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

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

Pulling a woman out of her car by her hair, punching her in the face several times, and hitting her head against the concrete driveway is both morally reprehensible and criminally actionable. The vicious nature of such conduct is neither condoned nor in dispute. Rather, the question we are faced with is whether Appellant should have been allowed to introduce evidence to support his claimed justification, however

unreasonable it might seem to us, for his violent conduct against his ex-wife.

Appellant's two sons had been sexually abused while they were under his ex-wife's care. This was the reason that the family court presiding over the child-custody case between Appellant and his ex-wife had required that all of the victim's visitations with her children be supervised. Appellant's ex-wife had even lied to the family court about living with her then-fiancé who also happened to be the stepfather of the boy who had sexually abused her children. On the day of the assault, Appellant was aware of the misrepresentations that the victim had made to the family court. And the week before the assault, Appellant learned of new allegations of abuse and that Appellant's ex-wife had been in the house when the abuse occurred.

The State presented evidence that the victim was required to have supervised visits with her children, but did not explain why. Appellant sought to introduce additional evidence to show why those visits had to be supervised, why he believed his ex-wife would fail to protect their children yet again, and why his belief that force was immediately necessary to protect his two sons from possible further sexual abuse was reasonable. In short, Appellant had reason to believe that his ex-wife

would not protect his children because she had failed to do so in the past. Appellant wanted to introduce evidence of his belief and his reasons for that belief. The trial court's ruling effectively prevented Appellant from taking the witness stand in his own defense to explain his state of mind at the time of the offense.

The Court concludes that this hypothetical chain-of-events was too conditional to justify Appellant's assaultive conduct. The Court holds that for Appellant's belief to be reasonable, his children must have been under a threat of imminent harm. Having reached that conclusion, the Court goes on to hold that the trial court properly excluded evidence of what Appellant believed because the Court determines that Appellant could not present sufficient evidence that his belief was reasonable. This strikes me as backwards.

What Appellant believed and why he believed it was unquestionably a fact of consequence to the issue of whether Appellant believed force was immediately necessary and whether that belief was reasonable. This is so regardless of whether Appellant presented evidence that his children were actually threatened with imminent harm. I agree that relevancy applies, but it should be applied properly and equally to both parties. I fear this Court's holding encourages trial courts to weigh the merits of a

particular defense before deciding whether evidence that supports an element of that defense is admissible. That is why I must reluctantly dissent.

Relevancy is not Sufficiency

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. TEX. R. EVID. 401. Evidence need not by itself prove or disprove a particular fact to be relevant; it need only provide a small nudge toward proving or disproving some fact of consequence. *Montgomery v. State*, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990); *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004) (holding that evidence need not provide conclusive proof in order to be relevant). For example, the State can admit breath test results to show consumption of alcohol even if the results themselves do not establish intoxication at the time of driving. *Id.*; *see also Manning v. State*, 114 S.W.3d 922, 927 (Tex. Crim. App. 2003) ("The fact that this evidence may not have been sufficient, by itself, to prove that Manning's actions were the result of his ingestion of cocaine does not detract from the fact that the evidence of the metabolite was strong evidence that Manning had consumed

cocaine."). I see no reason why a defendant must prove his or her entire defensive claim before testimony establishing a part of that claim can be relevant.[1]

Moreover, weighing the sufficiency of the claim to determine the relevance of particular evidence undermines the permissive standard associated with defensive instructions. When deciding whether a defensive instruction is proper, courts look at the evidence supporting a defensive charge, not the evidence refuting it. *Beltran v. State*, 472 S.W.3d 283, 294 (Tex. Crim. App. 2015). A defendant is entitled to every defensive instruction raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense. *Allen v. State*, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008). It is not for the trial court to judge the reasonableness or viability of the alleged defense; such a determination is rightfully left to the trier of fact. *Sanders v. State,* 707 S.W.2d 78, 79-80 (Tex. Crim. App. 1986). This

[1] The Court draws a distinction between a defendant presenting a case-in-chief and presenting evidence of a defense, but this is a distinction without a difference. A defendant must show the relevance of evidence he seeks to introduce whether it supports his case-in-chief or a justification defense. However, regardless of whether a defendant presents evidence in support of a case-in-chief or a justification defense, the evidence need not be sufficient by itself to prove the entire claim in order to be relevant. *Manning*, 114 S.W.3d at 927.

standard ensures that a trial court cannot weigh the merits of a particular defense when deciding whether a jury gets to hear it.

