

NO. 01-24-00655-CR

**IN THE COURT OF APPEALS
FOR THE FIRST SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON**

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
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DEBORAH M. YOUNG
Clerk of The Court

MICHAEL COATES

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DEBORAH M. YOUNG
Clerk of The Court

APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

APPELLANT'S BRIEF

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LIST OF PARTIES

The Appellant is Michael Coates.

The Appellant's trial counsel is Thomas Joseph Abbate, Jr.

The Appellant's appellate counsel is Crespín Michael Linton.

The Trial Judge is The Honorable Andrea Bell.

The appellate attorney representing the State is Jessica Caird, Assistant District Attorney, Harris County, Texas.

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PRELIMINARY STATEMENT

On August 15, 2024, a jury found Michael Coates (Coates) guilty of Murder. On August 16, 2024, the jury assessed a sentence of 80 years in the Texas Department of Criminal Justice and a \$10,000.00 fine. Appellant Coates perfected his appeal on August 21, 2024. (TR. at 329)

STATEMENT OF FACTS

TRIAL PHASE

A. State's Witnesses

1. Edwin Lopez

Houston Police Department Officer Edwin Lopez testified that at 12:29 p.m. on February 11, 2023, he was dispatched to a shooting that took place at 9834 Meadowglen Lane in Houston, Texas. (R.R. Vol. 3 at 16-21) Lopez stated that the deceased lay dead on a sidewalk from a shooting next to the Sunrise Grocery Store. (R.R. Vol. 3 at 22-25) He said he was told that the suspect wore red clothes and ran from the scene. (R.R. Vol. 3 at 24) Lopez testified that he interviewed an eyewitness named Dexter Fennie who saw the shooting from the front seat of his truck that was parked in the convenience store parking lot.

(R.R. Vol. 3 at 28) He noted that he saw several shell casings. (R.R. Vol. 3 at 30) On cross-examination, Lopez admitted that he did not see Appellant at the scene. (R.R. Vol. 3 at 33)

2. Megan Dawson

Houston Forensic Science Center Crime Scene Investigator

Megan Dawson testified that she arrived at the convenience store at 1:45 p.m. to document the crime scene. (R.R. Vol. 3 at 35-41) Dawson stated that she collected 8 Hornaday 9-millimeter Lugar spent cartridges. (R.R. Vol. 3 at 51-61) On cross-examination, Dawson admitted that it was possible that the deceased had a phone in his hand. (R.R. Vol. 3 at 66)

3. Keith Englishbey

Keith Englishbey testified that he arrived at the 9834 Meadowglen crime scene at 2:28 p.m. to help in the murder investigation. (R.R. Vol. 3 at 69-71) Englishbey stated that he later went to Ben Taub Hospital to interview a second victim of the shooting named Demorian Howell who had been shot in the right arm. (R.R. Vol. 3 at 73-77) He testified that Howell explained that he lived with his sister in an apartment across the

street from the Sunrise convenience store but could not provide any information on the shooter. (R.R. Vol. 3 at 79-81) Englishbey noted that someone other than EMS took Howell to the hospital, so he did not know what happened to Howell from the time of the shooting until the time of the hospital interview. (R.R. Vol. 3 at 84-85)

4. Darshan Phatak

Harris County Institute of Forensic Sciences Assistant Medical Examiner Darshan Phatak testified that he conducted an autopsy of Marcus Mercado on February 11, 2023. (R.R. Vol. 3 at 86-94) Phatak stated that Mercado's cause of death was multiple gunshot wounds, and his manner of death was homicide which he set out in a report dated March 1, 2023. (R.R. Vol. 3 at 98) He explained that Mercado suffered 6 gunshot wounds with 3 to his face and 1 to his chest which were all fatal wounds. (R.R. Vol. 3 at 100-121) Phatak stated that Mercado's blood alcohol level was 0.161. (R.R. Vol. 3 at 104)

