No. 01-24-00607-CR

In the
Court of Appeals
for the
First District of Texas
at Houston

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No. 18991
In the 506th District Court
Grimes County, Texas

———♦———

ROOSEVELT DARNELL ELLIS
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

MANDY MILLER
Attorney for Roosevelt Darnell Ellis
9722 Gaston Road, Ste. 150-257
Katy, TX 77494
SBN 24055561
PHONE (832) 900-9884
mandy@mandymillerlegal.com

APPELLANT WAIVES ORAL ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

Appellant waives oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

Counsel for the State:

Grimes County District Attorney's Office
270 FM 149
Anderson, TX 77830

Andria Bender — District Attorney of Grimes County and on appeal

Tammy Thomas — Assistant District Attorneys at trial

Appellant or criminal defendant:

Roosevelt Darnell Ellis

Counsel for Appellant at trial:

Zach Paul Coufal
200 East Alamo
Brenham, TX 77833

Counsel for Appellant on appeal:

Mandy Miller
9722 Gaston Road, Ste. 150-257
Katy, TX 77494

Trial Judge:

Hon. Gary W. Chaney

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STATEMENT OF THE CASE

Appellant was charged by indictment with evading arrest in a motor vehicle. (CR 5). A jury convicted appellant of the charged offense. (CR 244, 251). After a punishment proceeding, the jury found that appellant had been previously convicted of a felony offense and sentenced him to eight years in the Institutional Division of the Texas Department of Criminal Justice. (CR 250, 251).

STATEMENT OF FACTS

Appellant and his stepson, Xavier Sinegal, learned that Xavier's sister had been assaulted by her boyfriend, Larry Ealoms. (RR VI 13-16, 39, 150-51). Appellant drove to Magnolia Plaza, an apartment complex where Ealoms was living, to speak with him. (RR VI 16-17, 21). Xavier, with his mother, Shemeika Royal, followed in another vehicle. (RR VI 16-17, 21). Appellant and Sinegal both testified that they only intended to talk with Ealoms. (RR VI 21, 152).

Appellant approached Ealoms, who was standing on a porch. (RR V 35). After some words were said, Ealoms and appellant began fighting[1]. Ealoms picked up a BBQ pit and swung it at appellant. (RR VI 15, 152). Sinegal then tackled Ealoms in defense

[1] Appellant and Ealoms both testified that the other was the first aggressor. (RR V 35; RR VI 152-53)

of appellant. (RR V 35, 38; RR VI 20, 48). The fight eventually broke up and everyone dispersed. (RR VI 15, 17, 27, 153).

Deputy Victoria Gochnour with the Grimes County Sheriff's Department was dispatched to a "disturbance in progress" at Magnolia Plaza. (RR V 58-9). Responding deputies were informed to be on the lookout for a white, Dodge, dually truck. (RR V 67-8). Deputy Gochnour spotted the truck leaving the area of Magnolia Plaza and followed it. (RR V 65, 68; State's exhibit 4). When the deputy activated her lights, appellant, who was driving the truck, did not immediately stop but motioned with his arm out of the driver's window. (RR V 75; State's exhibits 3, 4). Deputy Gochnour assumed that appellant did not realize she was attempting to detain him, so she made a noise with her siren to indicate that he should pull over. (RR V 75; State's exhibits 3, 4). Appellant proceeded to drive to his home, less than three minutes away. (RR V 81; State's exhibits 3, 4).

At some point, additional law enforcement officers who responded to the initial dispatch call joined Deputy Gochnour in pursing appellant. (RR V 80-2). This included Michael Stover with the Navasota Police Department. (RR V 80). Appellant arrived at his home and exited his truck. (State's exhibit 3). By this time, appellant was agitated and removed all of his clothing. (RR V 154; State's exhibit 3). Officers physically subdued appellant, taking him to the ground. (RR V 158-60; State's exhibit 3).

Appellant was arrested and charged with evading arrest in a motor vehicle. (CR 5). A jury convicted appellant of the charged offense. (CR 244, 251). After the

punishment proceeding, the jury found that appellant had been previously convicted of a felony offense and sentenced him to eight years in the Institutional Division of the Texas Department of Criminal Justice. (CR 250, 251).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in permitting the State to redact portions of its own evidence over appellant's objection. The redacted evidence was res gestae of the arrest and rebutted the false impression that appellant was intoxication or simply aggressive toward law enforcement in general.

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The probative value of evidence that an officer who was involved in pursuing appellant and physically restraining him had previously been accused of using excessive force against appellant was not substantially outweighed by the danger or unfair prejudice or confusing the issues. The trial court abused its discretion in granting the State's motion to preclude the defense from presenting this evidence to establish the defense of necessity.

