defendant—Mr. Cruz asked him. Can I get—you know, can you sell me a beer, or Can I get at [*sic*.] beer, somewhere in that state." [6 RR 38]. When asked to elaborate on his testimony, Duong testified that Cruz was on the sidewalk when he asked to buy a beer for the second time. [6 RR 45; 70]. Cruz's attorney asked Duong whether he believed "that [Cruz] was sincerely there for—to try to get beer?" To which Duong responded, "I'm not too sure, sir." [6 RR 61−62]. Duong testified further that the second time that Cruz asked for beer that Cruz was calm and that he offered to pay for the beer. [6 RR 65]. Duong also testified that when Cruz returned and asked to purchase beer for a second time that "the beer store [was] closed." [6 RR 66].

Duong testified that immediately before the shooting that Cruz "reached to the side of his hip, and he pulled his weapon and pointed it downwards." [6 RR 46]. But at that moment, Cruz did not "yell out anything or pointing [*sic*.] at anybody to threaten anybody." [6 RR 71]. Instead, Cruz "just pulled—drew his weapon and said, Nah, why it's got to be like that, and pointed it down." [6 RR 71]. According to Duong, Ngo "saw that [Cruz] had the weapon, that's when

[Ngo] ran and grabbed [Cruz's] two hands." [6 RR 46; 70]. Immediately prior to the shooting Duong saw Ngo, "go towards and lunge towards [Cruz] . . . to grab the gun." [6 RR 68; 39]. Cruz's attorney asked Duong, "do you think your brother's actions may have caused that shot to be fired, that first shot?" to which Duong answered, "I'm not too sure." [6 RR 73].

According to Duong, this incident occurred on the sidewalk in front of the Ngo home. [6 RR 70]. Duong testified that after Cruz had fired the shot that killed Ngo, that Cruz "yell[ed] out some instructions to apply pressure to [Ngo's] wound." [6 RR 75].

The State then called Binh Luu. [6 RR 79]. Luu could not testify that Cruz was the same person who had asked to purchase beer earlier that evening. [6 RR 88]. According to Luu, "a lot of strangers" had approached the group of men while they sat outside of the Ngo home on the night of the shooting. [6 RR 100; 101]. Luu testified that just before the shooting that Ngo approached Cruz and that Luu "told [Ngo], like, hea, it's okay. Like don't—just let the guy go or just sell him the beer, but I guess Danny wanted him off the property." [6 RR 88]. According to Luu's testimony, he was trying to calm Ngo down. [6 RR 88].

Luu testified that immediately prior to the shooting that he was seated and trying to convince Ngo to calm down. [6 RR 89]. Then Luu testified, "I guess [Ngo] just wanted to go up to [Cruz] and talk to [him]. And when [Ngo] walked

past me, that's when I heard a loud pop noise." [6 RR 89]. Due to his position on the driveway, Luu did not see a weapon until after the shooting. [6 RR 112].

On cross-examination, Luu testified that Cruz communicated with their group in a "normal voice," that Cruz asked to buy beer from the group, and that Cruz produced money that he offered in exchange for that beer. [6 RR 103; 104].

As its next witness, the State called Randy Pope. [6 RR 118]. Pope testified that when Cruz returned to the Ngo home that "[Cruz] just kept pushing for two beers" and that Ngo then started to walk towards Cruz. [6 RR 124; 131; 132; 151]. Pope testified that "right when [Cruz] pulled it and—and [Ngo] grabbed him, he tried to, you know, fight for [the gun]. And the once he did that, a shot went off." [6 RR 125]. Pope testified that "[Cruz] reached in, grabbed it, and then pulled it out and then brought it up. And then [Ngo] grabbed him, and they kind of, you know, went back and forth for, maybe, a second." [6 RR 142; 143]. On cross-examination, Pope testified that "the first shot was fired only after [Ngo] took the action he took to try to grab at the gun." [6 RR 158; 160].

The State then called four witnesses who were not present at the time of the offense. [6 RR 162; 182; 210; 238].

The following day, Cruz testified on his own behalf. [7 RR 7]. Cruz testified that at the time of the offense that he lived with his parents, that he had never obtained a driver's license, and that his parents did not allow drinking inside

of their home. [7 RR 9; 16; 29]. Cruz testified that on the day of the offense that he walked to a beer store and purchased four Shiner Blonde beers. [7 RR 29; 38]. Cruz returned to his parents' home and consumed these beers while outside of his parents' home and while waiting for a friend to come and to visit. [7 RR 37−8]. At sometime around 11:00 in the evening, after having consumed his four beers, Cruz left his parents' home intending to find a place to eat. [7 RR 38].

Cruz's attorney asked him about the events immediately preceding Ngo's killing. [7 RR 45]. Cruz testified that the Ngo home was on "the normal route I would always take." [7 RR 45]. Cruz then described the events immediately before the shooting by testifying:

> I started walking back home; and then once I got to Purdue, I decided to try my luck again. And I thought, you know, the worst thing that could happen is them just saying no.
>
> So when I had approached them, I asked them again if I could buy a couple of beers from them, and Mr. Ngo told me—he said, I thought I told you the beer store's across the street. And then I told him, you know, the beer store is closed. And then I had put my hand in my pocket and I pulled out some money from my pocket and I told him that I had some money. You know, all I wanted was to buy a couple of beers. And at that point he got extremely aggressive and agitated and he jumped up from his seat.

[7 RR 45].

Cruz testified that Ngo responded to Cruz's request to buy beer by becoming "extremely aggressive and angry." [7 RR 46]. Specifically, Cruz testified that Ngo said, "I'll kill you motherfucker; you're on my property." [7 RR 47]. Cruz

testified the he was on the sidewalk and backing away from Ngo. [7 RR 47]. Cruz continued, testifying that he was afraid to turn his back to Ngo while Ngo persisted in trying to charge at Cruz while yelling that he would kill Cruz. [7 RR 47]. According to Cruz, Ngo's friends restrained him but that Ngo's friends had to "wrestle" with Ngo to attempt to keep him off of Cruz. [7 RR 48]. At this point, Cruz was still on the sidewalk in front of the Ngo home and Cruz, although armed, had not exhibited his firearm. [7 RR 48]. Cruz testified that while he did back away from Ngo and his friends that Cruz did not turn his back to Ngo because Ngo "was still trying to run at [him]" while "repeatedly saying I'm gonna kill you; I'm gonna kill you." [7 RR 47; 50]. Cruz then testified that Ngo broke loose of his friends who had been trying to restrain him and, as a result of Ngo getting away from his friends and coming towards Cruz, Cruz lifted his shirt and put his hand on his firearm. [7 RR 51].

At this point in the testimony, the trial court announced, "You know what? I need to take a break because there's some other folks waiting." [7 RR 51]. The jury left the courtroom and the trial court recessed for twenty-four minutes. [7 RR 51; 52].