On cross-examination, Phatak admitted that a finding of homicide does not rule out self-defense. (R.R. Vol. 3 at 122) He noted that he found a .40 caliber unfired bullet in the body bag which could have fallen out of the deceased's pocket. (R.R. Vol. 3 at 124) Phatak agreed that a .40 caliber bullet is not the same as a 9-millimeter bullet. (R.R. Vol. 3 at

125) He conceded that alcohol can make someone more aggressive and the deceased's blood alcohol level was twice the legal limit for driving a vehicle. (R.R. Vol. 3 at 126)

5. Derek McCloud

Texas Department of Public Safety Trooper Derek McCloud testified that on February 14, 2023, that he was dispatched to an apartment located at 3230 South Gessner in Houston, Texas to execute a search warrant. (R.R. Vol. 3 at 127-131) McCloud explained that the distance from this apartment to the Sunrise convenience store was about 7-10 minutes on foot. (R.R. Vol. 3 at 134) He stated that he took a photograph of Appellant in apartment number 1713. (R.R. Vol. 3 at 135) McCloud testified that he collected a 9-millimeter firearm with serial number MY929, magazines for that weapon, and USAA mail addressed to Appellant but with the address of 6810 Jay Street in Houston, Texas. (R.R. Vol. 3 at 137-140)

On cross-examination, McCloud admitted that the mail addressed to Appellant did not have the apartment address. (R.R. Vol. 3 at 141) He conceded that a .40 caliber bullet is not made for a 9-millimeter handgun. (R.R. Vol. 3 at 142) McCloud admitted that other people besides Appellant lived at this apartment. (R.R. Vol. 3 at 143) He

claimed that Appellant was the sole tenant of the apartment. (R.R. Vol. 3 at 144)

6. Dexter Fennie

Dexter Fennie testified that on February 11, 2023, that he drove from his home to the Sunrise convenience store to cool off after an argument with the mother of his child. (R.R. Vol. 4 at 11) Fennie stated that he parked his gray Dodge Ram in the store's parking lot with the engine off and smoked a cigarette with the window partially open. (R.R. Vol. 4 at 12-13) He explained that he saw and heard Appellant and two men arguing about a prior interaction about 25 to 30 yards from the driver's side of his truck. (R.R. Vol. 4 at 14-15) Fennie stated Appellant wore a white jacket while the deceased man wore blue jeans and a blanket. (R.R. Vol. 4 at 16) He described how the deceased was yelling loudly at Appellant and asked Appellant "what was his problem." (R.R. Vol. 4 at 17) Fennie testified that the deceased pulled up his pants in a manner that looked like he was ready to fight although he didn't hear the deceased voice any specific threats. (R.R. Vol. 4 at 18-19)

Fennie stated that Appellant pulled out a gun from under his jacket and began shooting. (R.R. Vol. 4 at 21) He described how the deceased ran behind a nearby tree while the other man fled the scene

on foot. (R.R. Vol. 4 at 20-21) Fennie explained that Appellant hovered over the deceased who had fallen near the tree. (R.R. Vol. 4 at 21-23) He testified that Appellant saw him in the truck, began walking towards his truck, turned around and walked back to the deceased, and finally walked away from the scene. (R.R. Vol. 4 at 23-25) Fennie commented that he spoke to many police officers that day. (R.R. Vol. 4 at 26-28) He testified that he identified Appellant as the shooter from a photo line-up shown to him by a police officer on March 3, 2023. (R.R. Vol. 4 at 31-33) Fennie claimed that he never saw the Sunrise convenience store surveillance video. (R.R. Vol. 4 at 33) He noted that Appellant appeared calm and never said anything to the other two men. (R.R. Vol. 4 at 34)