We have specifically held that the question of whether a particular belief is "reasonable" should be left to the fact-finder. *Granger v. State*, 3 S.W.3d 36, 39 (Tex. Crim. App. 1999). There, the defendant sought a mistake-of-fact instruction, and the State argued that the trial court should be allowed to evaluate the reasonableness of the defendant's mistaken belief when determining whether that particular statutory defense was raised. *Id.* at 38-39. We rejected the argument that the trial court could make a preliminary determination of the reasonableness of the defendant's belief when deciding whether or not to give a defensive instruction. *Id.* at 39.

And yet, allowing the trial court to weigh the reasonableness of Appellant's belief before admitting evidence of what Appellant believed permits the trial court to do exactly that. The only difference is that the trial court weighs the reasonableness and viability of the defense when the defendant tries to introduce evidence rather than when he or she requests a defensive instruction. In contrast, a proper application of the relevancy standard without reference to the sufficiency of the evidence establishing the entire defensive claim is consistent with our standards for

considering the appropriateness of a defensive instruction. Even if the evidence Appellant sought to admit did not provide conclusive proof of Appellant's defensive claim, it at least provided a small nudge towards proving that Appellant believed force was immediately necessary and that his belief was reasonable under the circumstances.

Belief in the Need for Immediate Action
Does Not Require the Existence of Imminent Harm

As Judge Hervey rightly points out, the Court appears to analyze the evidentiary admissibility question by essentially determining that Appellant would not be entitled to a jury instruction on Appellant's defense-of-a-third person claim. The Court determines the evidence in question is inadmissible because ultimately Appellant would not be entitled to his defense. As discussed above, I do not believe the relevancy of the evidence turns upon the success or failure of Appellant's defensive claim as a whole. However, to the extent that such analysis is necessary, I agree with Presiding Judge Keller that the plain terms of the self-defense and defense-of-a-third-person statutes do not require a showing of imminent harm.

In order to be entitled to an instruction on defense of a third person, Appellant was required to present evidence that his sons would have been

entitled to act in self-defense, and that he reasonably believed his intervention was immediately necessary to protect his sons from the threat of force. TEX. PENAL CODE § 9.33; *Morales v. State*, 357 S.W.3d 1, 4 (Tex. Crim. App. 2011). A person is justified in using force in self-defense against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. TEX. PENAL CODE § 9.31. A "reasonable belief" means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor. TEX. PENAL CODE § 1.07(42).

Under the plain terms of the statute, a defendant must believe force is immediately necessary, but the legislature did not use the word "imminent" to modify the use of force by "another." Simply put, a defendant must show a reasonable belief in the immediate need to act not that his or her action was necessary to avoid immediate harm. This stands in marked contrast to the necessity defense which does require that a defendant present evidence of "imminent harm" to justify his or her actions. TEX. PENAL CODE § 9.22(1); *see also Bowen v. State*, 162 S.W.3d 226, 229-30 (Tex. Crim. App. 2005) (holding that necessity and self-defense are separate defenses). Neither the self-defense statute nor

the defense-of-a-third person statute requires a showing that the force used or threatened occur "at that moment."

If it did, that would be inconsistent with our "apparent danger" jurisprudence. As we explained in *Jones v. State*, it is not necessary for a jury to find that a victim was actually using or attempting to use unlawful deadly force against a defendant in order for a defendant to claim self-defense. 544 S.W.2d 139, 142 (Tex. Crim. App. 1976); *see also Hamel v State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). The only requirement is that a defendant reasonably believe he or she must act immediately to prevent danger; he or she can have a reasonable belief that force is immediately necessary even if the objective evidence shows the defendant was never in any real danger. *Morales*, 357 S.W.3d at 8 (noting that a defendant is entitled to rely upon a defense-of-a-third-person justification where he reasonably believes force is immediately necessary regardless of whether that belief is actually correct). Obviously, a defendant's belief that force is immediately necessary appears more reasonable if evidence is presented to show a contemporaneous use or threat of force. But the statute does not require a showing of contemporaneity; it only requires a showing that the

defendant reasonably believed his actions were immediately necessary.[2]

I acknowledge that there are cases where a defendant's belief that force is immediately necessary has been deemed categorically "unreasonable." *See, e.g., Cyr v. State*, 887 S.W.2d 203, 205-06 (Tex. App.–Dallas 1994, no pet.) (holding that abortion-clinic protesters belief that third-trimester abortions were imminent at clinic was unreasonable absent any evidence that such third-trimester abortions had been performed at the clinic); *Wilson v. State*, 777 S.W.2d 823, 825 (Tex. App.–Austin 1989), *aff'd*, 853 S.W.2d 547 (Tex. Crim. App. 1993) ("No person could reasonably believe that the seizure of the university president's office was genuinely *necessary* to stop apartheid."). But these cases were wrongly decided because they too conflate relevancy with sufficiency.[3] I would rather trust a jury's ability to determine if a

---

[2] The Court posits that a defendant would not be entitled under self-defense to strike a blow to prevent anticipated danger. Yet we have already reached the contrary conclusion in *Hamel v. State*, a case in which the defendant stabbed the victim repeatedly after the victim had left the defendant's residence and was walking back to his car because the defendant feared the victim was getting a gun. *Hamel*, 916 S.W.2d at 493.

