

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS **FILE COPY**
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/23/2023

CHASE, TONY TERREL Tr. Ct. No. 114-0387-19

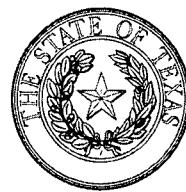
On this day, the Appellant's Pro Se petition for discretionary review has been refused.

**COA No. 12-22-00167-CR
PD-0291-23**

Deana Williamson, Clerk

TONY TERREL CHASE
STILES UNIT - TDC # 02411203
3060 FM 3514
BEAUMONT, TX 77705

Appendix - B



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 20, 2023

NO. 12-22-00167-CR

TONY TERREL CHASE,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-0387-19)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

NO. 12-22-00167-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

***TONY TERREL CHASE,
APPELLANT***

§ APPEAL FROM THE 114TH

V.

§ JUDICIAL DISTRICT COURT

***THE STATE OF TEXAS,
APPELLEE***

§ SMITH COUNTY, TEXAS

OPINION

Appellant Tony Terrel Chase appeals from his conviction for murder. In one issue, Appellant argues that the trial court erred in refusing to submit the defense of necessity in the jury charge. We affirm.

BACKGROUND

On January 7, 2019, Appellant placed a 911 call requesting an ambulance and stated that his father, Edward Blaylock, had been shot at his home. When the dispatcher asked whether he knew who shot his father, Appellant admitted to being the shooter. Smith County Sheriff's Office personnel arrived at the scene, detained Appellant using handcuffs, and placed him in the patrol car. Subsequently, law enforcement entered Blaylock's home and confirmed that the victim lacked signs of life, at which point they took photographs and awaited emergency medical services. During this initial investigation, law enforcement read Appellant his *Miranda* rights, and Appellant discussed his reason for shooting Blaylock. Appellant stated that he and Blaylock were arguing about missing clothing items, and during this argument, Appellant followed Blaylock into his bedroom. Appellant then left the room, retrieved a handgun from the kitchen, and returned to the bedroom to continue the dispute with the gun out of Blaylock's view. Appellant said that Blaylock was on his bed, but "turned like he was getting ready to lunge at

[Appellant].” In speaking to another officer at the scene, Appellant indicated that his father actually “lunged” at him. Appellant claimed he feared a physical assault because Blaylock beat him on multiple prior occasions. Appellant stated that, to prevent such an assault, he fired the gun at Blaylock until it jammed.

Detectives obtained a warrant for Appellant’s arrest on the charge of murder and contemporaneously executed that warrant. The State subsequently indicted Appellant for Blaylock’s murder. Appellant pleaded “not guilty,” and the matter proceeded to a jury trial.

At trial, Dr. Danielle Armstrong, a forensic pathologist, testified that her autopsy of Blaylock revealed seven gunshot wounds, which caused injuries to Blaylock’s heart, lungs, liver, and stomach. She opined that these multiple gunshot wounds caused Blaylock’s death.

Sergeant Noel Martin, the sergeant in charge of the Smith County Sheriff’s Office crime scene unit, testified regarding his examination of the crime scene and subsequent shooting reconstruction and trajectory analysis. Martin testified that the results of his analyses and his extensive experience in crime scene investigation and processing, in particular the presence and absence of blood in specific areas of the room, led him to conclude that Blaylock was on the bed when Appellant shot him, and had not moved from the bed or lunged toward Appellant before Appellant fired the first shot. Martin opined that he found no evidence that Blaylock exhibited any deadly force against Appellant.

Defense counsel requested the trial court include a necessity instruction in the jury charge; the trial court denied this request. Thus, the charge included only an instruction on self-defense. The jury found Appellant “guilty” of the murder charge and assessed punishment of life imprisonment. This appeal followed.

INCLUSION OF NECESSITY DEFENSE IN JURY CHARGE

Appellant claims that he was entitled to an instruction on the defense of necessity in the jury charge at trial, and that the omission of this instruction caused harm.

Standard of Review and Applicable Law

We review a trial court’s decision not to include an instruction on a defensive issue in the jury charge for abuse of discretion, and we view the evidence in the light most favorable to the defendant’s requested instruction. *See Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006); *Buford v. State*, 606 S.W.3d 363, 369 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

A person is justified in using force 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 ANN. § 9.31(a) (West 2021). A person is justified in using *deadly* force against another if (1) he would be justified in using force against another under Section 9.31, and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect him against the other's use or attempted use of unlawful deadly force or to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, robbery, or aggravated robbery. *Id.* § 9.32(a) (West 2021).