***

Appellant suffered some harm when the trial court refused to provide the jury an instruction on necessity.

***

The trial court abused its discretion in denying appellant's motion for new trial when it was discovered that the State failed to disclose one of its witnesses was on deferred adjudication supervision and a motion to adjudicate had been filed prior to his testimony.

APPELLANT'S FIRST POINT OF ERROR

The trial court abused its discretion by permitting the State to redact its own evidence over defense objection.

Relevant facts

In 2020, appellant had an unpleasant interaction with Officer Michael Stover. (CR 113-14). As a result, appellant was charged with interfering with public duties and appellant filed a complaint against the officer alleging that he used excessive force. (CR 113-14). The charge against appellant was dismissed and appellant's complaint against Officer Stover was declared unfounded and closed shortly before this trial. (RR VI 66; 114, 116).

Deputy Gochnour initially thought that appellant was under the influence of drugs when he removed all his clothing in his driveway. (RR V 185). However, it soon becomes apparent that appellant wanted to establish that he was unarmed. (RR V 156). When appellant was physically restrained, he made several statements referencing his previous interaction with Officer Stover and the resulting excessive force complaint. (DBOR exhibit 1). He also asked his wife to call his lawyer several times. (DBOR exhibit 1).

The State sought to admit into evidence a heavily redacted version of Deputy Gochnour's body worn camera video. (State's exhibit 3). The defense objected and the State countered that appellant's "self serving statements" were not admissible under *Allridge v. State*[2]. (RR V 87, 91, 98). The trial court agreed and admitted the State's redacted version of events. (States exhibit 3).

Standard of Review and Applicable Law

A trial court's decision to admit evidence over objection is reviewed for an abuse-of-discretion. *Zuliani v. State*, 97 S.W.3d 589, 595 (Tex. Crim. App. 2003). The trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement. *Cantu v. State*, 842 S.W.2d 667, 682 (Tex. Crim. App. 1992). Additionally, the trial court's ruling must be reasonable in view of all relevant facts. *Santellan v. State*, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997); *Rachal v. State*, 918 S.W.2d 799, 808 (Tex. Crim. App. 1996).

Argument

Ronald Allridge was convicted of capital murder. *Allridge v. State*, 762 S.W.2d 146, 149 (Tex. Crim. App. 1988). During trial, he attempted to introduce into evidence his own written statement that he provided after his arrest. *Id.* at 151-52. The trial court sustained the State's objection to the admission of the statement. *Id.* at 152.

[2] 762 S.W.2d 146 (Tex. Crim. App. 1988).

Allridge was arrested around 11:20 a.m. on March 25, 1985. *Id.* at 151. Later that day, he made two written statements, completing one at 6:06 p.m. and the other at 7:05 p.m. *Id.* The first statement implicated an accomplice as carrying the shotgun and shooting the victim. *Id.* In the second statement, Allridge admitted he wielded the shotgun and shot the victim after panicking. *Id.* Allridge sought to introduce the second statement to show that the shooting was not an intentional act. *Id.* Allridge justified the admission of his statements because they were not being offered for the truth of their contents, but rather as "admissions against interest admissible as exceptions to the hearsay rule," as res gestae of the offense or the arrest or both, and because they rebutted the State's theory of an intentional murder. *Id.* at 152.

Self-serving declarations are not admissible in evidence as proof of the facts asserted. *Id.* (citing 24 Tex.Jur.3d, Criminal Law, § 3058, p. 237). There are, however, exceptions to this general rule. "[S]elf-serving declarations of the accused are ordinarily inadmissible in his behalf, unless they come under some exception, such as: being part of the res gestae of the offense or arrest, or part of the statement or conversation previously proved by the State, or being necessary to explain or contradict acts or declarations first offered by the State." *Id.* (quoting *Singletary v. State*, 509 S.W.2d 572, 576 (Tex. Cr. App. 1974)).

One of the factors for determining whether a statement is res gestae is "spontaneity." *Rubenstein v. State*, 407 S.W.2d 793, 795 (Tex. Cr. App. 1966). "For a statement to be a part of the res gestae, the declaration must deal substantially with,

and must grow out of, the main fact so as to be spontaneous and not, in any event, a narration of a past event or occurrence. Above everything else, there must exist that spontaneity which takes the statement out of the realm of narration or premeditation." *Trammell v. State*, 145 Tex. Cr. R. 224, 167 S.W.2d 171, 174 (1942). Important factors to consider are "time elapsed, and, more importantly, spontaneity, or whether the statement was instinctive." *Singletary*, 509 .W.2d at 577 (quoting *Fisk v. State*, 432 S.W.2d 912 (Tex. Cr. App. 1968)).

