



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0257-15

GREGORY SHAWN HENLEY, Appellant

v.

THE STATE OF TEXAS

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
TARRANT COUNTY**

**HERVEY, J., filed a dissenting opinion in which KELLER, P.J., and NEWELL, J.,
joined.**

DISSENTING OPINION

Because I believe that Appellant was entitled to present evidence of defense of a third person, I respectfully dissent.

Under the Due Process Clause of the Fourteenth Amendment, a defendant must be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 484 (1984). And I find the analysis in the majority opinion to be more in line with a question of entitlement to a jury charge instruction, rather than whether Appellant was afforded his due process right to present a defense.

The majority seems to impose a subjective review of the reasonableness of Appellant's beliefs, deciding that because this Court finds his beliefs unreasonable, such overrides his right to present a defense. But whether Appellant's beliefs about his need to act were reasonable was a fact question for the jury.

The majority states that,

Under a claim of defense of a third person, a person must reasonably believe that his intervention is 'immediately necessary' to protect the third person. If appellant had put forth evidence that, at the time he assaulted Brandy, an unlawful force was threatening his sons, then we would agree that the reasonableness of his belief that his intervention was immediately necessary to protect his sons would be an issue for the jury. However, the evidence that appellant sought to admit did not suggest that an unlawful force was threatening his sons.

Maj. Op at 25–26. But the testimony cited by the majority opinion¹ in fact reveals an “unlawful force” of sexual assault having previously occurred, that the complainant lied to the court, and also that she was required to maintain supervised visitation. Whether the majority of the Court believes Appellant's actions to protect his sons from further abuse were reasonable is not the issue. The real issue is whether the defendant was entitled to present his defense to the jury.

Filed: June 29, 2016

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¹See Maj. Op. at 7–16.