The defense of necessity is available to justify criminal conduct 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. *Id.* § 9.22 (West 2021).¹ Thus, if there is a plain legislative purpose to exclude the defense of necessity, then subsection (3) precludes that defense from being included in the charge. *See id.*; *see also Striblin v. State*, No. 04-17-00826-CR, 2019 WL 1049233, at *4 (Tex. App.—San Antonio, Mar. 6, 2019, pet. ref'd) (mem. op., not designated for publication). To be entitled to an instruction on necessity, there must be some evidence that the defendant reasonably believed a specific harm was imminent and that the defendant reasonably believed the criminal conduct was immediately necessary to avoid the imminent harm. *See Pennington v. State*, 54 S.W.3d 852, 857 (Tex. App.—Fort Worth 2001, pet. ref'd).

Legislative Purpose for Excluding Necessity Instruction

Several of our sister courts have held that in murder cases where the defendant claims self-defense, Section 9.32 evidences a legislative intent that precludes an accompanying necessity instruction.² *See Striblin*, 2019 WL 1049233, at *4; *Sneed v. State*, No. 11-15-00320-

¹ A proper jury charge on the defense of necessity includes the first two subsections, but not the third. *See Williams v. State*, 630 S.W.2d 640, 642–43 (Tex. Crim. App. 1982) (noting that subsection (3) is a question of law, and the jury may not consider it); *Rodriguez v. State*, 524 S.W.3d 389, 393 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd).

² The Court of Criminal Appeals has neither examined legislative intent in relation to Section 9.32, nor ruled whether, when a defendant uses deadly force, the presence of a self-defense instruction bars a necessity instruction. *But see Bowen v. State*, 162 S.W.3d 226, 229–30 (Tex. Crim. App. 2005) (holding a defendant charged with resisting arrest, who did not use deadly force, was entitled to necessity instruction).

CR, 2017 WL 2588164, at *3 (Tex. App.—Eastland Apr. 28, 2017, pet. ref'd) (mem. op., not designated for publication); *Kelley v. State*, No. 05-15-00545-CR, 2016 WL 1446147, at *7 (Tex. App.—Dallas Apr. 12, 2016, pet. ref'd) (mem. op., not designated for publication); *Wilson v. State*, No. 06-14-00021-CR, 2014 WL 8332264, at *4-6 (Tex. App.—Texarkana Nov. 7, 2014, pet. ref'd) (mem. op., not designated for publication).³ Based on the statute's plain language, we agree with and adopt the reasoning of these courts.⁴ A plain reading of Section 9.32 shows that the Legislature intended to impose a higher standard for justification of deadly force, permitting its use *only* when the actor's life is immediately threatened by another's use of unlawful deadly force or to prevent the commission of specific violent crimes.⁵ A necessity defense involves a substantially lower showing, requiring only that the conduct be necessary to "avoid imminent harm." TEX. PENAL CODE ANN. § 9.22(1); 1.07(a)(25) (defining "harm" as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested"). Therefore, allowing an instruction on necessity when the appellant used deadly force *and* obtained a jury instruction on self-defense would undermine the legislative purpose of limiting the justifiable use of deadly force to preventing an immediate threat to one's life or preventing the commission of specific violent crimes. *See Striblin*, 2019 WL 1049233 at *4; *Sneed*, 2017 WL 2588164, at *3; *Kelley*, 2016 WL 1446147, at *7; *Wilson*, 2014 WL 8332264, at *4-6.

Because a legislative purpose for excluding the defense of necessity under the facts of this case plainly appears in Section 9.32 of the Texas Penal Code, we conclude that the trial court did not abuse its discretion by refusing to include an instruction on necessity in the jury charge.

³ *But see Walker v. State*, No. 08-17-00133-CR, 2019 WL 3713757, at *10-11 (Tex. App.—El Paso Aug. 7, 2019, no pet.) (mem. op., not designated for publication) (declining to rule on availability of necessity instruction because any error did not harm appellant); *Castro v. State*, No. 13-17-00266-CR, 2019 WL 3484426, at *3 (Tex. App.—Corpus Christi Aug. 1, 2019) (mem. op., not designated for publication) (ruling necessity instruction was available based on its prior holding, but acknowledging unsettled law on the issue).