The Court of Criminal Appeals upheld the trial court's ruling, first noting that Allridge did not testify in his defense, and that the State did not attempt to offer any of the statements into evidence. *Id.* Additionally, Allridge's statement was not res gestae, as it was made "approximately seventeen to eighteen hours after the offense and seven to eight hours after his arrest." *Allridge*, 762 S.W.2d at 152. "The fact that the statement was made by [Allridge] as a result of custodial interrogation containing his narration of the occurrence disproves the controlling element of spontaneity and instructiveness." *Id.*

Finally, Allridge's confessions were not admissible as statements previously proven by the State since none of the statements or parts thereof were introduced into evidence by the State. *Id.* at 153. Nor did the State mislead the jury or leave it with only a partial or incomplete version of the facts. *Id.* Consequently, the rule of "completeness," which takes effect only when other evidence has already been introduced but is incomplete and misleading, did not apply. *Id.*

The facts before this Court differ from those in *Allridge* in several significant ways. The State's case in chief consisted of three witnesses: Leonard Jessie, Larry Ealoms, and Deputy Victoria Gochnour. Despite several law enforcement personnel being on scene and participating in the pursuit and arrest of appellant, only Deputy Gochnour was called by the State. Over defense objections, Deputy Gochnour's body worn camera video was admitted into evidence with heavy redactions to edit out appellant's statements made during his arrest.

The unredacted video was admissible under the rule of optional completeness and to rebut a false impression left by the State.

If a party introduces part of an act, declaration, conversation, writing, or recorded statement, an adverse party may inquire into any other part on the same subject and may introduce any other act, declaration, conversation, writing, or recorded statement that is necessary to explain or allow the trier of fact to fully understand the part offered by the opponent. TEX. R. EVID. 107. This rule is one of admissibility and permits the introduction of otherwise inadmissible evidence when that evidence is necessary to fully and fairly explain a matter "opened up" by the adverse party. *Walters v. State*, 247 S.W.3d 204 , 217-18 (Tex. Crim. App. 2007) (citing *Parr v. State*, 557 S.W.2d 99, 102 (Tex. Crim. App. 1977). It is designed to reduce the possibility of the jury receiving a false impression from hearing only a part of some act, conversation, or writing. *Id.* at 218 (citing *Cerda v. State*, 557 S.W.2d 954, 957 (Tex. Crim. App. 1977)).

In *Walters v. State*, the defendant made a 911 call, and the 911 operator called the defendant back. *Id.* at 214-15. The State introduced the first call but only a portion of the second call. *Id.* The State stopped the 911 operator from testifying precisely at the point in the second call where the operator had asked the defendant if he wanted to talk about what had happened, and, in the process, the State prevented the operator from testifying that according to the defendant, the complainant (the defendant's brother) had threatened him several times, including one threat to kill him. *Id.* at 215.

The Court of Criminal Appeals held that the trial court abused its discretion by preventing the admission of the second call's remaining portion. *Id.* at 220-21. The State opened the door to the admission of the second call when it created the impression, through the testimony of two other witnesses, that Walters had not given any explanation of the shooting immediately after the event, and that the defendant was calm after the shooting. *Id.* at 220.

In the deputy's body worn camera video, appellant removes all his clothing and appears to act erratically and aggressively. Deputy Gochnour testified that she was initially concerned that appellant had a weapon on him and that it was a "dangerous situation." (RR V 154-57). This testimony, along with the redacted video, left the jury with the false impression that there was no reason for appellant's behavior or that his behavior was the result of drug induced intoxication. It also portrayed a false impression regarding appellant's intent as pertaining to the charged offense. The redacted portion of the video that the jury did not see establishes that appellant was

attempting to show the officers on the scene that he was unarmed and that he feared for his safety because of the presence of Michael Stover.

The unredacted video was admissible because appellant's statements were res gestae.

"Res gestae statements may some times operate as self-serving, but if they are res gestae they are still admissible." *Burnet v. State*, 150 Tex.Cr.R. 575, 205 S.W.2d 47, 49 (1947). Three requirements must be met for a statement to be admitted as res gestae: "(1) there must be an exciting, emotionally stimulating, or physically painful event — i.e., the arrest or the offense itself; (2) the statement must have been made sufficiently close in time to the occurrence that the declarant is still in the emotional grip of the exciting or stimulating event, such that the remark is spontaneous or impulsive; and (3) the statement must be related to the circumstances of the event." *Graham v. State*, 486 S.W.2d 92, 94 (Tex. Crim. App. 1972).

