

Appellant's challenge to the inclusion of the provocation instruction, the appellate court held "that the trial court did not err when it submitted the provocation instruction to the jury because there was sufficient evidence to raise this issue." With regard to the other challenges to the jury charge, the appellate court decided that, to the extent there were errors in the self-defense charge, such errors were harmless.

Holding: We concluded in [Smith v. State](#), 965 S.W.2d 509 (Tex.Cr.App. 1998)(see [68](#), [Vol. 6, No. 1](#); 03/23/1998), that "[a]n instruction on provocation should only be given when there is evidence from which a rational jury could find every element of provocation beyond a reasonable doubt." If the facts do not support giving the charge on provoking the difficulty (i.e., a rational jury could not find all three elements of provocation beyond a reasonable doubt), then the provocation instruction must not be submitted to the jury. Including it in the jury charge would constitute an unwarranted limitation on the right of self-defense, i.e., trial court error. *** In this case, in order to support the giving of a provoking-the-difficulty instruction in the jury charge, there had to be evidence raised from which a rational jury could find beyond a reasonable doubt that [Appellant] possessed an intent to provoke so he would have a pretext to harm [the deceased] under a guise of self-defense. *** Here, the circumstantial evidence, taken as a whole, is such that a finding by the jury of provoking acts or words on the part of [Appellant], that were done or said as a pretext for killing [the deceased], would amount to nothing more than impermissible speculation. [Appellant] did not know [the deceased] [Appellant] did not seek out [the deceased] There was no evidence that the argument was initiated by [Appellant] as a ruse to get [the deceased] to attack him so that [Appellant] would have a reason to kill [the deceased] in self-defense. There was no evidence that, when [Appellant] ran to his truck, he was goading [the deceased] into following him and attacking him. Even viewing the evidence in a light most favorable to giving the instruction, we conclude that the evidence was insufficient for a reasonable jury to find, beyond a reasonable doubt, that [Appellant] did or said something with the purpose and intent of creating a pretext for shooting [the deceased] under the guise of self-defense. *** Although [Appellant]'s actions may have prompted [the deceased] to approach [Appellant] with a gun in his hand, "it is impossible to fathom, under the facts as stated in the case, that [[Appellant]] arranged this set of events to bring on such an attack." Therefore, we hold that the Thirteenth Court of Appeals erred in holding that the trial court properly included an instruction in the jury charge on provoking the difficulty.

Ed Note: The Court found that, since the Court of Appeals failed to find harm in the incorrectly worded jury instruction, it would make no sense "to send the case back to the appellate court." Conducting the harm analysis in the first instance, using the harm analysis required by [Almanza](#), the Court found that Appellant suffered "some" harm "when the jury was erroneously instructed on provoking the difficulty absent the proper evidentiary support under [Smith v. State](#)."

Concurring / Dissenting Opinions: [Judge Yeary](#) dissented. He was joined by Presiding Judge Keller and Judge Hervey. He agrees the Court of Appeals erred, but would remand the case for the Court of Appeals to conduct the harm analysis. Judge Keasler dissented without note.