⁴ We may take guidance from unpublished opinions to "aid in developing reasoning that may be employed." *Carrillo v. State*, 98 S.W.3d 789, 794 (Tex. App.—Amarillo 2003, pet. ref'd).

⁵ The Texas Penal Code also provides that the use of deadly force to protect a third person is justified if such use would be justified under Section 9.32 and the actor believes his intervention is immediately necessary to protect the third person. TEX. PENAL CODE ANN. § 9.33 (West 2021). However, defense of a third person is not at issue in this case.

Harm from Omission of Necessity Instruction

Even if we assume the trial court erred in excluding a necessity instruction, Appellant cannot establish that he was harmed by the omission.⁶

When a defendant timely objects to the denial of his request for a necessity instruction, reversal is required on appeal if he has suffered some resulting harm. *See Almanza v. State*, 724 S.W.2d 805, 806 (Tex. Crim. App. 1986). Where the jury received an instruction for one “confession-and-avoidance” defense but not another at trial, a reviewing court must determine whether the defenses overlapped such that the self-defense instruction precluded harm from the absence of a necessity instruction. *See Bowen v. State*, 187 S.W.3d 744, 746 (Tex. App.—Fort Worth 2006, no pet.). On appeal, we decide whether the jury’s rejection of Appellant’s self-defense theory provides assurance that he suffered no harm from omission of the necessity instruction. *See Barrios v. State*, 389 S.W.3d 382, 397 (Tex. App.—Texarkana 2012, pet. ref’d).

In finding Appellant “guilty” of the murder charge, the jury implicitly found that the State refuted at least one essential element of self-defense. In other words, the State proved beyond a reasonable doubt that either (1) Appellant did not reasonably believe that he was in danger of serious bodily injury, or (2) Appellant did not reasonably believe that the degree of force he used was immediately necessary to protect himself against Blaylock’s use (or attempted use) of unlawful deadly force. TEX. PENAL CODE ANN. § 9.32(a); *see Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003) (“When a fact finder determines the defendant is guilty, there is an implicit finding against his defensive theory”).

Assuming the jury rejected Appellant’s self-defense theory based on a finding that Appellant did not reasonably believe he was in danger, then the jury also would have rejected the necessity defense, because Appellant did not reasonably believe specific harm was imminent. *See* TEX. PENAL CODE ANN. at §§ 9.22(2), 9.32(a), *Rodriguez*, 524 S.W.3d at 393. And assuming the jury instead rejected the self-defense theory based on a finding that Appellant lacked a reasonable belief that deadly force was immediately necessary to protect himself from Blaylock, then the jury also would have rejected the necessity defense, because Appellant lacked a reasonable belief that shooting Blaylock was immediately necessary. TEX. PENAL CODE ANN. §§ 9.22(1), 9.32(a), *Rodriguez*, 524 S.W.3d at 393. Appellant sought to justify the same action

⁶ Appellant alleges that he was harmed by the trial court’s denial of his requested necessity instruction because if the jury did not believe that he acted in self-defense, it would have no other choice than to find him “guilty” of murder.

with both defenses, namely shooting Blaylock, and the harm Appellant stated he acted to avoid was the same under either defense—a potential physical assault by Blaylock. Therefore, these defenses overlap to such a degree that the self-defense instruction precluded any harm from the omission of a necessity instruction from the jury charge. *See Barrios*, 389 S.W.3d at 397. Accordingly, even assuming the trial court abused its discretion by denying Appellant's requested instruction, no harm resulted from that denial.

Summation

Because Appellant was not entitled to a jury instruction on necessity, and no harm to Appellant resulted from the lack of such an instruction, we overrule Appellant's sole issue.

DISPOSITION

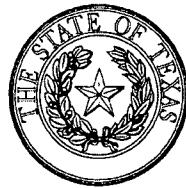
Having overruled Appellant's only issue, we ***affirm*** the judgment of the trial court.

JAMES T. WORTHEN
Chief Justice

Opinion delivered April 20, 2023.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

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