On cross-examination, he agreed that he had never met Appellant before the day of the shooting. (R.R. Vol. 4 at 35) Fennie claimed that Appellant was not shaking or trying to get away from the two men. (R.R. Vol. 4 at 36) He admitted that the deceased and his friend popped up and came after Appellant when they first saw him. (R.R. Vol. 4 at 39) Fennie admitted that because of his experience as a former prison guard he considered the deceased's jumping up and pulling up his pants as an aggressive move toward Appellant. (R.R. Vol. 4 at 39) He

conceded that Appellant probably thought he was in danger because the situation was two against one and they could have injured him with a knife or their fists. (R.R. Vol. 4 at 39-41) Fennie claimed that Appellant could have run away but admitted that Appellant was acting in self-defense by responding to threats of serious bodily injury with force. (R.R. Vol. 4 at 44) He conceded that the deceased's friend could have been running to get help for a fight. (R.R. Vol. 4 at 45) Fennie noted that he had seen the deceased before. (R.R. Vol. 4 at 48) He stated that Appellant didn't seem hurried at all. (R.R. Vol. 4 at 53) Fennie admitted that the two men initiated the conflict and Appellant stood his ground and fired his handgun. (R.R. Vol. 4 at 55)

7. Tammy Lyons

Harris County Institute of Forensic Sciences Firearms Examiner Tammy Lyons testified that she compared 8 fired Hornaday brand 9-millimeter Lugar cartridges to a Glock 17 model 9-millimeter Lugar pistol with serial number MX929US. (R.R. Vol. 4 at 57-67) Lyons concluded that the 8 cartridges were fired from the Glock submitted for testing. (R.R. Vol. 4 at 75) On cross-examination, Lyons admitted that a .40 caliber bullet can't be fired from a 9-millimeter pistol. (R.R. Vol. 4 at 76)

8. David Stark

Houston Police Department Homicide Detective David Stark testified that he was dispatched to the crime scene at 1:00 p.m. and saw the fired shell casings on the side of the store near the street and the deceased body of Marcus Mercado. (R.R. Vol. 4 at 77-82) Stark identified the injured victim as Demorian Howell. (R.R. Vol. 4 at 83) He stated that no firearm or knife was found on Mercado. (R.R. Vol. 4 at 87) Stark testified that he obtained a copy of the store's surveillance video from the store clerk. (R.R. Vol. 4 at 89-90) He stated that the store employee could not identify the shooter. (R.R. Vol. 4 at 92) Stark noted that the store video was about an hour long but the shooting sequence only lasted for about one minute. (R.R. Vol. 4 at 92) He described Mercado as wearing a gray blanket, Howell wearing red clothing, and Appellant wearing a white top with a black bottom. (R.R. Vol. 4 at 92-94) Stark claimed that the video showed all three of them walking to the left side of the tree when Appellant pulled a pistol from his pocket and fired at the two men. (R.R. Vol. 4 at 94-96) He stated that the video showed that neither Mercado nor Howell had a gun in their hands. (R.R. Vol. 4 at 95) Stark commented that he did not see

Mercado nor Howell exhibiting any threatening gestures. (R.R. Vol. 4 at 98)

Stark testified that he interviewed Dexter Fennie and released the store video to the media for the public's help in identifying the shooter.

(R.R. Vol. 4 at 100) He stated that Howell could not identify the shooter and wasn't helpful in the murder investigation. (R.R. Vol. 4 at 101)

Stark explained that Appellant's cousin, Nicole Young, contacted him and helped him develop Appellant as the suspect in Mercado's murder.

(R.R. Vol. 4 at 102) He commented that Appellant's father then contacted him and further supported Appellant as the murder suspect.