After the trial court resumed hearing testimony, Ngo summarized his prior testimony and then testified that once Ngo broke loose from his friends that Cruz "was very scared; I was very afraid." [7 RR 54]. According to Cruz, he hoped that

by showing the gun that Ngo would "stop coming towards" Cruz. [7 RR 55]. Ngo reached Cruz and they were "face-to-face." [7 RR 56]. Cruz testified that Ngo was moving his hands in a violent motion with closed fists and that Cruz believed that Ngo intended to attack him. [7 RR 57]. Cruz testified that before he discharged his weapon that he was hit in the "temple area" with a closed fist and that his glasses fell from his face, rendering him nearly blind. [7 RR 67; 68]. Cruz then testified that he pointed the gun at Ngo because he felt threatened by Ngo. [7 RR 59]. Cruz testified that when he pulled his gun that Ngo's friends were standing and that one or two of them was approaching Ngo and Cruz. [7 RR 60; 67]. Cruz clarified his testimony to say that there were "at least three" people attacking him when he decided to discharge his pistol and that Ngo had attempted to take Cruz's weapon from him and to use it against him. [7 RR 69; 121]. Cruz then testified that "At that point I had gotten real desperate and in fear of my life, especially with him threatening to kill me and just the way the situation was, so that was when I decided to fire." [7 RR 69].

Dr. Gordon Keehn, an ophthalmologist who had last treated Cruz in May 2011, testified that without corrective lenses that Cruz would be able to see clearly for only about six inches. [7 RR 143; 144; 145; 146].

At the charge conference, Cruz's attorney requested that the trial court include a self-defense instruction in the jury charge. [7 RR 166]. Both Cruz and

the State argued the merits and demerits of a self-defense instruction, but neither attorney argued the relevant standard. [7 RR 166−70]. Instead, the attorney for the State argued generally claiming that Cruz was not entitled to a self-defense instruction for the following reasons: that Ngo merely committed a verbal provocation and that is insufficient to get the instruction [7 RR 167]; that Cruz was on Ngo's driveway [7 RR 167]; that Cruz returned to discuss his differences with Ngo and his friends [7 RR 167]; and that Cruz's response was disproportionate to the threat [7 RR 170].

The trial court then stated that, "The Court does not recall the defendant testifying that he was in jeopardy of somebody's use of unlawful deadly force. The deceased had a right to be where he was.. . .furthermore, the law clearly states that the deadly force is not available for use if the Defendant provoked the other's use or attempted use of unlawful force." [7 RR 170]. The trial court continued, stating, "I don't know—based on the Defendant's own testimony, he was aware that he was provoking or that his actions would be provocative or were provocative in this case. That—on top of all of the reasons outlined by the Prosecutor, I'm going to deny your request for a self-defense claim." [7 RR 170].

The jury charge did not include a self-defense instruction. [CR 100−04].

SUMMARY OF THE ARGUMENT

In one issue, Cruz contends that the trial court erred in denying Cruz's request for a self-defense instruction in the jury charge. The evidence presented at trial established, at the very least, that a fact issue existed concerning Cruz's use of deadly force. When a fact issue exists about the use of deadly force, then the trial court should issue the self-defense instruction, but also include a paragraph directing the jury to determine whether the defendant acted in self-defense as defined by the Penal Code. Here, the trial court invaded the providence of the jury when the court determined that, as a matter of law, Cruz was not entitled to a self-defense instruction. Because Cruz admitted to the shooting that served as the basis for the underlying conviction, Cruz's entire defense was predicated on receiving this instruction. Therefore the error was harmful and Cruz asks this Court to grant him a new trial.

FIRST ISSUE PRESENTED

The trial court committed reversible error in denying Cruz a self-defense instruction in the jury charge.

A. Standard of Review for Jury Charge Error

When an appellate court evaluates an allegation of jury charge error, the Court must first determine whether the alleged error actually exists and, if the alleged error does exist, then the Court determines whether that error harmed the appellant.[3]

If an error or an omission in the jury charge was the subject of a timely objection, then reversal is required if the error or omission is "calculated to injure the rights of defendant," which simply means that the error caused some harm to the accused.[4] An intermediate-appellate court will reverse an objected to jury charge error or omission if it finds "any actual harm, regardless of the degree."[5] In assessing actual harm, intermediate-appellate courts examine the potential harm

[3] *See Alamanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g); *Sakil v. State*, 287 S.W.3d 23, 28 (Tex. Crim. App. 2009).

[4] *Sakil*, 287 S.W.3d at 28; TEX. CODE CRIM. PROC. 36.14; *Schoelman v. State*, 644 S.W.2d 727, 732 n.17 (Tex. Crim. App. 1983).

[5] *Brewer v. State*, 05-08-01082-CR, 2009 Tex. App. LEXIS 5871, 2009 WL 2274098, at *3 (Tex. App. Dallas—July 30, 2009, pet ref'd) (not designated for publication) (citing *Anderson v. State*, 11 S.W.3d 369, 374 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd)).

"in light of the entire jury charge; the state of the evidence, including the contested instructions and weight of probative evidence; the argument of counsel; and any other information revealed by the record of the trial as a whole."[6]

In reviewing a trial court's refusal to provide a jury instruction, intermediate-appellate courts view the evidence in the light most favorable to the defendant.[7]

B. Standard for Evaluating Whether a Jury Instruction Should have been Given

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 defense that, if believed by the jury, would support a rational inference that that element is true."[8] Importantly, an accused has the right to an instruction on any defensive instruction raised by the evidence, "whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense."[9] It is also well settled that an accused is entitled to a defensive instruction, whether the instruction is raised by a defendant's testimony

[6] *Id*. at *3−4 (citing *Frost v. State*, 25 S.W.3d 395, 400 (Tex. App.—Austin 2000, no pet.) (citing *Almanza*, 686 S.W.2d at 171)).

[7] *See Preston v. State*, 756 S.W.2d 22, 24 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

[8] *Shaw v. State*, 243 S.W.3d 647, 657−58 (Tex. Crim. App. 2007); TEX. PENAL CODE § 2.03(c).

[9] *Allen v. State*, 253 S.W.3d 260, 267 (Tex. Crim. App.2008) (quoting *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996)).

alone or through other evidence.[10] In determining whether the defendant's testimony raises the instruction of self-defense, the truth of the defendant's testimony is not relevant.[11]

C. Self-Defense Instructions in Jury Charges

1. Requirements for a Self-Defense Instruction

Section 9.32 of the Penal Code provides the required elements for a self-defense instruction involving the use of deadly force.[12] These elements are: (1) The person would have been justified in using force against the other under § 9.31 of the Penal Code; and, (2) the actor used deadly force when and to the degree the actor reasonably believed was immediately necessary to protect the actor against the other's use or attempted use of unlawful deadly force.[13]

2. Definitions

The Penal Code defines "deadly force" in the context of Chapter 9 as, "force that is intended or known by the actor to cause, or in the manner of its use or

[10] *Miller v. State*, 815 S.W.2d 582, 585 (Tex. Crim. App. 1991); *Hayes v. State*, 728 S.W.2d 804, 808 (Tex. Crim. App. 1987); *Elmore v. State*, 257 S.W.3d 257, 259 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

[11] *Elmore*, 257 S.W.3d at 259 (citing *Rodriquez v. State*, 544 S.W.2d 382, 383 (Tex. Crim. App. 1976)).