In the video, appellant makes several statements explaining why he removed his clothing and why he drove home instead of immediately stopping for law enforcement. The statements were certainly made spontaneously and in response to his arrest. The trial court rejected the argument that they were res gestate because they referred to an event that occurred prior to appellant's arrest. The court misconstrued the requirement that the statement be "related to the circumstances of the event." Appellant's statements may have referred to a previous interaction but were verbalized by appellant to explain his current behavior and in response to his arrest. *See Khoury v. State*, 669 S.W.2d 731, 733 (Tex. Crim. App. 1984) (Defendant's statements to officer, immediately

after arrest, that victim threatened him with a knife was admissible as being res gestae of the offense and the arrest.); *see also Galloway v. State*, 778 S.W.2d 110, 112-13 (Tex. App.--Houston [14th Dist.] 1989, no pet.) (res gestae of an arrest is a statement integral to the arrest itself); *Webb v. State*, 160 Tex. Crim. 144, 268 S.W.2d 136, 148 (1954) (In prosecution of streetcar operator for murder of passenger, testimony of dispatcher that in reporting incident by telephone shortly after its occurrence, defendant stated that decedent had threatened him with a knife was admissible as part of "res gestae" even if such statement constituted a self-serving declaration, in view of spontaneity of report to employer and excitement of defendant at time he made report).

This Court cannot be certain that the trial court's ruling did not contribute to appellant's conviction beyond a reasonable doubt.

"[T]he exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Potier v. State*, 68 S.W.3d 657, 665 (Tex. Crim. App. 2002). *Id.* An appellate court must reverse a constitutional error unless it can conclude beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. PRO. 44.2(a).

Appellant's defense was that it was necessary for him to travel to home instead of stopping immediately because he was either in fear of Officer Stover because of the way he had been previously treated by him or because he feared he would be retaliated against as a result of a complaint he had filed against the officer. (RR VI 75). Because

of the trial court's ruling, appellant was forced to testify in order to explain his actions on the day of his arrest. Appellant testified that he was in fear of Officer Stover but was prohibited from explaining why or why he felt the harm was imminent. (RR VI 169, 179, 186). *See* TEX. PEN. CODE ANN. § 9.22 (Conduct is justified if the actor reasonably believes the conduct is immediately necessary to avoid imminent harm). This Court cannot conclude, beyond a reasonable doubt, that the trail court's error in excluding the full version of the body worn camera video did not contribute to appellant's conviction or sentence.

APPELLANT'S SECOND POINT OF ERROR

The trial court abused its discretion in granting the "State's Motion to Deny Testimony Before the Jury, and To Deny Jury Charge on Necessity Defense."

Relevant facts

In 2020, appellant had an interaction with Officer Stover where appellant was arrested for interfering with public duties and appellant filed a complaint alleging excessive force against the officer. (RR VI 71). The charge against appellant was dismissed and the complaint against Officer Stover was categorized as unfounded and closed one week prior to trial. (RR VI 73

On August 8, 2024, the defense began putting on its defense. At 8:08 a.m., the State filed a "Motion to Deny Testimony Before the Jury, and To Deny Jury Charge on Necessity Defense." (CR 231-33). The State sought to preemptively prevent the defense

from putting on any evidence regarding the interaction between appellant and Officer Stover, the resulting complaint, and to deny any request for a necessity instruction to the jury. Even though the defense had not rested, the trial court granted the state's motion[3]. (RR VI 94, 96).

Standard of Review and Applicable Law

A trial court's decision to admit evidence over objection is reviewed for an abuse-of-discretion. *Zuliani*, 97 S.W.3d at 595. The trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement. *Cantu*, 842 S.W.2d at 682. Additionally, the trial court's ruling must be reasonable in view of all relevant facts. *Santellan*, 939 S.W.2d at 169; *Rachal*, 918 S.W.2d at 808.

A trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. The party objecting to the evidence must demonstrate the proffered evidence's negative attributes and also show that these negative attributes substantially outweigh any probative value. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g) (citing *Crank v. State*, 761 S.W.2d 328, 342 n.5 (Tex. Cr. App. 1988)). "The approach under Rule 403 is to admit all relevant evidence unless the

[3] The trial court admitted that its ruling was "premature,…[b]ut everyone is on notice of what I'm thinking and probably going to rule." (RR VI 96).

probative value is substantially outweighed by the danger of unfair prejudice to a defendant." *Crank*, 761 S.W.2d at 342 n.5.

"Probative value," as used in Rule 403, means more than simply relevance. *Old Chief v. United States*, 519 U.S. 172, 184, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997) (discussing Federal Rule 403, which is nearly identical to Texas Rule 403). Rather, "probative value" refers to the inherent probative force of an item of evidence - that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation - coupled with the proponent's need for that item of evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). "When the proponent [of an item of evidence] has other compelling or undisputed evidence to establish the proposition or fact that the [item of evidence] goes to prove, the [probative value of the item of evidence] will weigh far less than it otherwise might in the probative-versus-prejudicial balance." *Montgomery*, 810 S.W.2d at 390.