(R.R. Vol. 4 at 103-106) Stark testified that he developed a 6-person lineup which he had Detective Sean Sylvester show to Fennie who

identified Appellant as the shooter. (R.R. Vol. 4 at 107) He noted that ballistics evidence showed that the handgun found in Appellant's

apartment matched the shell casings found at the murder scene. (R.R. Vol. 4 at 108) Stark testified that he believed that there was no relation

between Appellant and Mercado after talking with Appellant's father and Nicole Young. (R.R. Vol. 4 at 109) He believed that Appellant was the

person who murdered Mercado. (R.R. Vol. 4 at 112)

On cross-examination, Stark admitted that he did not know if any threats were exchanged between Mercado and Appellant because the convenience store's video did not have audio. (R.R. Vol. 4 at 114) He conceded that Mercado and Howell appeared to be coming after Appellant even though Appellant was trying to walk away from them. (R.R. Vol. 4 at 115) Stark noted that it appeared that Mercado and Howell may have had their hands in their pockets. (R.R. Vol. 4 at 115) He admitted that Mercado and Howell may have been holding a small object like a gun in their hands. (R.R. Vol. 4 at 116) Stark conceded that he did not know if Howell had a gun because he fled from the scene. (R.R. Vol. 4 at 117) He admitted that Fennie stated that he heard a heated argument between the men before the shooting. (R.R. Vol. 4 at 118) Stark conceded that a person may not have even a full second to reflect before deciding to defend himself. (R.R. Vol. 4 at 121) He noted that he believed that people would have to be charging at him before he felt imminent danger. (R.R. Vol. 4 at 122) Stark believed that the store video did not show that Mercado had anything in his hands although he was wearing gloves. (R.R. Vol. 4 at 122) He noted that neither Mercado nor Howell threw a punch or lunged at Appellant. (R.R. Vol. 4 at 124) Stark stated that there was about 15 feet distance

between them and Appellant when Appellant fired his gun. (R.R. Vol. 4 at 124) He conceded that the video shows that Howell is pulling something from his pocket before Appellant began shooting. (R.R. Vol. 4 at 125) Stark admitted that he did not know if Mercado and Howell threatened Appellant. (R.R. Vol. 4 at 128)

9. Mark Schmidt

Harris County Sheriff's Department Sergeant Mark Schmidt testified that he is one of the three administrators of the Harris County inmate phone system called Securus. (R.R. Vol. 4 at 129-130) Schmidt stated that all inmate calls are recorded except for attorney-client telephone calls. (R.R. Vol. 4 at 131) He explained that Appellant made 21 telephone calls to his uncle Tennille Coates at (813) 422-0310 who had an address of 6810 Jay Street Houston, Texas 77028. (R.R. Vol. 4 at 135-137) Over Appellant's objection, Schmidt testified that Appellant called Tennille Coates on July 2, 2024 for over 9 minutes in which they discussed the issues of self-defense and provocation. (R.R. Vol. 4 at 5-10 & 139-141) He noted that the Appellant never mentioned that either Mercado or Howell was reaching for a gun. (R.R. Vol. 4 at 142)

On cross-examination, Schmidt admitted that Appellant's uncle did the majority of the talking during this telephone call and provided

Appellant with many suggestions for his trial. (R.R. Vol. 4 at 143) He conceded that neither Appellant nor his uncle discussed hiding evidence. (R.R. Vol. 4 at 144) Schmidt admitted that it appeared that Tennille Coates was coaching his nephew. (R.R. Vol. 4 at 145)

10. Monica Smith

Monica Smith testified that Marcus Mercado was her older brother, and he was married with two children that were 7 and 4 years old. (R.R. Vol. 4 at 146-147) Smith stated that her brother was 29 years old when he died. (R.R. Vol. 4 at 147)

The State rested. (R.R. Vol. 4 at 148)

The Defense rested. (R.R. Vol. 4 at 155)

The trial court overruled Appellant's request for an instruction in the jury charge for the defense of necessity. (R.R. Vol. 4 at 152)

B. Jury's Verdict

The jury found Appellant Coates guilty of Murder. (R.R. Vol. 5 at 6)

PUNISHMENT PHASE

A. State's Witnesses

1. Derek McCloud

Texas Department of Public Safety Trooper Derek McCloud testified that on February 14, 2023, he recovered stolen items, including a MacBook Pro laptop computer, from Appellant's apartment based on Apple's location tracking feature on the computer. (R.R. Vol. 5 at 9-11)

