Review of Recent Juvenile Cases (2011)

by
The Honorable Pat Garza
Associate Judge
386th District Court
San Antonio, Texas

In order to avail oneself of the affirmative defense of duress, the accused must admit to having engaged in the proscribed conduct.[Ramirez v. State](11-2-6)

On March 24, 2011, the Amarillo Court of Appeals held that having failed to admit to the offense, Appellant was not harmed by any alleged error in the manner in which the defensive issue of duress was presented to the jury in the charge.

¶ 11-2-6. Ramirez v. State, No. 07-09-0157-CR, --- S.W.3d ----, 2011 WL 1085185 (Tex.App.-Amarillo, 3-24-2011).

Facts: At approximately 4:00 a.m. on December 5, 2006, Officers Michael Chavez and Michael Matsik, in separate patrol cars, responded to an aggravated robbery at a local gaming establishment. Per procedure, they retrieved their patrol rifles from the trunks of their respective patrol cars. While Officer Chavez was loading his rifle, two suspects wearing black ski masks and hooded sweatshirts exited the back door of the gaming establishment and began running for the east gate. Although ordered to the ground, the two suspects began to flee in opposite directions. Officer Chavez gave chase to the suspect running south, while Officer Matsik gave chase to the other suspect. At the time, both officers observed a small gray or silver car parked in the alley.

Officer Matsik temporarily lost sight of his suspect when the suspect cut through a fence. A female bystander pointed Officer Matsik in the suspect's direction. Although the area was dark, Officer Matsik observed a silhouette followed by a muzzle flash. [FN4] He immediately dropped to the ground as multiple shots were fired. He picked himself up to return fire but noticed the safety on his rifle was still engaged. The suspect had retreated over a gate into a residential area, and Officer Matsik could not get a clear shot.

FN4. Officer Matsik testified that a muzzle flash is a flash that comes from the barrel of a weapon upon firing.

After Officer Chavez heard shots fired, he decided to check on his fellow officer. As he approached, he saw the silver car which he had earlier observed in the alley speed away. Other officers on the scene pursued the car and eventually arrested Appellant. The second suspect, the suspect Officer Chavez had originally pursued, was later found hiding under a door that was leaning up against a building.

After the suspects were arrested, Officer Matsik experienced a burning sensation on his upper thigh. He pulled his left pant leg up and, using the lights of the patrol car, noticed a bullet hole in the lower part of the pant leg toward his ankle. He also had graze wounds on his upper thigh and just above his left wrist. He concluded that bullets were fired in his direction and that contact was made on at least three occasions.

Although Appellant was initially charged in a six-count indictment, the State announced just before trial that it was proceeding only on count VI, the charge of aggravated assault with a deadly weapon against Officer Matsik. After a jury trial, Appellant was convicted and sentenced to life imprisonment.

Held: Affirmed

Opinion: Duress is an affirmative defense if the actor engaged in proscribed conduct because he was compelled to do so by threat of imminent death or serious bodily injury to himself or another. Tex. Penal Code Ann. § 8.05(a) (West 2003). A person is compelled to act within the meaning of the duress defense only if confronted by force or threat of force that would render a person of reasonable firmness incapable of resisting the pressure. Id. at (c). Whether a "person of reasonable firmness" would be incapable of resisting the pressure to engage in proscribed conduct is an objective inquiry rather than a subjective one. See Wood v. State, 18 S.W.3d 642, 651 n. 8 (Tex.Crim.App.2000).

Appellant does not complain about the abstract or application portions of the court's charge as they pertain to the affirmative defense of duress. Rather, he specifically maintains that the following paragraph improperly instructed the jury that a special finding was required for or against the affirmative defense of duress:
If, however, after viewing the facts from the defendant's standpoint, you do not find by a preponderance of evidence that defendant's participation in the offense, if any, was compelled by such threat of force by Richard Ramirez as would render a person of reasonable firmness incapable of resisting the pressure thereof, then you will find against the defendant on his defense of duress.

During the charge conference, defense counsel objected to inclusion of the above-quoted paragraph. Counsel's objection was overruled.

