In the Court of Criminal Appeals of Texas

No. PD-0918-21

AMBER RENEE GUYGER,
Appellant,

v.

THE STATE OF TEXAS

On Appellant's Petition for Discretionary Review
From the Fifth Court of Appeals
Dallas County

YEARY, J., filed a dissenting opinion in which SLAUGHTER, J., joined.

Appellant, a Dallas police officer, was convicted of murder and sentenced to ten years' confinement in the penitentiary. She argued on

appeal that the evidence was legally insufficient to support the jury's rejection of her self-defense claim. We should grant her petition for discretionary review in order to determine whether the court of appeals erred by discounting the statutory defense of mistake of fact in its consideration of the sufficiency of the evidence to support the jury's rejection of her self-defense claim. *Guyger v. State*, No. 05-19-01236-CR, 2021 WL 5356043 (Tex. App.—Dallas Nov. 17, 2021) (op. not designated for publication); TEX. PENAL CODE § 8.02(a).[1] Because the Court does not, I respectfully dissent.

I. BACKGROUND

The evidence plausibly shows that, believing that she was entering her own apartment after a shift at work, Appellant instead entered the apartment of her upstairs neighbor and, thinking him to be an intruder, shot him with the intent (as she admitted) to kill. At the conclusion of the evidence, the trial court submitted a self-defense instruction to the jury—and also submitted an instruction on the statutorily prescribed defense of mistake of fact, including an application paragraph that purported to apply that defense to the facts

[1] This provision reads: "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense." TEX. PENAL CODE § 8.02(a). A defense must be submitted to the jury if raised by any evidence in the case and, if submitted, "the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted." TEX. PENAL CODE § 2.03(c), (d).

of Appellant's claim of self defense.[2] The jury nevertheless rejected

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[2] After instructing the jury on the law of self defense, the trial court gave the following instruction regarding mistake of fact, applying it specifically to self defense:

> A person's conduct that would otherwise constitute the crime of murder or manslaughter is not a criminal offense if the person, through mistake, formed a reasonable belief about a matter of fact and mistaken belief negated the kind of culpability required for the commission of the offense.
>
> The Defendant is not required to prove that she made a mistake of fact. Rather, the State must prove beyond a reasonable doubt that the Defendant did not make a mistake of fact constituting a defense.
>
> Reasonable belief means a belief that an ordinary and prudent person would have held in the same circumstances as the Defendant. If you have found that the State has proved the offense beyond reasonable doubt, you must next decide whether the State has proved the Defendant did not make a mistake of fact constituting a defense.
>
> To decide the issue of mistake of fact, you must—you must determine whether the State has proved beyond a reasonable doubt one of the following:
>
> 1. The Defendant did not believe that she was entering her own apartment or did not believe that the deceased was an intruder in her apartment, or
>
> 2. The Defendant's belief that she was entering her own apartment or her belief that the deceased was an intruder in her apartment was not reasonable.
>
> You must all agree that the State has proved beyond a reasonable doubt either one or two listed above. You need not agree on which of these elements the State has proved.

Appellant's self-defense claim and convicted her of murder. On appeal, she claimed that the evidence was legally insufficient to support such a verdict. Now, in her petition for discretionary review, she argues that the court of appeals erroneously declined to take mistake of fact into account in assessing the legal sufficiency of the evidence with respect to self defense.

II. LEGAL SUFFICIENCY REGARDING SELF DEFENSE

In conducting a sufficiency review with respect to a self-defense claim, this Court has said, there must be evidence in the record to support a rational finding with respect to the elements of self defense; but so long as there is such evidence, the burden of persuasion is on the State (as with any "defense" under the Penal Code), so that a reasonable doubt about the issue should be resolved in the defendant's favor. *Braughton v. State*, 569 S.W.3d 592, 608–09 (Tex. Crim. App. 2018). The reviewing court asks "whether[,] after viewing all of the evidence in the light most favorable to the prosecution, a rational trier of fact would

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> If you find that the State has failed to prove beyond reasonable doubt either Element 1 or Element 2 listed above, you must find the Defendant, not guilty.
>
> If you are—if you unanimously agree that the State has proved beyond a reasonable doubt each of the elements of murder or manslaughter and you unanimously agree—agree that the State has proved beyond a reasonable doubt, either Element 1, that the Defendant did not believe that she was entering her own apartment or did not believe that the deceases was an intruder in her apartment, or Element 2, that the Defendant's belief that she was entering her own apartment or that her belief that the deceased was an intruder in her apartment was not reasonable, then you shall find the Defendant guilty as alleged or included in the indictment.

have found the essential elements of [the offense] beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Id.* at 609. Self defense is a fact issue, and it is the fact-finder's role to resolve witness credibility issues in this process. *Id.*