McCloud testified that he found a green camouflaged 12-gauge Mossberg shotgun and a 9-millimeter handgun, 4 different boxes of ammunition, and a backpack which contained the MacBook Pro laptop computer. (R.R. Vol. 5 at 13-22) He stated that he returned the victim's backpack, computer, driver's license, and wallet found in the backpack. (R.R. Vol. 5 at 23) McCloud explained that the place was a one-bedroom apartment that contained multiple beds which indicated that many people lived there. (R.R. Vol. 5 at 25) He believed that the Mossberg shotgun was used in an aggravated robbery. (R.R. Vol. 5 at 27) McCloud noted that three people were in the apartment when he was executing the search warrant. (R.R. Vol. 5 at 30) On cross-examination, McCloud admitted that several people lived in this apartment because he found several sizes of clothing. (R.R. Vol. 5 at

31) He noted that he believed that three people were involved in the aggravated robbery. (R.R. Vol. 5 at 33)

2. Monica Smith

Monica Smith testified that she found it hard to believe that her brother was dead. (R.R. Vol. 5 at 36) Smith stated that her brother was a protector of her and their two others sisters. (R.R. Vol. 5 at 37) She noted that he had a son named Junior who was 7 and a daughter named Bella who was 4. (R.R. Vol. 5 at 38)

3. Kenneth White

Harris County Sheriff's Department Detective Kenneth White testified that he took DNA buccal swabs from Randy Ramos, Dyrone Connor, and Appellant and submitted them to the Harris County Institute for Forensic Sciences for testing. (R.R. Vol. 5 at 41-44)

4. Sergio Rangel

Sergio Rangel testified that he is the house manager at the Ronald McDonald House Charities of Greater Houston which provides housing to families who have patients in hospitals receiving treatment. (R.R. Vol. 5 at 49) Rangel stated that on February 14, 2023, that he was robbed by a man with a long gun as he exited his car at home. (R.R. Vol. 5 at

51-52) He described that he was terrified and screamed so loudly that his parents heard him from inside their house. (R.R. Vol. 5 at 53) Rangel noted that he gave his backpack to the masked gunman. (R.R. Vol. 5 at 54) He stated that the gun was green. (R.R. Vol. 6 at 5) Rangel noted that his backpack contained a MacBook Pro laptop computer, 2 calculators, a Nintendo switch, keys, and his wallet. (R.R. Vol. 6 at 5-6) He stated that he saw two robbers, one with a long gun and one with a handgun. (R.R. Vol. 5 at 7) Rangel described how the man with the long gun tried to steal his Ford Mustang but he couldn't drive a manual transmission vehicle. (R.R. Vol. 6 at 8) He testified that the man with the long gun had to run from the scene down the street because his partner had already left in the their vehicle. (R.R. Vol. 6 at 11) Rangel noted that he provided the police with the location of his stolen laptop from his Apple location tracker. (R.R. Vol. 6 at 12)

On cross-examination, Rangel admitted that he couldn't identify either robber because they both wore masks. (R.R. Vol. 6 at 15) He stated that the police returned his stolen property. (R.R. Vol. 6 at 16)

5. Mario Galioto

Harris County Institute for Forensic Science assistant manager for training testified that he compared the DNA of the 3 suspects, Ramos,

Connor, and Appellant with the DNA swabbed from different places on the recovered backpack. (R.R. Vol. 6 at 17-26) Galioto stated that the DNA swabbed from the back of the backpack, from the straps, and from the zipper pull showed that Appellant was a contributor while Ramos and Connor were excluded as contributors. (R.R. Vol. 6 at 28-34) On cross-examination, Galioto admitted that the more opportunities a person has to contact an object the more likely that person will leave his DNA on that object. (R.R. Vol. 6 at 36) He admitted that the swabs picked up hair from the surface of the backpack, and he agreed that hair can transfer DNA. (R.R. Vol. 6 at 37) Galioto admitted that he can't say with absolute certainty that it was Appellant's DNA found on the backpack. (R.R. Vol. 6 at 38) He conceded that the testing of the backpack swabs showed a mixture of 3 individuals which made the calculations more difficult. (R.R. Vol. 6 at 39)