The Court of Criminal Appeals has articulated a four-factor balancing test to determine whether unfair prejudice substantially outweighs the probative value of evidence under Rule 403:

(1) how compellingly the evidence serves to make a fact of consequence more or less probable;

(2) the potential the evidence has to impress the jury "in some irrational but nevertheless indelible way;"

(3) the time the proponent will need to develop the evidence, during which the jury will be distracted from consideration of the indicted offense; and

(4) the force of the proponent's need for this evidence to prove a fact of consequence, i.e., does the proponent have other probative evidence available to him to help establish this fact, and is this fact related to an issue in dispute.

Wyatt v. State, 23 S.W.3d 18, 26 (Tex. Crim. App. 2000) (citing *Montgomery*, 810 S.W.2d at 389-90).

Argument

The trial court abused its discretion by refusing to permit the defense to present evidence of the prior interaction with Officer Stover. The court specifically found that the evidence's probative value was substantially outweighed by the danger of unfair prejudice to the State. (RR VI 88-9). The court also determined that the defense was not entitled to a statutory defense of necessity and therefore could not present evidence to establish that defense. (RR VI 90-5).

The evidence tended to make appellant's defense of necessity more probable. Appellant's need for the excluded evidence was great. The evidence explained the relationship between appellant and Officer Stover, would have provided the jury with context regarding appellant's state of mind, and clarified appellant's behavior after he arrived at his home. Put more simply, the court's ruling prevented appellant from presenting a complete defense.

The evidence could have been presented through one or two witnesses, who testified at trial. Thus, it would not have taken an inordinate amount of time for the defense to present the evidence. Furthermore, the evidence would not have confused the jury but actually explained appellant's seemingly over reaction to being pulled over. This Court cannot be certain that the trial court's ruling did not contribute to appellant's conviction beyond a reasonable doubt[4].

"[T]he exclusion of a defendant's evidence will be constitutional error only if the evidence forms such a vital portion of the case that exclusion effectively precludes the defendant from presenting a defense." *Potier*, 68 S.W.3d at 665. An appellate court must reverse a constitutional error unless it can conclude beyond a reasonable doubt that the error did not contribute to the conviction or punishment. TEX. R. APP. PRO. 44.2(a).

Appellant's defense was that it was necessary for him to travel to home instead of stopping immediately because he was either in fear of Officer Stover because of the way he had been previously treated by him or because he feared he would be retaliated against as a result of a complaint he had filed against the officer. (RR VI 75). Because of the trial court's ruling, appellant was prevented from fully explaining his state of mind on the day of his arrest. He told the jury he was frightened but could not testify as to why and expound on why he believed that he was in imminent harm. (RR VI 155-56, 169, 219). *See* TEX. PEN. CODE ANN. § 9.22 (Conduct is justified if the actor

[4] Because the points of error concern essentially the same topic, appellant mostly repeats his harm analysis from his first point of error.

reasonably believes the conduct is immediately necessary to avoid imminent harm). This Court cannot conclude, beyond a reasonable doubt, that the trial court's error in granting the State's motion did not contribute to appellant's conviction or sentence.

APPELLANT'S THIRD POINT OF ERROR

Appellant suffered some harm from the trial court's refusal to instruct the jury on necessity.

Standard of Review and Applicable Law

The importance of proper instructions in the jury charge "is apparent in the context of the division of responsibilities between judge and jury in a jury trial." *Abdnor v. State*, 871 S.W.2d 726, 730 (Tex. Crim. App. 1994). The jurors are the exclusive judges of the facts elicited during the trial. *Ex parte Thomas*, 638 S.W.2d 905, 907 (Tex. Cr. App. 1982). However, the jury "is bound to receive the law from the court and be governed thereby." Tex. Code Crim. Proc. Ann. art. 36.14. Thus, "[t]he law must come from the court, the facts must be decided by the jury, and the charge, to instruct the jury properly, must apply the law to the facts raised by the evidence." *Williams v. State*, 547 S.W.2d 18, 20 (Tex. Crim. App. 1977).

The trial court must give a requested instruction on every defense issue raised by the evidence. *See Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013). A defensive issue is considered raised by the evidence if there is some evidence on each element of a defense that, if believed by the jury, would support a rational inference

that the element is true. *Shaw v. State*, 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007). "The defendant is entitled to an instruction on a defense when there is legally sufficient evidence to raise the defense, regardless of whether the evidence supporting the defense is weak or contradicted even if the trial court is of the opinion that the evidence is not credible." *Holland v. State*, 481 S.W.3d 706, 709 (Tex. App.--Eastland 2015, pet. ref'd)(citing *Shaw*, 243 S.W.3d at 657-58). Whether the record contains such evidence is a question of law, which means the reviewing court does not apply the usual rule of appellate deference to the trial court's ruling. *Shaw*, 243 S.W.3d at 657-58. "Quite the reverse, [it views] the evidence in the light most favorable to the defendant's requested submission." *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).