In conducting the legal sufficiency analysis, the court of appeals concluded that a hypothetically correct jury charge, by which this Court has said the legal sufficiency of evidence generally must be measured, would not have combined the defenses of self defense and mistake of fact as the trial court's charge did in this case. *Guyger*, 2021 WL 5356043 at *5 (citing *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997)). It therefore declined to consider mistake of fact in conducting the sufficiency analysis as described in *Braughton*. In rejecting Appellant's self-defense claim, the court of appeals observed that she "admitted that she could have taken a position of cover and concealment while she called for backup rather than shooting" the occupant of the apartment. *Id.* at *6. The suggestion here seems to be that, even taking the facts as Appellant's self-defense claim asserted—*i.e.*, that she reasonably believed she was in her own apartment, and that the deceased was an intruder—a rational jury could still have rejected her claim that she reasonably believed deadly force was *immediately* necessary to protect herself.

In my view, however, it is at least possible to argue that an application of mistake of fact, appropriately tailored to the law of self defense, might have made a difference to the court of appeals' legal sufficiency analysis. We should grant Appellant's petition to decide

whether the court of appeals was correct to regard the two defenses as mutually exclusive, and to conduct its sufficiency analysis as if they were.

III. THE PROPER SCOPE OF MISTAKE OF FACT

This Court's cases have made it abidingly clear, since the 1974 Penal Code was enacted, that the defense of mistake of fact applies whenever a defendant's purported mistake about a particular fact would serve to negate a culpable mental state that is essential to conviction. *See Granger v. State*, 3 S.W.3d 36, 41 (Tex. Crim. App. 1999) ("When an accused creates an issue of mistaken belief as to the culpable mental element of the offense, he is entitled to a defensive instruction of 'mistake of fact.'"). This is true even though such a "defense" only serves to negate an element of the offense.[3] What we have never authoritatively decided—at least not in a majority opinion—is whether this is the *exclusive* context in which mistake of fact might be available under the

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[3] Indeed, I recognize that, but for the existence of Section 8.02(a) of the Penal Code, a defendant would probably not even be entitled to an instruction on mistake of fact (at least not insofar as it only serves to negate an elemental culpable mental state). The Court has said that defenses (such as alibi) that serve only to disprove an element of the offense do not ordinarily entitle a defendant to a jury instruction. *Giesberg v. State*, 984 S.W.2d 245, 246–47 (Tex. Crim. App. 1998). For this reason, the State has sometimes argued that, because mistake of fact does no more than to negate an elemental culpable mental state, "a mistake-of-fact instruction would not [be] required and serve[s] no purpose." *Okonkwo v. State*, 398 S.W.3d 689, 695 (Tex. Crim. App. 2013). Moreover, because of the "duplicative" nature of a mistake of fact instruction—at least as limited in application to mistakes of fact that negate elemental culpable mental states—Professors Dix and Schmolesky have observed that "it is difficult to imagine that an erroneous refusal to grant a defense instruction for a charge concerning the [mistake-of-fact] defense would ever fail to be harmless." George E. Dix & John M. Schmolesky, 43 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 43:36, at 917 (3d ed. 2011).

language of Section 8.02(a) of the Penal Code.

In *Celis v. State*, 416 S.W.3d 419 (Tex. Crim. App. 2013), a plurality of the Court, bolstered by a concurring opinion from Presiding Judge Keller, declared that the defense of mistake of fact "is limited to any culpable mental state required for the offense"—elemental culpable mental states. *Id.* at 431; *see also id.* at 435 (Keller, P.J., concurring) ("The use of the word 'required' [in Section 8.02(a)] seems pretty clearly to mean that the culpability to which the defense refers is not culpability in general but, instead, the culpable mental state 'required' by the offense."). In another concurring opinion, Judge Cochran disagreed, arguing that Section 8.02(a)'s language ("the kind of culpability required for commission of the offense") was susceptible to a broader interpretation, and that it should not be limited only to mistakes of fact that negate elemental culpable mental states. *See id.* at 441 (Cochran, J., concurring) ("I believe that the plurality mistakenly equates the phrase 'negates the kind of culpability required for the offense' with the phrase 'negates the culpable mental state.' The Legislature knew the difference between these two concepts and carefully chose its phrasing in defining the mistake-of-fact defense in the 1974 Penal Code."); *id.* at 441 n.4 ("The term 'culpability' is broader than the term 'culpable mental state' and refers to the general 'blameworthiness' or 'guilt' of the actor."). A majority opinion of this Court has yet to resolve this dispute about whether mistake of fact may embrace statutory elements of an offense other than, strictly speaking, a culpable mental state.