[12] TEX. PENAL CODE § 9.32(a).

[13] TEX. PENAL CODE §§ 9.31(a), 9.32(a).

intended use is capable of causing, death or serious bodily injury."[14] Depending on the circumstances surrounding the event, the use of fists can be "deadly force" under this section of the Penal Code.[15]

The Penal Code defines "unlawful" as, conduct that is "criminal or tortious or both . . ."[16]

"Serious bodily injury" is an injury that creates a "substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[17]

The Penal Code defines "Reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor."[18]

The Penal Code does not define the term "provoke."[19] Under the common law, a defendant has "provoked" a victim when: (1) the defendant did some act or used some words that provoked the attack on him, (2) the act or words were reasonably calculated to provoke the attack, and (3) the act was done or the words

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[14] TEX. PENAL CODE § 9.01(3).

[15] *Bundy v. State*, 280 S.W.3d 425, 435 (Tex. App.—Fort Worth 2009, pet ref'd.) (citing to *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. dism'd)).

[16] TEX. PENAL CODE § 1.07(a)(48).

[17] TEX. PENAL CODE § 1.07(a)(46).

[18] TEX. PENAL CODE § 1.07(a)(42).

[19] *See generally*, TEX. PENAL CODE §§ 1.07 & 9.01.

were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.[20]

3. Exceptions to Self-Defense Instruction and Inclusion in Jury Charge with Limiting Instruction

a. Exceptions to Self-Defense Instruction in the Jury Charge

A person may not use force to respond "to a verbal provocation alone."[21]

Additionally, the use of force against another is not justified if the actor "sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was carrying a weapon in violation of section 46.02 of the penal code."[22]

Finally, a person is not entitled to a self-defense instruction in the jury charge if the defendant, "provoked the other's use or attempted use of unlawful force. . . "[23]

b. If a Fact Issue Exists Concerning the Instruction, then the Exceptions are Included in the Jury Charge with Self-Defense Instruction and Jury is to Decide Whether Exception Applies

[20] *Mendoza v. State*, 349 S.W.3d 273, 279 (Tex. App.—Dallas 2011, pet ref'd) (citing *Smith v. State*, 965 S.W.2d 509, 512 (Tex. Crim. App. 1998)).

[21] TEX. PENAL CODE § 9.31(b)(1).

[22] TEX. PENAL CODE § 9.31(b)(5)(A). Section 46.02 of the Penal Code governs the unlawful carrying of a weapon. TEX. PENAL CODE § 46.02.

[23] *Id*. § 9.31(b)(4).

Where there is a fact issue raised on any of the elements in § 9.31(b) (the exceptions to the self-defense instruction), a defendant is entitled to a self-defense instruction if he satisfied the requirements of section 9.31(a) (the general requirements for a self-defense instruction).[24] Generally, issues like provocation or whether the defendant carried a gun to a discussion are fact issues that are included in the charge as limitations to self-defense.[25]

However, when the evidence—viewed in the light most favorable to the defendant—establishes as a matter of law that force is not justified in self-defense, then no self-defense instruction is required to be included in the jury charge.[26]

D. Self-Defense Instruction Cases

Generally, the cases on self-defense instructions fall into two categories. The first category is cases in which a self-defense instruction was requested and then denied by the trial court. The second category comprises cases in which the self-defense instruction was requested and received but an objected-to-limiting

[24] *Williams v. State*, 35 S.W.3d 783, 786 (Tex. App.—Beaumont 2001, pet ref'd.); *Barron v. State*, 05-08-00637-CR, 2010 Tex. App. LEXIS 2721, 2010 WL 1294078 at *6 (Tex. App.—Dallas, pet ref'd. Apr. 6, 2010) (not designated for publication) (citing *Elmore v. State*, 257 S.W.3d 257, 258 (Tex. App.-Houston [1st Dist.] 2008, no pet.))

[25] *See* TEX. PENAL CODE § 9.31(b)(5)(A); *Lee v. State*, 259 S.W.3d 785, 789−91 (Tex. App.—Houston [1st Dist.], pet. denied).

[26] *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001).

instruction that allowed the jury to determine the validity of the self-defense claim was also included in the charge. This brief will address each category individually.

1. Cases in which A Self-Defense Instruction was Requested and Denied

a. *Moore v. State*[27]

Moore was charged with and convicted of murder.[28] Moore requested a self-defense instruction but the trial court denied the instruction.[29] In *Moore*, the appellant, under any version of the events, sought an explanation of some disputed matter while carrying a weapon in violation of § 46.02 of the Penal Code.[30] This Court recited the facts of the case and then concluded that "the undisputed evidence was that Moore approached [the victim and his friends] in the parking lot seeking a discussion with the men about their differences over comments made to

[27] *Moore v. State*, 392 S.W.3d 697 (Tex. App.—Dallas 2010, no pet.) (withdrawn from publisher).

[28] *Id*. at *1.

[29] *Id*. at *6.

[30] *Id*. at *1−*5. The witnesses provided two versions of the events leading to the shooting. Under one set of facts, Moore was upstairs, came out on a balcony, and then told the victim to stop harassing a specific woman. Moore then went downstairs, while armed, to "make sure there was 'no further disrespect' [towards the women.]." Moore then left and returned a few minutes later and asked, "What's up now with y'all?" and then produced his pistol. *Id*. at *1−*3. In Moore's version of events he stepped out on the balcony and told the victim and his friends to stop harassing the women. The victim and his friends pretended to be unable to hear Moore, so Moore went downstairs, while illegally armed, and repeated his entreaty. Moore testified that he then turned to leave the scene and as he did so one of the men said something to Moore. Moore then turned and approached the man and said, "Man, what you say?" At that point the man pulled a gun and then Moore pulled a gun. *Id*. at *3−*5.

Moore's 'female.' . . . Accordingly, as a matter of law, Moore was not justified in using deadly force."[31]

b. *Lay v. State*[32]

Lay also concerned a conviction for murder.[33] In *Lay*, the undisputed facts showed that Lay gave a man named Feggett money for a cookout.[34] Feggett used the money to purchase drugs and when Lay learned that there would not be a cookout and that Feggett had spent the money on drugs Lay left angrily while threatening to kill Feggett.[35] Lay then returned to Feggett's apartment to confront him about the money and, while there, Lay shot Feggett.[36] *Lay* requested a self-defense instruction, but the trial court held that as a matter of law that he was not entitled to this instruction.[37] The Texarkana Court of Appeals agreed.[38] Specifically, the intermediate-appellate court held that, "The *undisputed* evidence was that after the first altercation, Lay returned to his home, took possession of his

[31] *Id*. at *10.