To raise the necessity defense, a defendant must admit that he committed the offense charged and then offer the alleged necessity as a justification for his conduct. Necessity is a statutory defense that exonerates a person's otherwise illegal conduct. *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999). Conduct is justified by necessity 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. PEN. CODE ANN. § 9.22; *Young*, 991 S.W.2d at 839. The issue is whether the defendant

"reasonably believed his conduct was necessary to avoid imminent harm." *Maldonado v. State*, 902 S.W.2d 708, 712 (Tex. App.--El Paso 1995, no pet.).

Argument

Appellant admitted that he did not stop for Deputy Gochnour but instead traveled to his home. (RR VI 174, 178-9). After the trial court's ruling prevented appellant from testifying regarding his previous experience with Officer Stover, appellant testified that he did not stop because he was in fear for his life. (RR VI 155). If Officer Stover were not behind him, he would have stopped. (RR VI 155-56, 169, 219). Appellant's fear was not a generalized fear of police officers, but a specific fear of one officer with whom he had a previous interaction with. Appellant presented more than a scintilla of evidence that entitled him to a jury instruction on necessity. The trial court erred in refusing appellant's request instruction.

Harm

A trial court's failure to instruct the jury on a confession-and-avoidance defense "is generally harmful because its omission leaves the jury without a vehicle by which to acquit a defendant who has admitted to all the elements of the offense. *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013). Because appellant timely requested an instruction on necessity, the court's error in denying the instruction requires reversal so long as there has been "some harm" to appellant. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) (op. on reh'g). When conducting a harm analysis, a reviewing court considers four factors: (1) the charge itself; (2) the state of the evidence including

contested issues and the weight of the probative evidence; (3) the arguments of counsel; and (4) any other relevant information revealed by the record of the trial as a whole. *Barron v. State*, 353 S.W.3d 879, 884 (Tex. Crim. App. 2011) (quoting *Almanza*, 686 S.W.2d at 171). "In ascertaining whether there is harm, appellate courts 'focus on the evidence and record to determine the likelihood that the jury would have concluded that the defense applied had it been given the instruction." *Chase v. State*, 418 S.W.3d 296, 301 (Tex. App.--Austin 2013), aff'd, 448 S.W.3d 6 (Tex. Crim. App. 2014) (quoting *Wooten v. State*, 400 S.W.3d 601, 606 (Tex. Crim. App. 2013)).

1. The Jury Charge

The trial court denied appellant's requested necessity instruction. Thus, the jury was not given the opportunity to consider whether the evidence regarding appellant's actions of not immediately stopping for law enforcement could be legally justified as a necessity. The lack of instruction denied the jury the option of acquitting appellant if they found that he reasonably believed that his actions were immediately necessary to avoid danger. *Cornet*, 417 S.W.3d at 451; *see also Villarreal v. State*, 453 S.W.3d 429, 433 (Tex. Crim. App. 2015); *Dugar v. State*, 464 S.W.3d 811, 822 (Tex. App.--Houston [14th Dist.] 2015, pet. ref'd) (Explaining that when the self-defense "instruction was taken away from the jury, appellant was left without his only defensive theory, making his conviction a virtual inevitability.").

In *Dugar v. State*, after the defendant was denied a self-defense instruction, counsel "was left to argue" in closing that Dugar did not act with the requisite mens

rea. *Dugar*, 464 S.W.3d at 821. The Fourteenth Court of Appeals noted that Dugar "pitched this case as a question of self-defense, and he admitted to the conduct that formed the basis of the offense in order to receive a self-defense instruction. When that instruction was taken away from the jury, appellant was left without his only defensive theory, making his conviction a virtual inevitability." *Id.* at 822-23. The court of appeals concluded the trial court's error resulted in harm.

Appellant's case is similar. After appellant was denied a necessity instruction, defense counsel was "left to argue" that he did not intend to flee from Deputy Gochnour. Because appellant had only a single defense and there was no necessity instruction in the charge, nor were there any other instructions that clarified this issue, appellant was left without a defensive theory, and the jury was without a vehicle on which it could acquit. This charge error related to a contested issue at trial and appellant's trial strategy. This factor weighs in favor of a finding that appellant was harmed by the error.