[3] I am also not persuaded by *Andersen v. United States* because that admiralty case is clearly distinguishable from this case. There, the "imminent danger" the defendant sought to avoid was the consequences of his own conduct in shooting the captain. *Andersen v. United States*, 170 U.S. 481 (1898) ("The immediate danger which threatened him was the danger of the gallows."). Holding that the defendant's conduct in *Andersen* was not justified is consistent with the long-standing prohibition against claiming self-defense where the defendant himself provokes the difficulty. *Elizondo v. State*, ___ S.W.3d ___; 2016 WL 1359341 at *5 (Tex. Crim. App. April 6, 2016) ("However, a defendant may forfeit his right to self-defense if he provokes the attack."). In this case, the danger Appellant perceived was not of his own making.

defendant's stated belief is truly irrational than risk a defendant's constitutional right to present a complete defense.

The Court's Rule 403 Analysis Points to the Problem with Admitting this Evidence

Whether the trial court could have excluded Appellant's proffered evidence under Rule 403 is a much closer call. Rule 403 favors the admissibility of relevant evidence and presumes that relevant evidence will be more probative than prejudicial. *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex. Crim. App. 1991) (op. on reh'g.). A proper Rule 403 analysis includes, but is not limited to, four factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational yet indelible way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Id.* at 389-90.

Rule 403 does not exclude all prejudicial evidence, only evidence that is unfairly prejudicial. *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005). "Unfair prejudice" refers only to relevant evidence's tendency to tempt the jury into reaching a decision on grounds apart from the proof presented in support of the claim. *Manning*, 114 S.W.3d 928. If the evidence relates directly to elements of a particular claim, it may be prejudicial, but not unfairly so. *Id.*

In *Gigliobianco v. State*, we refined our Rule 403 analysis to include other factors for consideration on the issue of prejudice. 210 S.W.3d 637, 641-42 & n. 8 (Tex. Crim. App. 2006). Under a proper Rule 403 analysis, we consider whether there is any tendency of the evidence to confuse or distract the jury from the main issues as well as any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence. *Id.* at 641. As we acknowledged, "these factors may well blend together in practice." *Id.* at 642.

The Court correctly notes that Appellant's evidence carried with it the potential to impress the jury in an irrational and indelible way. Presenting evidence that the victim failed to protect her own children from sexual abuse carried with it the risk that the jury would reach its decision out of antipathy for the victim rather than on the merits of the case or Appellant's defense. *Giglioblanco*, 210 S.W.3d at 641 ("Evidence might be unfairly prejudicial if, for example, it arouses the jury's hostility or sympathy for one side without regard to the logical probative force of the evidence."). Moreover, as the State argues, without a jury instruction on the defensive issue, the evidence could have encouraged the jury to engage in jury nullification. So while the evidence would support

Appellant's defensive claim, I agree that it was also very inflammatory.

Still, I cannot join the Court's opinion because the Court's skewed relevancy analysis tips the scales too far in favor of prejudice. According to the Court, Appellant's evidence was not probative of Appellant's perception because his sons were not in immediate danger. But regardless of whether Appellant had to show that his sons were actually facing "imminent harm," Appellant's evidence of what he believed and why he believed it supported his claim that he believed his actions were immediately necessary and that his belief was reasonable under the circumstances. The Court too easily dismisses the probative value of the evidence in question or Appellant's need for the evidence, which results in a Rule 403 analysis that presumes prejudice. This approach is incompatible with a rule that presumes admissibility unless the probative value of evidence is substantially outweighed by the danger of unfair prejudice. TEX. R. EVID. 403; *Montgomery*, 810 S.W.2d 389.

Conclusion

The Court determines that Appellant's conduct was unjustified. I do not suggest it was. If we were considering whether the jury acted rationally in rejecting Appellant's defensive claim, I would have no qualms about weighing whether a jury's determination was rational. But the jury

never had the chance to consider Appellant's defense because the trial court would not allow Appellant to admit his defensive evidence. That, to me, is unreasonable.

Filed: June 29, 2016

Publish