[32] *Lay v. State*, 359 S.W.3d 291 (Tex. App.—Texarkana 2012, no pet).

[33] *Id*. at 293.

[34] *Id*. at 294.

[35] *Id*.

[36] *Id*.

[37] *Id*. at 298.

[38] *Id*.

friend's gun, returned to [the victim's] apartment complex, and confronted [the victim], seeking 'to convince [the victim] to acknowledge wrongdoing in swindling money from' him."[39] (Emphasis added.). The Court then concluded, "Because Lay sought a discussion concerning *his difference* with [the victim] . . . [Lay] was not entitled to an instruction on the instruction of self-defense as a matter of law."[40] (Emphasis added.).

c. *Williams v. State*[41]

Williams too concerned a conviction for murder.[42] This case arose from a stepfather's anger at a non-family member who punished Williams' stepson with a belt.[43] Williams went to this non-family member's home with a belt and a gun to discuss the beatings.[44] Williams possessed the gun in violation of § 46.02 of the Penal Code.[45] Williams hit the non-family member with the belt, the non-family member grabbed Williams' gun, Williams regained control of the gun and shot the

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[39] *Id*.

[40] *Id*.

[41] *Williams v. State*, 35 S.W.3d 783 (Tex. App.—Beaumont 2001, pet ref'd).

[42] *Id*. at 784.

[43] *Id*.

[44] *Id.*

[45] *Id*.

non-family member.[46] Williams appealed his conviction on the basis that the trial court had erroneously refused his request for a self-defense instruction in the jury charge.[47] The *Williams* court explained that, "where there is a fact issue raised on any of the elements in the 'carrying the gun to the discussion' section [section 9.31(b)(5)], a defendant would be entitled to a self-defense charge if he satisfied the requirements of section 9.31(a);. . ."[48] The *Williams* court held, however, that the trial court properly denied the instruction because "*the record . . . clearly shows that Williams intentionally sought out [the victim] to confront him about the spanking incident* and that he intentionally brought the handgun with him and used it to shoot the victim,. . ."[49] (Emphasis added.).

2. Objection Made to Limiting Instruction on Self-Defense Instruction

a. *Lee v. State*[50]

Lee is the leading case in this jurisprudence.[51] *Lee* concerned a conviction for murder.[52] The trial court included the requested self-defense instruction but

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[46] *Id*.

[47] *Id*.

[48] *Id*. at 786.

[49] *Id*.

[50] *Lee v. State*, 259 S.W.3d 785 (Tex. App.—Houston [1st Dist.] pet ref'd). Of note, the authoring justice of this opinion now sits on the Court of Criminal Appeals.

[51] *Id*. at 787.

also included an objected-to-limiting instruction that directed the jury to find that Lee had not acted in self defense if they found beyond a reasonable doubt that while unlawfully carrying a handgun and "seeking an explanation from the complainant" that Lee killed the victim.[53] The *Lee* Court held that:

> Appellant had a prior dispute with the deceased, and some evidence existed that appellant was seeking a discussion with [the deceased] when he shot [the deceased]. Appellant's walking up and speaking to [the deceased] about the subject of their disagreement, the robbery and subsequent conduct by the gang members, while carrying an unlawful weapon, was some evidence of appellant's effort to have a discussion with Alexander, raising a [fact] instruction under section 9.31(b)(5)(B) of the Penal Code.. . . Because some evidence raised the instruction, we hold that the trial court did not err by instructing the jury that it should find against appellant on his claim of self-defense if it found, beyond a reasonable doubt, that deadly force was used by appellant at a time when he was seeking a discussion with [the deceased] while unlawfully carrying a weapon.[54]

b. *Skief v. State*[55]

Skief, decided by this Court in 2013, also concerned a conviction for murder.[56] Skief requested and received a self-defense instruction in the charge, but

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[52] *Id*. at 789.

[53] *Id*.

[54] *Id*. at 790−91.

[55] *Skief v. State*, 05-12-00223-CR, 2013 Tex. App. LEXIS 6247, 2013 WL 2244336, at *1 (Tex. App.—Dallas 2013, no pet.) (not designated for publication)..

[56] *Id*.

he also received a limiting instruction similar to that given in *Lee*.[57] On appeal, Skief argued that there was no evidence to support the submission of the limiting instruction. This Court recited the facts, relied on the reasoning from *Lee*, and concluded,

> [t]he trial court properly instructed the jury. There is sufficient evidence from which a rational trier of fact could find appellant sought an explanation from or discussion with the complainant after appellant's car suddenly swerved and struck or nearly struck the complainant. Because there is evidence raising the instruction, we therefore conclude the trial court did not err by instructing the jury under section 9.31(b)(5)(A), and that the jury charge does not contain error.[58]

c. *Thomas v. State*[59]

Thomas is an anomalous case and it stands for the proposition that every requirement in the statute must be satisfied before an exclusion to the self-defense

[57] *Id*.

[58] *Id*. at *11. For similar holdings on almost identical fact instructions, *see e.g*., *Kelley v. State*, 05-09-0143-CR, 2012 Tex. App. LEXIS 5361, 2012 WL 2628074 (Tex. App.—Dallas July 6, 2012, pet ref'd) (not designated for publication) (holding "Viewing the evidence in the light most favorable to giving the instruction, the record reflects that Appellant and [his victim] had a disagreement over appellant's presence . . . in [the] apartment. They argued, both through the open window and then again outside the apartment. From the evidence, we conclude that a rational jury could have found beyond a reasonable doubt that appellant and [the victim] had their differences and that appellant 'sought an explanation from or discussion with' [the victim] concerning their differences. Therefore the trial court properly submitted the [limiting] instruction to the jury.").

[59] *Thomas v. State*, 07-11-00081-CR, 2012 Tex. App. LEXIS 809, 2012 WL 280578 (Tex. App.—Amarillo 2012, pet ref'd.) (case transferred from the Dallas Court of Appeals to Amarillo, underlying conviction was rendered by a trial court in Dallas County).

instruction is properly included in the jury charge.[60] In *Thomas*, the Amarillo Court of Appeals held that the trial court committed reversible error when it issued the standard limiting charge with the self-defense instruction because there was no evidence to support the required element that the appellant sought an "explanation or discussion with the other person '*while* the actor' was carrying a weapon in violation of section 46.02."[61] (Emphasis original.). Ultimately, the Court concluded that "we see that the element of the limitation that is missing is seeking the discussion or explanation while armed."[62]

E. Facts of This Case

As his first witness, the attorney for the State called Hieu Duong, Dinh "Danny" Ngo's youngest brother. [6 RR 24]. Duong was present when Cruz returned to the Ngo home. According to Duong, Ngo was a volatile person and that Ngo started drinking around 3:00 or 4:00 on the afternoon of the shooting. [6 RR 30−31; 56; 57; 58].

Duong testified to the events that preceded the shooting. Specifically, Duong testified that, "[Ngo] was about to get into the Honda Civic and pull it up, and, you know, we were about to call it a night. So he had the door open. He was

[60] *See generally, id.* (holding that all elements of exception not established therefore trial court erred in including exception in the jury charge).