6. Maceo McIntyre

Harris County Sheriff's Department Detention Deputy Maceo McIntyre testified that on August 16, 2023, he issued a written reprimand to Appellant for disobeying the floor Sergeant's orders to line up for a head count. (R.R. Vol. 6 at 41-45) McIntyre stated that he also issued a

written reprimand to Appellant on September 18, 2023, for starting a fire by sticking a metal wick into a wall socket. (R.R. Vol. 6 at 45) He explained that inmates often spark wall outlets to smoke contraband. (R.R. Vol. 6 at 46) McIntyre believed that Appellant thought he could do whatever he wanted. (R.R. Vol. 6 at 47)

On cross-examination, McIntyre admitted that he didn't recover any contraband on Appellant. (R.R. Vol. 6 at 48) He conceded that Appellant was not a violent inmate. (R.R. Vol. 6 at 50)

7. Robert Mays

Harris County Sheriff's Department Detention Deputy Robert Mays testified that on May 3, 2024 he issued a written reprimand to Appellant for starting a fire and for smoking contraband. (R.R. Vol. 6 at 51-53) Mays explained that Appellant knocked out the power to 4 cell blocks when he started a fire with a wick to smoke his contraband. (R.R. Vol. 6 at 54) He believed that Appellant was homophobic and extorted commissary funds from gays and other inmates in a scheme he called "Pay to Stay." (R.R. Vol. 6 at 55-56) On cross-examination, Mays stated that on March 11, 2024, that he issued a written reprimand to Appellant for threatening a gay inmate, but he admitted that this charge was dismissed. (R.R. Vol. 6 at 62-64)

8. Alejandro Carmona

Houston Police Department Sergeant Alejandro Carmona testified that he investigated a robbery of a woman at gunpoint in her garage on February 11, 2023. (R.R. Vol. 6 at 67-68) Carmona stated that a Flock camera in front of the victim's residence showed a male walking to the house just before the robbery and the 9-1-1 call made at 2:52 p.m. (R.R. Vol. 6 at 70) He explained that the images from the Flock camera and the victim's Ring doorbell camera showed that the robber wore black pants and black shoes, carried a small handgun, and stole the victim's car. (R.R. Vol. 6 at 71-81) Carmona testified that he filed felony charges against Appellant for stealing the BMW on February 11, 2023, at about 3:00 p.m. (R.R. Vol. 6 at 83)

On cross-examination, Carmona admitted that no DNA and no fingerprints were obtained from the BMW after it was recovered. (R.R. Vol. 6 at 84) He claimed that he identified Appellant as the robber from the Flock camera. (R.R. Vol. 6 at 85) Carmona admitted that he did not conduct a line-up for the victim to try and identify the robber. (R.R. Vol. 6 at 86) He conceded that no gun was recovered. (R.R. Vol. 6 at 86) Carmona admitted that the victims were unable to identify the robber. (R.R. Vol. 6 at 88)

9. Robert Collins

Robert Collins testified that he is an attorney for Hunton Andrew Kurth in Houston, heard his wife screaming on February 11, 2023, and opened the front door of his home to see a man holding a gun to his wife before the robber turned the gun on him. (R.R. Vol. 6 at 93-94) Collins stated that the robber wore a hoodie, mask, and gloves, and carried a gun in his hand. (R.R. Vol. 6 at 94) He explained that the robber followed him into his house so that he could give the robber the keys to the Collins' BMW. (R.R. Vol. 6 at 94) Collins described how the robber demanded that he should hurry up or he would kill Collins' wife. (R.R. Vol. 6 at 96) He stated that this experience made his wife very upset, and she won't go anywhere alone. (R.R. Vol. 6 at 99) On cross-examination, Collins admitted that he can't identify the robber. (R.R. Vol. 6 at 99)

