In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00164-CR

MOHAMMED KHALED AWDE, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the Criminal District Court 2
Tarrant County, Texas
Trial Court No. 1353199D, Honorable Wayne F. Salvant, Presiding

May 3, 2017

MEMORANDUM OPINION

Before QUINN, CJ., and CAMPBELL and PIRTLE, JJ.

Appellant, Mohammed Khaled Awde, was convicted of murder and sentenced to forty-five years imprisonment after he shot his step-daughter's father (Kevin Nguyen) during a dispute about her curfew. On appeal, he complains that the trial court twice erred when it failed to instruct the jury on certain aspects of self-defense. We affirm.[1]

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this court. *See* TEX. R. APP. P. 41.3.

Background

Appellant plainly admits that he shot Nguyen but maintains that he did so in self-defense.[2] Allegedly, Nguyen had lunged towards him after appellant drew a firearm and threatened to shoot. That the decedent possessed no deadly weapon at the time is undisputed. Nor did appellant testify that he believed Nguyen possessed such a weapon. Nevertheless, appellant supposedly believed Nguyen was attempting to kill him and, therefore, the jury should have been instructed that his use of deadly force was presumptively reasonable. We frame this argument within the following factual background.

In December 2013, Nguyen was on winter break from pharmacy school and wanted to take his daughter, his new girlfriend, and her children to see Christmas lights in Dallas. That meant his daughter would be out later than the curfew set by the girl's mother and appellant. Nguyen asked if he could return her at a later time, but the child's mother would not agree to it without appellant's input. When the mother and appellant eventually decided to deny the request, Nguyen had already left on the outing. This resulted in his returning the girl home shortly before 10:00 p.m.

Appellant awaited Nguyen's arrival, and when he appeared with the child, appellant insisted on discussing the matter. At that point, Nguyen leaned against the back door of his car, crossed his arms, and began conversing with appellant. All the while, Nguyen's girlfriend and her children sat within that vehicle and witnessed the events about to unfold.

[2] Throughout his appellant's brief, appellant alludes to Nguyen as the "alleged injured party" or "AIP." For clarity, we refer to Nguyen as the decedent.

The discussion grew heated. Nguyen allegedly raised his voice and thrusted his finger at and slowly moved towards appellant. Yet, appellant did not fear for his life when that was occurring. Though he said he did not feel safe and feared that the circumstances "could lead to" serious bodily injury or death, he did not fear imminent bodily injury or death at the time. And, when asked by the prosecutor to disclose the "exact moment when you felt when you were in fear of imminent bodily injury or death," appellant answered as follows:

> The exact moment was when I asked, Do you want me to shoot you, and he screamed, Shoot me. And it was that scream mixed with him bringing his arms towards me that just – it wasn't like a conscious decision like that I had time to think about and pause and then shoot, it just happened in that very moment, that split second.

So, appellant drew the handgun and fired multiple times.

Appellant admitted that he saw no weapon on the decedent but, nonetheless, maintained that Nguyen was in a violent rage and was significantly bigger than him. So too did he acknowledge that he himself had been moving back slowly before threatening to shoot. And while it appeared that appellant could have walked away and ended the argument, he opted to remain and "avoid having that conversation over and over again, so I wanted to definitely talk about it with him and solve the problem then and there."

Nguyen never physically contacted appellant. And, despite the allegation that the decedent lunged in a violent manner with his arms open or forward, Nguyen's body was found by the police kneeling against the car, as if he slid down. The medical examiner also would later note the presence of evidence suggesting that Nguyen's arms were crossed when he was shot.

When it came time to charge the jury at the end of the guilt-innocence phase of the trial, the court agreed to instruct it on self-defense through use of deadly force. Yet, it denied appellant's request to tell the jury to deem reasonable his alleged belief about the need for deadly force. So too did the trial court refuse appellant's request founded upon § 9.31(b)(5) of the Texas Penal Code, which request would have interjected the topic of whether appellant was lawfully possessing the firearm used to kill Nguyen.

After deliberating, the jury rejected the claim of self-defense, found appellant guilty of murder, and sentenced him to forty-five years imprisonment. Appellant appealed, claiming that the trial court should have included the instructions mentioned in the immediately preceding paragraph.

Instruction on Presumption of Reasonableness

We first address the contention that the jury should have been told to deem reasonable appellant's belief that deadly force was immediately necessary.[3] In considering the matter, we do so within the time frame established by appellant's own admission. The admission of which we speak is that wherein he told the jury he felt the use of deadly force was unnecessary until ***after*** he threatened to shoot the decedent and the decedent yelled "Shoot me" and lunged.