[61] *Id.* at *13.

[62] *Id.*

standing right next to it, and the Defendant—Mr. Cruz asked him. Can I get—you know, can you sell me a beer, or Can I get at [*sic*.] beer, somewhere in that state." [6 RR 38]. When asked to elaborate on his testimony, Duong testified that Cruz was on the sidewalk when he asked to buy beer for the second time. [6 RR 45−46; 70]. Cruz's attorney asked Duong whether he believed "that [Cruz] was sincerely there for—to try to get beer?" To which Duong responded, "I'm not too sure, sir." [6 RR 61−62]. Duong testified further that the second time that Cruz asked for beer that Cruz was calm and that he offered to pay for the beer. [6 RR 65]. Duong also testified that when Cruz returned and asked to purchase beer for a second time that "the beer store [was] closed." [6 RR 66].

Duong testified that when Cruz first exhibited his gun that Cruz removed the gun from his waistband and then pointed it towards the ground and to the side away from Ngo. [6 RR 46]. At that point, according to Duong's testimony, Ngo grabbed Cruz's hands or writs in an effort to take Cruz's gun and then the two started to fight. [6 RR 39; 68; 73]. During this fight Cruz shot Ngo.

The State then called Binh Luu. [6 RR 79]. Luu testified that just before the shooting that Ngo approached Cruz who had asked to purchase beer, and that Ngo became upset and Luu worked to calm Ngo down. Specifically, Luu "told [Ngo], like, hea, it's okay. Like don't—just let the guy go or just sell him the beer, but I guess [Ngo] wanted [Cruz] off the property." [6 RR 88]. When Luu was unable

to calm Ngo down, Ngo walked in front of Luu and toward Cruz and that is when the shooting occurred. [6 RR 89]. On cross-examination, Luu testified that prior to the shooting that Cruz had communicated with their group in a "normal voice," that Cruz asked to buy beer from them, and that Cruz produced money that he offered in exchange for that beer. [6 RR 103; 104].

As its next witness, the State called Randy Pope. [6 RR 118]. Pope testified that when Cruz returned to the Ngo home that "[Cruz] just kept pushing for two beers." [6 RR 124; 131; 132]. Pope testified that after Cruz removed his gun from his waistband that Ngo tried to grab the gun and the two started to fight and then Cruz shot Ngo. [6 RR 142; 143; 158; 160].

The following day, Cruz testified on his own behalf. [7 RR 7]. Cruz testified that at the time of this offense that he lived with his parents, that he had never obtained a driver's license, and that his parents did not allow drinking inside of their home. [7 RR 9; 16; 29]. Cruz testified that on the day of the offense that he walked to the beer store and purchased four Shiner Blonde beers. [7 RR 29; 38]. Cruz returned to his parents' home and consumed these beers while waiting for a friend to come and to visit. [7 RR 37−8]. After consuming these four beers, and sometime around 11:00 in the evening, Cruz left his parents' home intending to find a place to eat. [7 RR 29].

Cruz's attorney asked him about the events immediately preceding Ngo's killing. [7 RR 45]. Cruz responded:

> I started walking back home; and then once I got to Purdue, I decided to try my luck again. And I thought, you know, the worst thing that could happen is them just saying no.
>
> So when I had approached them, I asked them again if I could buy a couple of beers from them, and Mr. Ngo told me—he said, I thought I told you the beer store's across the street. And then I told him, you know, the beer store is closed. And then I had put my hand in my pocket and I pulled out some money from my pocket and I told him that I had some money. You know, all I wanted was to buy a couple of beers. And at that point he got extremely aggressive and agitated and he jumped up from his seat.

[7 RR 45].

Cruz testified that Ngo responded to Cruz's question by becoming "extremely aggressive and angry." [7 RR 46]. Specifically, Cruz testified that Ngo said, "I'll kill you motherfucker; you're on my property." [7 RR 46−47]. Cruz testified the he was on the sidewalk and that he was afraid to turn his back to Ngo and that Ngo charged at Cruz while yelling that he would kill Cruz. [7 RR 47]. According to Cruz, Ngo's friends restrained him but that Ngo's friends had to "wrestle" with Ngo to attempt to keep him off of Cruz. [7 RR 48]. At this point, Cruz was still on the sidewalk in front of the Ngo home and Cruz, although armed, had not exhibited his firearm. [7 RR 48]. Cruz testified that while he was backing away from Ngo that Cruz did not turn his back on Ngo because Ngo "was still trying to run at [him]" while "repeatedly saying I'm gonna kill you; I'm gonna kill

you." [7 RR 47; 50]. Cruz then testified that Ngo broke loose of his friends who had been trying to restrain him and, as a result of Ngo getting away from his friends and coming towards Cruz, Cruz lifted his shirt and put his hand on his firearm. [7 RR 51].

At this point in the testimony, the trial court announced, "You know what? I need to take a break because there's some other folks waiting." [7 RR 51]. The jury left the courtroom and the trial court recessed for twenty-four minutes. [7 RR 51; 52].

After the trial court resumed hearing testimony, Ngo recapped his testimony and then testified that once Ngo broke loose from his friends that Cruz "was very scared; I was very afraid." [7 RR 54]. According to Cruz, he hoped that by showing the gun that Ngo would "stop coming towards" Cruz. [7 RR 55]. Ngo, however, reached Cruz and they were "face-to-face." [7 RR 56]. Cruz testified that Ngo was moving his hands in a violent motion with closed fists and that he believed that Ngo intended to attack him. [7 RR 57]. Cruz testified that he pointed the gun at Ngo because he felt threatened by Ngo. [7 RR 59]. Cruz testified that when he pulled his gun that Ngo's friends were standing and that one or two of them was approaching Ngo and Cruz. [7 RR 60; 67]. Cruz testified that before he discharged his weapon that he was hit in the "temple area" with a closed fist and that his glasses fell from his face, rendering him nearly blind. [7 RR 67; 68]. Cruz

then clarified his testimony to say that there were "at least three" people attacking him when he decided to discharge his pistol and that he believed that Ngo intended to take Cruz's weapon from him and to use it against him. [7 RR 69; 121]. Cruz then testified that "At that point I had gotten real desperate and in fear of my life, especially with him threatening to kill me and just the way the situation was, so that was when I decided to fire." [7 RR 69].

Dr. Gordon Keehn, an ophthalmologist who had treated Cruz within a year of the shooting, testified that without corrective lenses that Cruz would be able to see clearly for only about six inches. [7 RR 143; 144; 145; 146].

At the charge conference, Cruz's attorney requested that the trial court include a self-defense instruction in the jury charge. [7 RR 166].