2. The State of the Evidence

Appellant's defense at trial was that he did not immediately stop but traveled to a safe space, his home, because he was in fear for his life because Officer Stover was pursuing him. A defendant is entitled to an instruction on any defensive issued raised by the evidence, whether that evidence is weak or strong, unimpeached or uncontradicted, and regardless of how the trial court views the credibility of the defense. *Maciel v. State*, 631 S.W.3d 720, 722 (Tex. Crim. App. 2021) (quoting *Celis v. State*,

416 S.W.3d 419, 430 (Tex. Crim. App. 2013)). The credibility of the defense is a determination for the jury to make. *Garcia v. State*, 667 S.W.3d 756, 762 (Tex. Crim. App 2023).

Given that the defense's trial strategy focused exclusively on the necessity defense (if appellant fled from Deputy Gochnour, it was only for the purpose of necessity), the exclusion of a necessity instruction in the charge weighs in favor of some harm.

3. The Arguments of Counsel

The third *Almanza* factor pertains to the arguments of trial counsel. In considering this factor, the appellate court must determine whether any statements made by the State, appellant's trial counsel, or the trial court exacerbated or ameliorated the complained-of charge error. *Arrington v. State*, 451 S.W.3d 834, 844 (Tex. Crim. App. 2015). Since the defense was prohibited from arguing necessity to the jury, it instead urged the jury to acquit appellant because he lacked the intent to flee from Deputy Gochnour. As pointed out by the State in its closing argument, the jury had no choice but to convict appellant absent a necessity instruction. *See Pennington v. State*, 54 S.W.3d 852, 859 (Tex. App.--Fort Worth 2001, pet. ref'd) (Absent a necessity charge, as pointed out by the State in closing argument, the jury had no option but to convict.).

> And we hammered this quite a bit here. Actions. What are the defendant's actions despite his words? He already told you he knew the police were following him. He already told you he kept going instead. He's saying he's afraid. Well, that's not -- that doesn't throw intent out. That's – he's trying to sell you a motive for what we were calling a necessity defense. But there is no necessity defense in that piece of paper called the charge that the Judge gave you. Did you notice that?

> The law of necessity is not there because the Defense didn't properly raise the defense. You can't just get up there and say, "Oh, I'm afraid." If that were true, nobody would ever get convicted of anything because we could always use the crutch of necessity.
>
> You don't have the necessity defense. They're trying to turn the intent angle into their defense, when despite everything he said, he has actually confessed to intent to spite himself. He didn't stop. He wanted to get home. We don't have that luxury. He wasn't afraid for his life. He was afraid of going to jail.

(RR VII 41-2).

The omission of appellant's requested necessity instruction resulted in "some harm." While reasonable minds may differ, it was for the jury, not the trial court, to decide whether appellant reasonably believed that fleeing from the officers was immediately necessary to avoid imminent danger.

APPELLANT'S FOURTH POINT OF ERROR

The trial court abused its discretion in denying appellant's motion for new trial.

Relevant facts

The State failed to disclose that Leonard Jessie was on community supervision for two felony offenses in Grimes County at the time of his testimony. (Defendant's MNT Exhibit B). Additionally, the State failed to disclose that it had filed motions to adjudicate and that Jessie had been released from jail just prior to his testimony. (Defendant's MNT Exhibit B). Appellant timely filed a motion for new trial, which the trial court denied. (CR Supp II 3-8; CR Supp III 3).

Standard of Review and Applicable Law

A trial court's denial of a defendant's motion for new trial is reviewed under an abuse of discretion standard. *Salazar v. State*, 38 S.W.3d 141, 148 (Tex. Crim. App. 2001). The trial court abuses its discretion when the decision lies outside the zone of reasonable disagreement. *Cantu*, 842 S.W.2d at 682. Additionally, the trial court's ruling must be reasonable in view of all relevant facts. *Santellan*, 939 S.W.2d at 169; *Rachal*, 918 S.W.2d at 808.

In *Brady v. Maryland*, the United States Supreme Court concluded that the suppression by the prosecution of evidence favorable to a defendant violates due process if the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Wyatt v. State*, 23 S.W.3d 18, 27 (Tex. Crim. App. 2000). The Supreme Court subsequently extended *Brady* and held that the duty to disclose such evidence is applicable even if there has been no request by defendant, and that the duty to disclose encompasses both impeachment and exculpatory evidence. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Article 39.14 of the Texas Code of Criminal Procedure codified the State's duty to disclose evidence to the defense in a criminal prosecution. The passage of the Michael Morton Act in 2013 revamped Article 39.14 completely, overhauling discovery

in Texas. The statutory changes broadened criminal discovery for defendants, "making disclosure the rule and non-disclosure the exception." *Watkins v. State*, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021). Generally speaking, the current version of Article 39.14 removes procedural hurdles to obtaining discovery, broadens the categories of discoverable evidence, and expands the State's obligation to disclose. *Id.*, at 278.