According to § 9.32(b) of the Penal Code, an actor's belief that deadly force is "immediately necessary" is "presumed to be reasonable if the actor"

> (1) knew or had reason to believe that the person against whom the deadly force was used:
>
> > (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

[3] Sadly, the State did not directly address appellant's contention. Instead, it argued that appellant was not entitled to any instruction on self-defense via the use of deadly force.

> (B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or
> (C) was committing or attempting to commit an offense described by Subsection (a)(2)(B);
>
> (2) did not provoke the person against whom the force was used; and
>
> (3) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used.

TEX. PENAL CODE ANN. § 9.32(b)(1)–(3) (West 2011). All we concern ourselves with here is § 9.32(b)(1)(C). Appellant argues that he "knew or had reason to believe" that Nguyen was committing or attempting to commit an offense described in subsection (a)(2)(B), the particular offense being "murder." *See id.* § 9.32(a)(2)(B) (stating that a person is justified in using deadly force when and to the degree he reasonably believes deadly force is immediately necessary "to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery"). Since he so believed, he allegedly should have received the instruction. We overrule the issue.

"Murder" occurs when the actor (1) "intentionally or knowingly causes the death of an individual," (2) "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual," or (3) "commits or attempts to commit a felony . . . and . . . he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual." *Id*. § 19.02(b)(1)–(3) (West 2011). Implicit in each of those categories of murder is the element of death. That is, the actor must intend to cause death or commit or attempt to commit a dangerous act that causes death.

Thus, to be entitled to the instruction sought by appellant, evidence must appear of record illustrating, at the very least, that he "knew or had reason to believe" Nguyen intended to kill him or undertake a dangerous act that would cause appellant's death. Without such evidence, no instruction was warranted. *See id.* § 2.03(c) (stating that "[t]he issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense"); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007) (stating that "under § 2.03(c), a defense is supported (or raised) by the evidence if there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that that element is true" and in "determining whether a defense is thus supported, a court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of rational inference from the facts proven").

Needless to say, the legislature did not define the terms "knew" or "reason to believe" when drafting the self-defense provisions of the Penal Code. The lack of statutory definitions, therefore, requires us to give effect to the "plain meaning" of those words. *See Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). To that end, we first note the word "knew" is the past tense of the verb "to know," and, "to know" denotes the concept of perceiving, understanding, or being aware of some particular thing. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 691 (11th ed. 2003) (defining "know" as "to perceive directly," "to have understanding of," or "to recognize the nature of").

In turn, the noun "reason" means a "rational ground or motive," "a sufficient ground of explanation or of logical defense," or "something that supports a conclusion or

explains a fact." *Id.* at 1037 (defining the noun "reason"). And, one cannot doubt that to "believe" means to hold an opinion or viewpoint about a particular thing. So, by combining "reason" and "believe" into the phrase "reason to believe," we would construe the latter phrase as requiring evidence that the actor held an opinion or viewpoint about a particular matter, which opinion or viewpoint was based upon some rational, logical, or supporting ground. The particular matter in play here would be appellant's death and Nguyen attempting to cause it either intentionally or knowingly or by engaging in some dangerous act that would result in it.

For purposes of this appeal, and given the standard of review, we accept as true appellant's testimony about Nguyen being a big, angry, yelling man who hated and lunged at appellant. We also assume *arguendo* that from the foregoing indicia one could logically infer that the decedent would have come into physical contact with appellant had the latter not fired. But, what we cannot assume is what would have happened had contact been made. Nor can we assume the existence of evidence to support one's belief that he is about to be killed. Nguyen may have been yelling and may have said "shoot me," but no one said that he uttered verbal threats against the life of appellant.[4] Nor was there evidence that the decedent carried or brandished any deadly weapon before being shot. Appellant did not even argue or try to show that Nguyen's thrusting finger constituted a weapon of some sort. All we have is yelling, a thrusting finger, anger and a lunge once appellant threatened the decedent with a deadly weapon.

[4] We acknowledge the evidence of record about Nguyen and others having burglarized a home in which an elderly lady was restrained. Yet, there is no evidence that she was killed. Nor were the jurors told about the extent of the injuries, if any, suffered by her. So, while appellant may correctly allude to such evidence as evincing that Nguyen had engaged in aggressive physical acts in the past, it says nothing about his penchant for desiring to cause death.