In denying the requested charge, the trial court stated that "The Court does not recall the defendant testifying that he was in jeopardy of somebody's use of unlawful deadly force. The deceased had a right to be where he was.. . . furthermore, the law clearly states that the deadly force is not available for use if the Defendant provoked the other's use or attempted use of unlawful force." [7 RR 170]. The trial court then stated, "I don't know—based on the Defendant's own testimony, he was aware that he was provoking or that his actions would be provocative or were provocative in this case. That—on top of all of the reasons

outlined by the Prosecutor, I'm going to deny your request for a self-defense claim." [7 RR 170].

The jury charge did not include a self-defense instruction. [CR 100−04].

F. Application of the Law to the Facts

The trial court committed reversible error in failing to grant Cruz's request for a jury instruction on self defense. When the evidence is considered in the light most favorable to Cruz, the evidence produced was sufficient to support every element of the requested defense.[63] Legitimate fact issues existed concerning the exceptions to the self-defense instruction, therefore the trial court should have issued the self-defense instruction and included a complementary instruction that directed the jury to decide whether Cruz acted in self-defense.[64] Because Cruz admitted to the shooting and his entire defense was predicated on receiving a self-defense instruction the denial of this instruction harmed Cruz.

1. Cruz Provided Evidence of the Elements Required for a Self-Defense Instruction

To be entitled to a self-defense instruction in the jury charge, evidence had to have been received and admitted that established a rational inference that the following elements are true: (1) Cruz would have been justified in using force

[63] *Shaw*, 243 S.W.3d at 657−58; TEX. PENAL CODE §2.03(c).

[64] *Lee*, 259 S.W.3d at 785; and *Skief*, 2013 Tex. App. LEXIS 6247, 2013 WL 2244336, at *1.

against Ngo under § 9.31 of the Penal Code; and, (2) Cruz used deadly force when and to the degree that he reasonably believed was immediately necessary to protect him against the use or attempted use of unlawful deadly force.[65]

In evaluating whether Cruz met this standard, this Court considers the evidence in the light most favorable towards Cruz and the evidence is sufficient even if that evidence is weak, impeached, or incredible to the trial court.[66] Further, it is sufficient that Cruz produced this evidence through his own testimony.[67]

a. Sufficient Evidence was Produced to Establish that Cruz would have been Justified in Using Force under § 9.32(a) of the Penal Code

Section 9.32(a)(2) limited Cruz's ability to use deadly force to circumstances in which he was acting to "protect [himself] against the other's use or attempted use of deadly force."[68]

The Penal Code defines "deadly force" in the context of Chapter 9 as, "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury."[69] Depending on

[65] TEX. PENAL CODE §§ 9.31(a), 9.32(a); *Shaw*, 243 S.W.3d at 657−58.

[66] *Allen*, 253 S.W.3d at 267 (quoting *Hamel*, 916 S.W.2d at 493).

[67] *Miller*, 815 S.W.2d at 585; *Hayes*, 728 S.W.2d at 808; *Elmore*, 257 S.W.3d at 259.

[68] TEX. PENAL CODE § 9.32(a)(2).

[69] TEX. PENAL CODE § 9.01(3).

the circumstances, an attack with just fists can be a use or attempted use of "deadly force."[70]

The Penal Code defines "unlawful" as conduct that is "criminal or tortious or both . . ."[71]

"Serious bodily injury" is an injury that creates a "substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[72]

Here, the trial court explained that it was denying Cruz's request for a self-defense instruction by stating that it did "not recall the Defendant testifying that he was in jeopardy of somebody's use of unlawful deadly force." [7 RR 170].

Duong, Ngo's brother, testified that Ngo was a volatile person. [6 RR 57; 58]. According to Duong, Ngo confronted Cruz immediately prior to the shooting and that when Cruz exhibited his gun for the first time that he pointed it towards the ground and away from Ngo. [6 RR 46]. Then, according to Ngo's brother's testimony, Ngo lunged for the gun and a fight ensued. [6 RR 39; 68]. This fight occurred on the sidewalk in front of the Ngo home and during the fight Cruz shot Ngo. [6 RR 70].

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[70] *Bundy*, 280 S.W.3d at 435; *Schiffert*, 257 S.W.3d at 14.

[71] TEX. PENAL CODE § 1.07(a)(48).

[72] TEX. PENAL CODE § 1.07(a)(46).

Luu testified that shortly before the shooting that he tried to calm Ngo down by telling Ngo, "like hea, it's okay. Like don't—just let [Cruz] go or just sell him the beer, but I guess Danny [Ngo] wanted [Cruz] off the property." [6 RR 88].

According to Cruz, as he approached the Ngo home that he decided to ask again to purchase beers, thinking, "the worst thing that could happens is them just saying no." [7 RR 45]. After Cruz asked to purchase the beer, Ngo "got extremely aggressive and agitated and he jumped up from his seat." [7 RR 45]. According to Cruz, Ngo threatened to kill Cruz, Ngo attempted to confront Cruz but Ngo's friends restrained him. [7 RR 47−48]. Cruz testified that, prior to the shooting, several of Ngo's friends were standing, that Ngo got free of the people who had been restraining him, and that Ngo was then face-to-face with Cruz while Ngo waived his arms violently. [7 RR 54−55; 56]. Cruz also testified that Ngo, "tried to take my weapon from me and use it against me." [7 RR 121]. Cruz testified that at this point he was "very scared; . . . very afraid." [7 RR 54]. Cruz testified further that before he discharged his weapon that there were at least three people attacking him and that he had been hit in the side of the head with a closed fist. [7 RR 67; 68; 69; 121]. The blow to the side of Cruz's head knocked his glasses from his face and without them, especially at night, Cruz was nearly blind. [7 RR 67; 68; 143−46]. Cruz characterized himself at this point as "desperate and in fear for his life" and so he "decided to fire." [7 RR 69].

Punching Cruz in the head, three people attacking Cruz, attempting to take Cruz's gun and to use it against him each establish "unlawful" conduct under §1.07(a)(48) of the Penal Code as they are all, individually or collectively, both criminal and tortious.[73] Further, by testifying that three people were attacking him while he was nearly blind and by testifying that Ngo attempted to take Cruz's gun and to use that gun against Cruz, Cruz provided testimony that he employed deadly force to protect himself against Ngo's use or attempted use of deadly force against Cruz.[74] [7 RR 67; 68; 69; 121]

When the evidence is viewed in the light most favorable to Cruz,[75] Cruz has carried his burden to show that he was entitled to a self-defense instruction under § 9.32(a) of the Penal Code.[76]

Accordingly, a fact question exists about whether Cruz used deadly force to "protect [himself] against the other's use of attempted use of deadly force."[77] Therefore, the trial court erred in determining, as a matter of law, that Cruz was not entitled to a self-defense instruction on this basis. [7 RR 170].

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[73] *See e.g.*, TEX. PENAL CODE §§ 22.01 (statute making assault illegal) and 22.02 (statute making aggravated assault illegal); *G.T. Mgmt. v. Gonzalez*, 106 S.W.3d 880, 884−85 (Tex. App.—Dallas 2003, no pet.) (providing elements for tort of assault).

[74] TEX. PENAL CODE § 9.32(a).