10. Patricia Collins

Patricia Collins testified that she is a retired schoolteacher who was robbed on February 11, 2023. (R.R. Vol. 6 at 101-102) She explained that she was unloading supplies from her car in the garage to help her grandchildren decorate Valentine's Day cookies when a man pointed a gun at her. (R.R. Vol. 6 at 102) She explained that the robber

turned the gun on her husband once he came out of the front door.

(R.R. Vol. 6 at 103) She stated that when they entered the home to

retrieve the keys to the BMW she heard the robber tell her husband:

“Hurry up or I’m going to kill your wife.” (R.R. Vol. 6 at 104) She noted

that the robber left the scene in their 2016 BMW. (R.R. Vol. 6 at 105)

She admitted that she did not see the robber’s face because of the mask

he was wearing. (R.R. Vol. 6 at 106) She claimed that she was afraid

to leave her house. (R.R. Vol. 6 at 106) On cross-examination, she

admitted that she can’t identify who robbed her. (R.R. Vol. 6 at 107)

The State rested. (R.R. Vol. 7 at 5)

The Defense rested. (R.R. Vol. 7 at 5)

C. Jury’s Sentence

The jury assessed a sentence of 80 years in the Texas

Department of Criminal Justice and a \$10,000.00 fine. (R.R. Vol. 7 at

20)

POINTS OF ERROR

POINT OF ERROR ONE:

The Evidence Was Insufficient To Support Appellant's Conviction For Murder.

POINT OF ERROR TWO:

The Trial Court Erred In Denying Appellant's Requested Change The Jury Charge In The Guilt-Innocence Phase Of The Trial.

POINT OF ERROR NO. 1

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR MURDER

Appellant Coates contends that the State has not proven its case beyond a reasonable doubt because the State has failed to show that Coates did not kill Mercado in self-defense.

The test for reviewing the insufficiency of the evidence where a defendant has been found guilty is for the reviewing court to determine whether, after viewing the relevant evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Brooks v. State**, 323 S.W.3d 893 (Tex. Crim. App. 2010) Thus, the issue on appeal is not whether the appellate court believes the State's evidence or instead believes the appellant's evidence outweighs the State's evidence. **Wicker v. State**, 667 S.W. 2d 137, 143 (Tex. Crim. App. 1984) The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. **Matson v. State**, 819 S.W. 2d 839,

846 (Tex. Crim. App. 1991) The jury, as the sole judge of the facts, is entitled to resolve any conflicts in the evidence, to evaluate the credibility of witnesses, and to determine the weight to be given any particular evidence. **Jones v. State**, 944 S.W. 2d 642, 647 (Tex. Crim. App. 1996)

Section 19.02 (a) of the **Texas Penal Code** provides that a person commits the offense of Murder if he intentionally or knowingly causes the death of an individual. (West 2024)

Section 9.31(a)(1)(C) of the **Texas Penal Code** provides that 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 of force or attempted use of unlawful force. The actor's belief that the force was immediately necessary as described by this subsection is presumed to be reasonable if the actor knew or had reason to believe that the person against whom the force was used was committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. (West 2024)

Section 9.31(b)(1) of the **Texas Penal Code** provides that the use of force against another is not justified in response to verbal provocation alone. (West 2024)

Section 9.32(a) of the **Texas Penal Code** provides that a person is justified in using deadly force against another when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the actor against the other's use of or attempted use of unlawful deadly force or to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. (West 2024)

Section 9.32(b)(1)(c) of the **Texas Penal Code** provides that the actor's belief that deadly force was immediately necessary is presumed to be reasonable if the actor knew or had reason to believe that the person against whom the deadly force was used was committing or attempting to commit an offense described by Subsection (a)(2)(b), did not provoke the person against whom the force was used, and was not otherwise engaged in criminal activity. (West 2024)