Evidence of size, anger, hatred, yelling, and lunging may reasonably suggest a mindset desiring to engage in physical contact. But, assault and murder are distinct acts. The former encompasses a *mens rea* coupled with causing physical contact or bodily injury. *See* TEX. PENAL CODE ANN. § 22.01(a) (West Supp. 2016) (describing the crime of assault). The latter, though, couples a particular *mens rea* with death. And it is the *mens rea* coupled with death that is relevant here, given appellant's reliance on the "murder" element of § 9.32(b)(1)(C). It is not enough that the evidence would enable a person to believe he was about to be assaulted. The term used in § 9.32(a)(2)(B) is "murder," and that connotes death and a belief he was about to be killed.

In analogous situations, evidence of a potentially forthcoming assault was deemed insufficient to entitle the defendant to an instruction on self-defense through the use of deadly force. For instance, in *Werner v. State*, 711 S.W.2d 639 (Tex. Crim. App. 1986) (en banc), the appellant testified not only that he feared for his life but also that the deceased (1) said appellant would have to shoot him, (2) made a "shrugging" motion with his shoulders, (3) took a step towards appellant, and (4) "looked crazy." *See id.* at 640. Missing from the appellant's testimony were comments about him seeing any weapon in the deceased possession. *See id.* at 644. Under these circumstances, according to our Court of Criminal Appeals, the appellant "plainly could not have testified that he reasonably believed it necessary to shoot the deceased . . . to defend himself against the deceased's use or attempted use of deadly force." *Id.*; *see Holmes v. State*, 830 S.W.2d 263, 265–66 (Tex. App.—Texarkana 1992, no pet.) (concluding defense not raised where decedent was struck in the head with a bat by defendant as decedent moved towards defendant while also engaged in quarrel with a

third party). Admittedly, deadly force encompasses both serious bodily injury and death. *See* TEX. PENAL CODE ANN. § 9.01(3) (West 2011) (defining deadly force as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury"). Yet, if evidence of an unarmed decedent moving towards the defendant with a crazed look on his face after mentioning that the defendant should shoot him is not enough to infer that the defendant would soon suffer from serious bodily injury, then it is hardly sufficient to constitute "reason to believe" that the defendant was about to be killed. Nor is it enough to lead the defendant to know his death is forthcoming.

Just as the trial court and jurors below, we can only speculate about what would have happened had appellant not shot. We can only speculate about whether Nguyen wanted to kill or would have killed appellant. Speculation is not evidence, *Perilla v. State*, No. 05-15-00051-CR, 2016 Tex. App. LEXIS 4301, at *11 (Tex. App.—Dallas Apr. 25, 2016, no pet.) (mem. op., not designated for publication), just as fearing an assault is not foreseeing a murder.

More importantly, appellant stood in the same position as did the trial court and jurors; he too could only speculate on what was about to happen. While his version of events (if deemed credible) may have provided him with basis to believe that he was about to be the victim of an assault, it (nor any other evidence of record) provides a basis for him to believe he was about to be killed. And, it is a supportable belief that he was about to be murdered that would have obligated the trial court to instruct the jury to deem as reasonable appellant's purported belief that deadly force was immediately necessary. Again, it is not enough to simply say, "I believed I was about to be killed."

The belief must be founded upon indicia suggesting that death is imminent before the jury is told that the belief is presumed reasonable. An opinion is not reasonable simply because someone voices it. In requiring that the actor "knew or had reason to believe," the legislature did not strip the opinion of the need for reasonable support. Accordingly, the trial court did not err in refusing the requested instruction.

Instruction on Carrying a Gun to Discussion

We next address appellant's contention implicating § 9.31(b)(5) of the Penal Code. According to that statute, the use of force is not justified when the actor sought an explanation from or discussion with the decedent concerning the actor's differences with the other person while unlawfully carrying a weapon or possessing or transporting a prohibited weapon. *See* TEX. PENAL CODE ANN. § 9.31(b)(5) (West 2011). Appellant asserts that the jury was entitled to be told that, or that it was entitled to be told the converse. We overrule the issue.

First, little attention was paid to the argument in the appellant's brief. More importantly, though, appellant cites us to no evidence satisfying the elements of the statute. It is true that he possessed a firearm, just as it is true that he had a permit to carry it. No one argued or offered evidence to the contrary. Nor did anyone present evidence or argued that the handgun he possessed was a prohibited weapon of some type. So, given the absence of evidence satisfying the elements of § 9.31(b)(5), the trial court was not obligated to submit the desired instruction. *See Shaw*, 243 S.W.3d at 657–58.

Having overruled both of appellant's points of error, we affirm the trial court's judgment of conviction.

Brian Quinn
Chief Justice

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