[75] *Preston*, 756 S.W.2d at 24; *Shaw*, 243 S.W.3d at 657−58.

[76] TEX. PENAL CODE § 9.32(a).

[77] TEX. PENAL CODE § 9.32(a)(2).

b. The Exceptions in § 9.31(b) Mentioned by the Trial Court Do Not Apply

i. There is Sufficient Evidence to Create a Fact Question about Verbal Provocation Alone

Section 9.31(b)(1) provides that a person is not justified in using self-defense against a verbal provocation alone.[78]

In evaluating whether Cruz was entitled to the self-defense instruction, this Court considers the evidence in the light most favorable towards Cruz and the evidence is sufficient to find that the trial court erred in denying the instruction even if that evidence is weak, impeached, or even incredible to the trial judge.[79] Further, it is sufficient to find that the trial court erred in denying the instruction if the evidence was produced only through Cruz's own testimony.[80]

The attorney for the State argued to the trial court that Cruz was not entitled to use self-defense because "you can't attack someone based on a verbal provocation alone." [7 RR 167]. In justifying its decision not to include a self-defense instruction in the jury charge, the trial court uncritically adopted each of the arguments presented by the attorney for the State. [7 RR 170].

[78] TEX. PENAL CODE § 9.31(b)(1).

[79] *Allen*, 253 S.W.3d at 267.

[80] *Miller*, 815 S.W.2d at 585; *Hayes*, 728 S.W.2d at 808; *Elmore*, 257 S.W.3d at 259.

Duong, Ngo's brother, testified that Ngo was a volatile person. [6 RR 57; 58]. According to Duong, Ngo confronted Cruz immediately prior to the shooting and that when Cruz exhibited his gun for the first time that he pointed it towards the ground and away from Ngo. [6 RR 46]. Then, according to Ngo's brother's testimony, Ngo lunged for the gun and a fight ensued. [6 RR 39; 68]. This fight occurred on the sidewalk in front of the Ngo home and during the fight Cruz shot Ngo. [6 RR 70].

In response to questions from the attorney for the State, Luu testified that when Cruz approached Ngo requesting to purchase the beer for the second time that Luu "told [Ngo] like, hea, it's okay. Like don't— just let [Cruz] go or just sell him the beer, but I guess Danny [Ngo] wanted him [Cruz] off the property." [6 RR 88].

Cruz testified that before even exposing his gun, that Ngo was charging at Cruz while yelling that he would kill Cruz. [7 RR 47]. Cruz testified further that Ngo's friends fought with Ngo to restrain him but that Ngo eventually broke free from these people and charged at Cruz while continuing to yell that he was going to kill Cruz. [7 RR 50; 51]. Once Ngo was face-to-face with Cruz, Ngo began to waive his arms in a violent way that made Cruz believe that Ngo intended to attack him. [7 RR 56; 57]. Cruz testified that before he discharged his weapon that "at least three" people were assaulting him and that he had been hit in the side of the

head with a closed fist and lost his glasses, which rendered him nearly blind. [7 RR 67; 68; 69; 121].

The evidence adduced at trial was sufficient—at the very least—to create a fact question concerning whether Cruz reacted exclusively to a verbal provocation.[81] Accordingly, the trial court erred in deciding that, as a matter of law, Cruz was not entitled to a self-defense instruction because Cruz had reacted to a verbal provocation alone.[82]

ii. There is no Evidence that Cruz "Provoked" the Incident

The Penal Code does not define the term "provoke."[83] Under the common law, a defendant has "provoked" a victim when: (1) the defendant did some act or used some words that provoked the attack on him, (2) the act or words were reasonably calculated to provoke the attack, and (3) the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other.[84] Generally, whether a defendant provoked a victim is a fact issue for the jury.[85]

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[81] TEX. PENAL CODE § 9.31(b)(1); *Williams*, 35 S.W.3d at 786; *Ferrel*, 55 S.W.3d at 591.

[82] TEX. PENAL CODE § 9.31(b)(1); *Williams*, 35 S.W.3d at 786; *Ferrel*, 55 S.W.3d at 591.

[83] *See generally*, TEX. PENAL CODE §§ 1.07 & 9.01.

[84] *Mendoza*, 349 S.W.3d at 279.

[85] *Williams*, 35 S.W.3d at 786.

Here, the trial court equivocated on the issue of whether Cruz provoked Ngo. [7 RR 170]. Specifically, in denying Cruz's requested instruction, the trial court stated, "I don't know—based on the Defendant's own testimony, he was aware that he was provoking or that his actions would be provocative or were provocative in this case." [7 RR 170].

The evidence was insufficient for the trial court to have determined as a matter of law that Cruz "provoked" the incident with Ngo.[86] Instead, a fact issue exists for a showing of "provocation."[87]

Specifically, a fact issue exists concerning whether Cruz's words "were reasonably calculated to provoke the attack" or that "the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other."[88]

Doung testified that Cruz was on the sidewalk in front of the Ngo home and Cruz requested to purchase some beer. [6 RR 38]. In response to a question from Cruz's attorney, Doung testified that Cruz could have "sincerely [been] there for—to try to get beer." [6 RR 61−62]. Doung continued, testifying that the beer store was closed when Cruz approached for a second time and that when Cruz asked to buy the beer that he had cash in his hand. [6 RR 65; 66].

[86] *Ferrel*, 55 S.W.3d at 591.

[87] *Mendoza*, 349 S.W.3d at 279.

[88] *Id.*

Further, Luu testified that after Cruz asked to buy the beer and Ngo began to approach Cruz that Luu said to Ngo, "like, hea, it's okay. Like don't—just let the guy go or just sell him the beer,. . ." [6 RR 88]. Luu testified that Cruz had asked to buy the beer in a "normal" voice and that Cruz extended his hand offering money in exchange for the beer. [6 RR 103; 104].

Lastly, Cruz testified that he "decided to try [his] luck again. And . . . thought,. . . the worst thing that could happen is them just saying no.. . . You know, all I wanted was to buy a couple of beers." [7 RR 45].

Accordingly, at the very least, there was sufficient evidence to raise a fact issue concerning whether Cruz's words "were reasonably calculated to provoke the attack" and whether Cruz's "words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other."[89] Specifically, a fact issue exists on the question of whether Cruz sought to use his words to catalyze a fight or whether he was simply asking to purchase beer. This issue was an issue for the jury rather than for the trial court.[90] Therefore the trial court was not entitled to decide—as a matter of law—that § 9.31(b)(4) precluded Cruz from receiving a self-defense instruction in the jury charge.[91]

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[89] *Id.*

[90] *Lee*, 259 S.W.3d at 789−91.

