



**In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana**

No. 06-07-00113-CR

CLIFTON WAYNE PERRY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 278th Judicial District Court
Leon County, Texas
Trial Court No. CM-05-489

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Justice Carter

MEMORANDUM OPINION

Clifton Wayne Perry appeals his conviction by a jury for murder under the immediate influence of sudden passion with a deadly weapon finding. The jury found the enhancements true and assessed a punishment of sixty years' imprisonment. The trial court sentenced Perry consistent with the jury's findings. On appeal, Perry argues the trial court erred in denying his requested instruction on necessity. Because the evidence clearly implicates the application of self-defense using deadly force, the trial court did not err in refusing to charge the jury concerning both self-defense using deadly force and necessity. We affirm the judgment of the trial court.

At the conclusion of the guilt/innocence phase of the trial, Perry requested a jury instruction on both self-defense and necessity. The necessity defense is contained in Section 9.22 of the Texas Penal Code, which states:

Conduct is justified if:

- (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
- (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

TEX. PENAL CODE ANN. § 9.22 (Vernon 2003). Under Section 9.32 of the Texas Penal Code, a person's conduct is justified, under deadly force in defense of a person:

- (1) if he would be justified in using force against the other under Section 9.31;
- (2) if a reasonable person in the actor's situation would not have retreated; and

(3) when and to the degree he reasonably believes the deadly force is immediately necessary:

(A) to protect himself against the other's use or attempted use of unlawful deadly force; or

(B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Act of May 16, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2141–42 (amended 2007) (current version at TEX. PENAL CODE ANN. § 9.32 (Vernon Supp. 2008)).¹ The trial court instructed the jury on self-defense but refused to give an instruction on necessity. Perry argues that the evidence raised an issue concerning necessity, and the trial court erred by denying the requested instruction.

Generally, if the evidence raises the issue, the defendant is entitled to have this issue submitted to the jury. *Riddle v. State*, 888 S.W.2d 1, 6 (Tex. Crim. App. 1994). "When evidence . . . raises a defensive issue, and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury." *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993); *see Gibson v. State*, 726 S.W.2d 129, 132 (Tex. Crim. App. 1987). "[A]n accused has the right to an instruction on any defensive issue raised by the evidence, whether that evidence is weak

¹In 2007, the Texas Legislature amended Section 9.32 to remove the requirement that "a reasonable person in the actor's situation would not have retreated." *See* Act of May 16, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2141–42, *amended by* Act of March 20, 2007, 80th Leg., R.S., ch. 1, § 3, 2007 Tex. Gen. Laws 1, 1–2. The offense for which the jury convicted Perry occurred in 2005. Our analysis of Perry's appeal is therefore governed by the prior version of Section 9.32. *See* Act of March 20, 2007, 80th Leg., R.S., ch. 1, § 3, 2007 Tex. Gen. Laws 1, 1–2 (stating that an offense committed before the act's effective date is governed by the sections in effect when the offense was committed).

or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense." *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996).

Perry argues that his testimony raised the issue of whether the murder was justified by necessity. Perry testified his cousin, Jerry Wayne Bailey, gave him a ride home from a family reunion. When they arrived at Perry's house, Bailey and Perry drank beer together outside the house, leaning on Bailey's truck. After a while, Perry lit a "premo," which he described as a mixture of tobacco, crack cocaine, and marihuana. Bailey objected to the "premo." Eventually, curse words were exchanged and fisticuffs ensued. According to Perry, Bailey then opened the driver's side door of the truck. Thinking that Bailey was attempting to retrieve a weapon, Perry reached into the bed of the truck and seized a metal pipe. Perry testified he saw Bailey coming toward him with "something in his hand." Perry admitted to striking Bailey twice with the pipe and observing Bailey fall to the ground covered in blood.