Significantly, article 39.14(h) places upon the State a duty to disclose all "exculpatory, impeaching, and mitigating" evidence to the defense that tends to negate guilt or reduce punishment. This duty to disclose is much broader than the prosecutor's duty to disclose as a matter of due process under *Brady vs. Maryland. Id.*, at 277.

The statute also requires disclosure of evidence that merely "tends" to negate guilt or mitigate punishment. Thus, under Article 39.14(h), the State has an affirmative duty to disclose any relevant evidence that tends to negate guilt or mitigate punishment regardless of whether the evidence is "material" under *Brady v. Maryland. Id.* Any evidence that does not tend to negate guilt or mitigate punishment must be disclosed upon request without any showing of "good cause" or the need to secure a discretionary trial court order. *Id.* Disclosure is mandatory and must occur "as soon as practicable." TEX. CODE CRIM. PRO. ART. 39.14(a).

Argument

Leonard Jessie was a fact witness called by the State. He testified about the events leading up to the alleged offense. (RR V 11-26). After the trial, it was discovered that Jessie was on deferred adjudication supervision for ten years in Grimes County for

Assault Family Violence by Occlusion and Continuous Violence Against the Family. (Defendant's MNT Exhibit B). Motions to adjudicate were filed in Jessie's cases on July 10, 2024, and a capias was issued on July 15, 2024. (Defendant's MNT Exhibit B). Jessie was arrested on July 31, 2024, and placed into custody, less than one week prior to the beginning of the appellant's trial. (Defendant's MNT Exhibit B). Jessie was released on bond on August 1, 2024, and was on bond when he testified. (Defendant's MNT Exhibit B).

The State did not contest that it failed to provide the information regarding Jessie's pending criminal cases to trial counsel. Instead, the State asserted that it was under no duty to reveal this information to trial counsel "because 39.14(a) was never triggered by a written request…" (CR Supp I 5). The State also acknowledged that it was aware that the witness was on a deferred adjudication but believed that it was not bound to reveal this information to the defense because it is not an impeachable offense under Texas Rule of Evidence 609. (CR Supp I 5).

The requirement that a court order or request be lodged before the State is obligated to turn over impeaching information was discarded in 2014 with the Michael Morton Act. *See* TEX. CODE CRIM. PRO. ART. 39.14(h) ("Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.").

In closing argument, the State emphasized that appellant was not to be believed due to his status as a convicted felon. (RR VII 36). Yet, appellant was prevented from questioning the State's witness regarding his criminal history and motive to testify for the State. The State's failure to disclose this information to appellant's trial counsel deprived appellant of due process by preventing trial counsel from impeaching Jessie's testimony. (Defendant's MNT Exhibit B).

The right of the defense to impeach a State's witness is not limited to convictions. In fact, a defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias, or interest for the witness to testify. *Lewis v. State*, 815 S.W.2d 560, 565 (Tex. Cr. App. 1991). When discussing the breadth of that scope the Court of Criminal appeals has held,

> … Evidence to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only.

Jackson v. State, 482 S.W.2d 864, 868 (Tex. Cr. App. 1972) (quoting *Aetna Insurance Company v. Paddock*, 301 F.2d 807, 812 (5th Cir. 1962)). This broad scope necessarily includes cross-examination concerning criminal charges pending against a witness and over which those in need of the witness' testimony might be empowered to exercise control. *Carroll v. State*, 916 S.W.2d 494 (Tex. Cr. App. 1996) (error for trial court to

restrict cross-examination of State's witness about his pending aggravated robbery charges); *Lewis*, 815 S.W.2d at 565 (Defendant entitled to question witness about pending indictment and any benefit expected or promised in return for testifying.).

CONCLUSION

Appellant's points of error should be sustained, his conviction reversed, and the cause remanded for a new trial.

Respectfully submitted,

Mandy Miller
MANDY MILLER
Attorney for Roosevelt Darnell Ellis
9722 Gaston Road, Ste. 150-257
Katy, TX 77494
SBN 24055561
PHONE (832) 900-9884
FAX (877) 904-6846
mandy@mandymillerlegal.com

CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on March 3, 2025, has 8,291 words based upon a word count under MS Word.

Mandy Miller
Mandy Miller

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument to counsel for the State of Texas via eservice on March 3, 2025, at:

Andria Bender
Grimes County District Attorney's Office
Andria.bender@grimescountytexas.gov

Mandy Miller
Mandy Miller

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Mandy Miller on behalf of Mandy Miller
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mandy@mandymillerlegal.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Andria Bender		andria.bender@grimescountytexas.gov	3/3/2025 11:03:08 PM	SENT
Tammy Thomas		tammy.thomas@grimescountytexas.gov	3/3/2025 11:03:08 PM	SENT