[91] *Ferrel*, 55 S.W.3d at 591; *Williams*, 35 S.W.3d at 786; and TEX. PENAL CODE § 9.31(b)(4).

ii. A Fact Issue Exists Concerning Whether Cruz "Sought an Explanation from or Discussion with" Ngo Concerning Any Differences Between Them

The use of force against another is not justified if the actor sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was carrying a weapon in violation of § 46.02 of the penal code.[92]

Here, the trial court did not mention this exception in her denial of Cruz's request for a self-defense instruction. [7 RR 170]. The attorney for the State argued, however, that Cruz returned to the Ngo home "to fix that confrontation,. . ." and the trial court adopted each of the arguments asserted by the attorney for the State. [7 RR 168; 170].

Cruz admitted that he was carrying his gun in violation of § 46.02 of the Penal Code. [7 RR 81−82].

Doung testified that Cruz was on the sidewalk and requested to purchase some beer. [6 RR 38]. In response to a question from Cruz's attorney, Doung testified that Cruz may have "sincerely [been] there for—to try to get beer." [6 RR 61−62]. Doung continued, testifying that the beer store was closed when Cruz approached for a second time and that when Cruz asked to buy the beer that he had cash in his hand. [6 RR 65; 66].

[92] TEX. PENAL CODE § 9.31(b)(5)(A).

Further, Luu testified that after Cruz asked to buy the beer and Ngo began to approach Cruz that Luu said to Ngo, "like, hea, it's okay. Like don't—just let the guy go or just sell him the beer,. . ." [6 RR 88]. Luu testified that Cruz had asked to buy the beer in a "normal" voice and that Cruz extended his hand offering money in exchange for the beer. [6 RR 103; 104].

Lastly, Cruz testified that he "decided to try [his] luck again. And . . . thought,. . . the worst thing that could happen is them just saying no.. . . You know, all I wanted was to buy a couple of beers." [7 RR 45].

The facts of this case distinguish it from *Moore*,[93] *Lay*,[94] and *Williams*.[95] In each of these three cases, there was unchallenged evidence that the appellant had returned to the scene of a prior incident to confront the eventual victim about a prior disagreement. The most difficult of these cases for Cruz is *Moore*.[96] But even in *Moore*, under the version of events least favorable to Cruz, Moore left the scene of the confrontation and returned a few minutes later and asked, "What's up now with y'all?" and then produced his pistol.[97] Accordingly, even under the facts

[93] *Moore*, 392 S.W.3d at 697.

[94] *Lay*, 359 S.W.3d at 291.

[95] *Williams*, 35 S.W.3d at 783.

[96] *Moore*, 392 S.W.3d at * 1.

[97] *Id.* at *1−3.

of *Moore* that are the least favorable to Cruz, the defendant left and returned with a gun to confront the victim about a prior disagreement.[98] Here, however, the evidence, regardless of the degree of dispute, shows that Cruz returned more than thirty minutes after initially asking to buy beer [6 RR 62; 66], because the Ngo house was on his regular route home [7 RR 45], and from the sidewalk merely asked in a normal voice to buy beer [6 RR 45; 66; 70], and he offered money in exchange for the beer [6 RR 65]. Cruz himself testified that his only reason for speaking with the group again was to try to buy beer. [7 RR 45]. And Duong and Luu testified that Cruz might have been there to buy beer. [6 RR 61−62; 103; 104]. Accordingly, the facts of this case distinguish it from the cases in which the defendant unquestionably returned to the confront the eventual victim about a prior disagreement.[99] Instead, here, there is a legitimate fact issue, an issue for the jury to determine, whether Cruz returned to the Ngo home to confront Ngo about Ngo's decision to not sell beer to Cruz or whether this route was simply on Cruz's way home and he merely asked a second time to buy beer.

The facts of this case render it analogous to *Lee*,[100] *Skief*,[101] and *Thomas*.[102] As in these three cases, a fact issue existed about whether the defendant,

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[98] *Id*.

[99] TEX. PENAL CODE § 9.31(b)(5); *Moore*, 392 S.W.3d at 697; *Lay*, 359 S.W.3d at 291; and *Williams*, 35 S.W.3d at 783.

[100] *Lee*, 259 S.W.3d at 789.

immediately before the shooting, "sought an explanation from or discussion with the other person concerning the actor's differences with the other person while the actor was carrying a weapon in violation of § 46.02 of the penal code."[103] Due to the fact issues raised by the evidence in this case, the trial court was not entitled to rule that as a matter of law that Cruz was not entitled to a self-defense instruction on this section of the Penal Code. Instead, the trial court should have included the instruction and then included the limiting instruction that would have allowed the jury to resolve the factual disputes in this case.

G. Harm Analysis

When a requested jury charge instruction is wrongly excluded from the jury charge, the error is harmful if it is "calculated to injure the rights of the defendant," which simply means that the error caused some harm to the accused.[104] An intermediate-appellate court will reverse an objected to jury charge error or omission if it finds "any actual harm, regardless of the degree."[105]

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[101] *Skief*, 2013 Tex. App. LEXIS 6247, 2013 WL 2244336, at *1.

[102] *Thomas*, 2012 Tex. App. LEXIS 809, 2012 WL 280578, at *12−14.

[103] TEX. PENAL CODE § 9.31(b)(5).

[104] *Sakil*, 287 S.W.3d at 28; TEX. CODE CRIM. PROC. 36.14; *Schoelman*, 644 S.W.2d at 732 n.17.

[105] *Brewer*, 2009 Tex. App. LEXIS 5871, 2009 WL 2274098, at *3..

In *Chaney*, the Amarillo Court of Appeals found that the jury charge error was harmful because it contained the entire statutory definition for the terms "knowing" and "reckless" rather than the truncated definitions that should have been included in a result of conduct offense.[106]

Here, Cruz admitted to the shooting and predicted his entire defense on receiving a self-defense instruction in the jury charge. [7 RR 69]. Accordingly, the trial court's decision to deny him the requested instruction was harmful.[107] This harm was even greater than the harm in *Chaney*, in which the jury charge merely expanded the ways in which the jury could find Chaney guilty. By contrast, here, the error in denying this requested instruction required the jury to find Cruz guilty. Therefore, the error was harmful and Cruz asks this Court to grant him a new trial.

[106] *See generally Chaney v. State*, 314 S.W.3d 561 (Tex. App.—Amarillo 2010, pet. ref'd.) (reversing trial court's verdict because of jury charge error).

[107] *Sakil*, 287 S.W.3d at 28; TEX. CODE CRIM. PROC. 36.14; *Schoelman*, 644 S.W.2d at 732 n.17.

PRAYER AND CONCLUSION

Cruz asks this Court to find that the trial court erred in denying him the requested jury charge instruction, to reverse the trial court's verdict, and to remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing brief was served on the Dallas County Criminal District Attorney's Office, Appellate Section, 133 N. Riverfront Blvd., LB-19, 10th Floor, Dallas, Texas 75202 by hand delivery on the 10th day of November, 2014 via electronic service.

/s/ Niles Illich
Niles Illich

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the length and style requirements in Rule 9.4 of the Texas Rules of Appellate Procedure. The brief is presented in Times New Roman font, size 14. This entire brief contains 11,868 words.

/s/ Niles Illich
Niles Illich