
MEMORANDUM

TO: JUDGES TRYING CRIMINAL CASES
FROM: DEBORAH SELDEN AND INTERNS JOSH SCHNEIDER, ELIZABETH WIEHLE, AND MARY MARTIN
SUBJECT: 12/05/07 COURT OF CRIMINAL APPEALS OPINIONS
DATE: 12/20/07
CC: JACK THOMPSON

***Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].**

COCHRAN, J., *delivered the opinion of the Court, in which KELLER, P.J., and PRICE, WOMACK, JOHNSON, KEASLER, HERVEY, and HOLCOMB, J.J., joined. MEYERS, J., did not participate.*

FACTS: A jury convicted defendant of murder. Defendant and his brother were engaged in a long running dispute over land, money, and cattle. In the past, defendant's brother brandished firearms while threatening defendant. Finally, after a brief and heated exchange of words in a church parking lot, defendant shot his brother twice and then left to call 911. At trial, the court did not allow defendant to respond to the testimony of the 911 operator. Although defendant had argued self defense, the trial court refused to include an instruction on prior verbal threats in the jury charge. The court of appeals reversed, holding that denying the requested instruction violated defendant's constitutional rights. The Court of Criminal Appeals (CCA) disagreed; vacated the court of appeals' judgment, and remanded. The CCA held that the trial court abused its discretion when it excluded defendant's response to the 911 operator.

JURY CHARGE—REQUIREMENTS

The trial court judge must provide the jury with a written charge distinctly setting forth the law applicable to the case. In doing so, the court may not: 1) express any opinion as to the weight of the evidence, 2) sum up the testimony, 3) discuss the facts, or 4) use any argument in the charge calculated to arouse the sympathy or excite the passions of the jury.

***Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].**

JURY CHARGE—DEFENSES

Whenever raised by the evidence, a trial judge is required to instruct the jury on statutory defenses, affirmative defenses, and justifications. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE—DEFENSIVE ISSUES

A defendant is entitled to an instruction on every defensive issue raised by the evidence, even if the trial court thinks the evidence is not worthy of believe and regardless of whether the evidence is strong, feeble, unimpeached or contradicted. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE—ALIBIS

If a defensive theory is not explicitly listed in the Penal Code and merely negates an element of the State's case, a trial judge should not instruct the jury on the theory. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE – GENERAL - ALIBI

A defendant has no burden to establish a defensive issue, such as an alibi, which merely negates an element of the offense alleged by the State. Since alibi evidence only asserts that the State has not met its burden of proof, such evidence is sufficiently embraced in a general jury charge that the defendant is presumed innocent until he is proven guilty beyond a reasonable doubt. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE—NO SPECIAL INSTRUCTION—ALIBI

A special instruction on alibi constitutes an unwarranted comment on the weight of the evidence by the trial court. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE—NO SPECIAL INSTRUCTION— DEFENSES

A defendant is not entitled to a defensive jury charge on: 1) accident, 2) good faith, 3) alternative, independent impulse, or 4) suicide. Use of a special instruction in these situations is an unwarranted comment on the evidence by the trial court. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE—SPECIAL INSTRUCTIONS—REQUIREMENTS

Neither the defendant nor the State is entitled to a special jury instruction relating to a statutory offense or defense if that instruction: 1) is not grounded in the Penal Code; 2) is

covered by the general charge to the jury; and 3) focuses the jury's attention on a specific type of evidence that may support an element of an offense or defense. Such instructions would constitute a prohibited comment on the weight of the evidence. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE—SPECIAL INSTRUCTION—PRIOR VERBAL THREATS

A special instruction on prior verbal threats is not permissible because it: 1) is based on a previous Penal Code; 2) is covered by a general self-defense charge; and 3) focuses the jury's attention on a specific type of evidence that could support a finding of self defense.

Walters v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

JURY CHARGE — PERMITTED SPECIAL INSTRUCTIONS—STATUTORY PRESUMPTIONS

If raised by the evidence, some jury instructions on various statutory presumptions are appropriate even though they may focus the jury's attention on certain evidence.

Walters v. State, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—EXCEPTIONS TO HEARSAY—OPTIONAL COMPLETENESS

When an adverse party "opens up" a matter by introducing some act, conversation or writing, an exception to the hearsay rule (Rule 107) permits a litigant to introduce otherwise inadmissible hearsay evidence necessary to fully and fairly explain the matter. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—EXCEPTIONS TO HEARSAY—INTERPLAY BETWEEN RULES 107 & 403

Evidentiary Rule 107 does not permit the introduction of other similar, but inadmissible evidence unless it is necessary to explain properly admitted evidence. Further, the rule is not invoked by the mere reference to a document, statement, or act. Its admission is also limited by Rule 403, which permits a trial judge to exclude otherwise relevant evidence if its unfair prejudicial effect or its likelihood of confusing the issues substantially outweighs its probative value. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—EXCLUSION ERROR

A court's exclusion of evidence will not be considered harmful error unless the exclusion affects a substantial right of the party and the substance of the evidence was made known to the court by the offer, or was apparent from the context within which the questions were asked. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—SUBSTANTIAL RIGHTS

Substantial rights are affected only when an evidentiary error has a substantial and injurious effect or influence in determining the jury's verdict. Conversely, non-constitutional evidentiary errors, including defects, irregularities, or variances that do not affect substantial rights must be disregarded. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—ERRONEOUS EXCLUSION – GENERALLY NON-CONSTITUTIONAL ERROR

The erroneous exclusion of evidence offered under the rules of evidence generally constitutes non-constitutional error. The exception is when erroneously excluded evidence offered by the criminal defendant “forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense.” *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—ERRONEOUS EXCLUSION—CONSTITUTIONAL VIOLATIONS

Exclusion of evidence might rise to the level of a constitutional violation if: 1) a state evidentiary rule categorically and arbitrarily prohibits the defendant from offering otherwise relevant, reliable evidence vital to his defense; or 2) a trial court's clearly erroneous ruling results in the exclusion of admissible evidence that forms the vital core of a defendant's theory of defense and effectively prevents him from presenting that defense. In such a case, the standard for constitutional errors under Rule 44.2(a) would apply. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].

EVIDENCE—HEARSAY—FEDERAL CONSTITUTIONALITY

As a rule the federal constitution does not require admission of a defendant's self-serving, out-of-court declarations of remorse when they are inadmissible under state law even when these declarations meet the test of constitutional ‘relevancy.’ However, there may be occasions when the court may be required to admit such statements, when it is necessary to correct a false impression the State creates. *Walters v. State*, ___ S.W.3d ___ (Tex. Crim. App. 2007) [PD-1952-06; 12/17/07].