This case also presents a further question: whether the defense of mistake of fact may be applied to mental-state components of statutory

defenses, such as self defense. Professors Dix and Schmolesky have declared definitively that "[m]istake of fact cannot be used regarding elements of a defense or affirmative defense." George E. Dix & John M. Schmolesky, 43 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 43:36, at 918 (3d ed. 2011). But they cite only courts of appeals opinions. May the defense of mistake of fact be asserted in a case where, but for a mistake of fact, an accused might otherwise have been found to have reasonably acted in self-defense—since, if self-defense applies, his conduct is justified, and thus the "kind of culpability required for the offense" is not established? *See* TEX. PENAL CODE § 8.02(a); TEX. PENAL CODE §§ 9.31 & 9.32. This Court has yet to address this question. And this case presents us with an opportunity to do so.

IV. MISTAKE OF FACT APPLIED TO SELF DEFENSE

If the mistake of fact defense can properly be applied to self defense, it could well have made a difference to the legal sufficiency analysis here. As part of its instructions to the jury on the law of self defense (as distinguished from the law of mistake of fact, as set out in note 2, *ante*), the trial court instructed the jury with respect to the duty to *retreat*. The jury was told, pursuant to Section 9.32(c) of our Penal Code:

> 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 was used, is not required to retreat before using deadly force to defend herself.

See TEX. PENAL CODE § 9.32(c). Moreover, by statute, a duty to retreat does not impact a fact finder's consideration of whether the actor had a

reasonable belief that deadly force was immediately necessary under the terms of Section 9.32(a)(2). *See* TEX. PENAL CODE § 9.32(d) ("For purposes of Subsection (a)(2) [of Section 9.32], 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."). This means that a person who, among other things, had "a right to be present at the location where deadly force was used" need not show that she first retreated before the fact-finder may credit, as "reasonable," her belief that deadly force was "immediately necessary." On the other hand, an actor who did *not* have "a right to be present at the location" may have to convince the fact-finder that it was reasonable for her *not* to have retreated first.

When the trial court came, later in the jury charge, to apply the law of mistake of fact to the law of self defense, it neglected to mention whether, and if so, how mistake of fact might serve to eliminate any duty to retreat that arguably exists when the terms of Section 9.32(c) are *not* satisfied. Thus, the jury was never explicitly told that it could apply mistake of fact in deciding whether Appellant had "a right to be present at the location" at which she used the deadly force. It might, therefore, have concluded that any belief Appellant harbored that she was in her own apartment, however reasonable, was simply *irrelevant* to whether she should be expected to retreat before she could resort to deadly force. Because she was *not* in her own apartment, the fact-finder might rationally have regarded her failure to retreat alone as a sufficient basis to reject the reasonableness of her belief that her use of deadly force was immediately necessary—regardless of the reasonableness of her

mistaken belief that she *was* in her own apartment.

Having concluded that it was not proper to apply mistake of fact to self defense, the court of appeals seems in this way to have discounted the possibility that Appellant need not have retreated based on her mistaken belief that she was in her own apartment. Otherwise, it arguably might not have rejected her self-defense claim on nothing more than the fact that she "admitted that she could have taken a position of cover and concealment while she called for backup" rather than immediately using deadly force. *Guyger*, 2021 WL 5356043, at *6. If mistake of fact were to apply to whether Appellant had "a right to be present at the location" at which the shooting occurred, then arguably she need not have retreated first.

V. HYPOTHETICALLY CORRECT JURY CHARGE

When a trial court submits a jury instruction on a defensive issue, whether by request or *sua sponte*, but fails to get it right, "this is charge error subject to review under *Almanza* [*v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985) (op. on reh'g)]." *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013). Moreover, legal sufficiency of the evidence should be measured, not against the jury charge actually given, but against the jury charge that *should* have been given: the hypothetically correct jury charge. *Malik*, 953 S.W.2d at 240. We seem to have applied this standard in the context of evaluating legal sufficiency of the evidence to support rejection of a self-defense claim. *Braughton*, 569 S.W.3d at 608. The court of appeals seems to have regarded it as applicable. *See Guyger*, 2021 WL 5356043, at *3 (citing *Malik* in describing the appropriate standard for measuring the legal sufficiency

of the evidence to support a jury's rejection of self defense).

It could make a difference here. *If* the hypothetically correct jury charge in this case would apply mistake of fact to self defense, and *if* it would apply mistake of fact *not just* to the "reasonable belief" component of self defense, but *also* to the *retreat* component, then it would have been a mistake for the court of appeals to measure sufficiency in the limited way that it did. In that case, it should not have simply inquired whether the evidence was sufficient on the assumption that retreat is a relevant consideration (there being no question on the record that she was *not* in her own apartment). It should *at least* have *also* inquired whether she nonetheless had "formed a reasonable belief" about that "matter of fact," such that her mistake of fact (if any) about the location might have rendered it unnecessary for her to retreat before using deadly force—she having reasonably believed, based on that mistake, that she *did* have a right to be present at that location, and therefore need *not* have retreated before using deadly force. It is conceivable this would have made a difference to the court of appeals' resolution of the legal sufficiency claim.

I would grant Appellant's petition for discretionary review to consider and finally resolve these various issues. Because the Court does not, I respectfully dissent.

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