Subsection (3) of Section 9.22 precludes the defense of necessity when there exists a legislative purpose to exclude the necessity for the conduct alleged. TEX. PENAL CODE ANN. § 9.22(3). This Court has concluded the defense of necessity is not applicable in murder cases in which self-defense is raised. *Searcy v. State*, 231 S.W.3d 539, 544 (Tex. App.—Texarkana 2007, pet. ref'd); *see Gonzales v. State*, 2 S.W.3d 600, 606 (Tex. App.—Texarkana 1999, pet. ref'd). At the time Perry committed the offense in question, a defendant who used deadly force was required to establish that "a reasonable person in the actor's situation would not have retreated." Act

of May 16, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2141–42 (amended 2007) (current version at TEX. PENAL CODE ANN. § 9.32). In *Searcy*, we held that including an instruction on the "necessity defense together with self-defense would thwart the legislative purpose to impose a higher standard and circumvent the "retreat" requirement of Section 9.32 where the use of deadly force is sought to be justified." *Searcy*, 231 S.W.3d at 544 (quoting *Banks v. State*, 955 S.W.2d 116, 119 (Tex. App.—Fort Worth 1997, no pet.)); see *Butler v. State*, 663 S.W.2d 492, 496 (Tex. App.—Dallas 1983), *aff'd*, 736 S.W.2d 668 (Tex. Crim. App. 1987); *cf. Banks*, 955 S.W.2d 116 (suggesting, when both necessity and self-defense justifications are raised, the inclusion of one of the justifications in the charge precludes the inclusion of the other); *Fitch v. State*, No. 14-06-00408-CR, 2007 Tex. App. LEXIS 7065 (Tex. App.—Houston [14th Dist.] Aug. 30, 2007, pet. ref'd) (mem. op., not designated for publication) (holding counsel not ineffective for failing to request charge on necessity because necessity not available).

Perry cites *Bowen v. State*, 162 S.W.3d 226 (Tex. Crim. App. 2005), in support of his argument on appeal.² In *Bowen*, a prosecution for resisting arrest, the defendant had kicked a police officer in response to pain allegedly inflicted by the officer and in an attempt to regain her balance.

²We note Perry also cites *Fox v. State*, No. 13-03-00230-CR, 2006 Tex. App. LEXIS 7898 (Tex. App.—Corpus Christi Dec. 6, 2006, pet. ref'd) (mem. op., not designated for publication). In *Fox*, the victim accelerated his car toward the defendant's wife and the defendant shot the victim wounding the victim in the arm. *Id.* at *3–4. The Corpus Christi Court of Appeals, relying on *Bowen*, concluded the submission of a self-defense instruction did not foreclose the availability of a necessity instruction. *Id.* at *11 n.25. The Corpus Christi court did not discuss whether the duty to retreat would affect the applicability of *Bowen*. Further, as an unpublished opinion, *Fox* has limited precedential value.

Id. Noting the justification based on self-defense is extremely limited when a person uses force to resist arrest, the Texas Court of Criminal Appeals held the trial court erred in denying the requested instruction on necessity. *Id.* at 229. In reaching the above conclusion, the court held Section 9.31, which concerns self-defense not involving deadly force, does not limit the necessity defense's application because the court was unable to "glean any clear legislative purpose indicating that the necessity defense is not available." *Id.*

Bowen is distinguishable from this case because it did not involve the use of deadly force. The use of deadly force in the defense of a person involves a different section of the Texas Penal Code and requires proof that a reasonable person in the actor's situation would not have retreated. Because the retreat requirement was not at issue in *Bowen*, we conclude *Bowen* is distinguishable.

Here, the trial court instructed the jury on self-defense using deadly force, which included a duty to retreat. Thus, the inclusion of the justification of necessity, on facts such as these which implicate the application of self-defense using deadly force, would undermine the Legislature's purpose in imposing the duty to retreat. The trial court did not err in refusing to instruct the jury on the justification of necessity. We overrule Perry's sole point of error.

For the reasons stated, we affirm the judgment of the trial court.

Jack Carter
Justice

Date Submitted: August 11, 2008

Date Decided: August 12, 2008

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