Appellant argues the charge is a misstatement of the law because it improperly instructs the jury to find "against the defendant" if it does not find the affirmative defense of duress by a preponderance of the evidence. We disagree.

First, the objected to portion of the court's charge does not instruct the jury to find against the defendant on the issue of guilt or innocence if it does not find the affirmative defense of duress by a preponderance of the evidence. Instead, in such a circumstance, it only instructs the jury to find against the defendant on the affirmative defense issue of duress. Therefore, Appellant's argument lacks substantive merit.

Secondly, assuming arguendo, that the trial court's inclusion of the objected-to paragraph was error, Appellant was not harmed. [FN6] The function of the jury charge is to instruct the jury on the law applicable to the case. Tex.Code Crim. Proc. Ann. art. 36.14 (West 2007); Dinkins v. State, 894 S.W.2d 330, 339 (Tex.Crim.App.1995), cert. denied, 516 U.S. 832, 116 S.Ct. 106, 133 L.Ed.2d 59 (1995). The charge consists of an abstract statement of the law and the application paragraph(s). See Plata v. State, 926 S.W.2d 300, 302 (Tex.Crim.App.1996), overruled on other grounds, Malik v. State, 953 SW.2d 234, 239 (Tex.1997). When reviewing the charge for alleged error, we examine the charge as a whole, considering the relationship between the abstract and application portions of the charge. King v. State, 189 S.W.3d 347, 364 (Tex.App.-Fort Worth 2006, no pet.).

FN6. The degree of harm necessary under Almanza v. State, 686 S.W.2d 157, 171 (Tex.1984), is some harm because the paragraph complained of was objected to and the trial court overruled the objection.

To avail oneself of the affirmative defense of duress, the accused must admit to having engaged in the proscribed conduct. See Giesberg v. State, 984 S.W.2d 245 (Tex.Crim.App.1998), cert. denied, 525 U.S. 1147, 119 S.Ct. 1044, 143 L.Ed.2d 51 (1999); Timms v. State, 2009 Tex.App. LEXIS 10042, at * 3 (Tex.App.-Amarillo April 22, 2009, pet. ref'd). Forcing the State to carry its burden of proof is not an admission of the charged

offense. Id. at *5. Having failed to admit to the offense, Appellant was not harmed by any alleged error in the manner in which the defensive issue of duress was presented to the jury.

Furthermore, in order to meet the requirements of duress, the threat of death or serious bodily injury must be imminent. [FN7] (Emphasis added). An imminent threat has two components of immediacy. Anguish v. State, 991 S.W.2d 883, 886 (Tex.App.-Houston [1st Dist] 1999, pet. ref'd). First, the person making the threat must intend and be prepared to carry out the threat immediately. Second, carrying out the threat must be predicated upon the threatened person's failure to commit the charged offense immediately. Id. The Texas Court of Criminal Appeals has determined that a threat of death at some indefinite time in the future is insufficient to satisfy the requirement of imminence. Blount v. State, 542 S.W.2d 164, 166 (Tex.Crim.App.1976).

FN7. Appellant did not testify. This Court has found that one asserting the affirmative defense of duress must admit to having engaged in the proscribed conduct. See Timms v. State, 2009 Tex .App. LEXIS 10042, at *3 (Tex.App.-Amarillo April 22, 2009, pet. ref'd). Forcing the State to carry its burden of proof is not an admission of the charged offense. Id. at *5.

Part of the State's theory in opposition to the defense of duress was that Appellant was not acting under duress because he was not in imminent danger at the time of the aggravated robbery. The testimony elicited from Ramirez was that if Appellant was apprehended, he would "deal with" him when he tried to get him out of jail. He explained that he would carry out his threat at some time in the future. When asked again, "you would have dealt with [Appellant] at some point in the future," Ramirez replied, "[o]f course." Ramirez also answered "no" when asked if he was within "killing range" of Appellant at the time of the robbery. Because Ramirez's threat to Appellant was a future threat, there was no threat of imminent death or serious bodily injury.

Conclusion: Based upon the record before us, we conclude that the trial court did not commit reversible error by failing to submit a jury charge that properly instructed the jury regarding the affirmative defense of duress. Issue two is overruled.