The burden of proof rests on the State to disprove self-defense beyond a reasonable doubt. **Alanzo v. State**, 353 S.W.3d 778, 781

(Tex. Crim. App. 2011) “The self-defense provisions in the Texas Penal Code focus on the actor’s motives and on the level of force used, not on the outcome of that use of force. If the actor reasonably believed that the force was necessary to protect himself against another’s unlawful use of force, and the amount of force actually used was permitted by the circumstances, Section 9.31 and 9.32 apply, regardless the actual result of the force used.” **Alanzo**, at 783. “In resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted appellant’s self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and would also have found against appellant on the self-defense issue.” **Sexton v. State**, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991)

The evidence that tends to prove that Appellant was justified in using deadly force against Mercado because he reasonably believed that deadly force was immediately necessary to protect himself against two men who Appellant reasonably believed were attempting to kill him are as follows:

- 1) Mercado and Howell approached Appellant.
- 2) Mercado pulled up his pants.
- 3) Jail call expressing fear.
- 4) Mercado was intoxicated.

1. Mercado and Howell approached Appellant.

Fennie admitted that Mercado and Howell jumped up when they first saw Appellant and then they came at him in an aggressive manner while yelling at him. (R.R. Vol. 4 at 16, 17 & 39) He noted that Appellant probably thought it was two against one as they approached him. (R.R. Vol. 4 at 39) Fennie explained that Mercado or Howell could have killed Appellant without a gun by using a knife or their fists. (R.R. Vol. 4 at 40) He conceded that Appellant probably thought he was in danger. (R.R. Vol. 4 at 41) Detective Stark admitted that the Sunrise store surveillance video showed that Mercado and Howell were coming after Appellant even though Appellant was trying to walk away from them. (R.R. Vol. 4 at 115) He also conceded that Mercado and Howell could have been holding a small object in their hands in anticipation of harming Appellant. (R.R. Vol. 4 at 116)

2. Mercado pulled up his pants.

Fennie testified that he saw Mercado pull up his pants like he was ready to fight Appellant shortly after he saw Appellant. (R.R. Vol. 4 at 18-19) He explained that his experience as a prison guard at the Ellis Unit in Huntsville, Texas taught him that Mercado was making an aggressive move towards Appellant by pulling up his pants. (R.R. Vol. 4 at 39)

3. Jail call expressing fear.

Deputy Schmidt played the jail call between Appellant and his uncle in which Appellant stated that he was afraid and didn't know if the two men were armed or not. (R.R. Vol. 4 at 141) The recording also showed that Appellant told his uncle that he did it in self-defense. (R.R. Vol. 4 at 141)

4. Mercado was intoxicated.

Dr. Phatak testified that Mercado's blood alcohol level was 0.161. (R.R. Vol. 3 at 104) He admitted that Mercado's blood alcohol level was twice the level for legal intoxication and further noted that alcohol can make someone more aggressive. (R.R. Vol. 3 at 126)

The store video clearly showed that Appellant was trying to walk away from Mercado and Howell when they jumped up to come after and confront him. In addition to the store video, Fennie testified that Mercado yelled at Appellant while Appellant never said a word to either man. The store video also showed that Mercado and Howell may have been reaching for something as they confronted Appellant which would have reasonably placed Appellant in fear for his life. Appellant told his uncle during the jail call that he was afraid of the two men as they came after him and that he didn't know whether or not they had a weapon. Mercado and Howell's loud and aggressive actions toward Appellant provided sufficient evidence to show that the State failed to produce evidence beyond a reasonable doubt to disprove Appellant's claim of self-defense. Moreover, Appellant contends that he did not provoke the deadly confrontation because he walked away from Mercado and Howell. Therefore, Appellant contends that he was justified in using deadly force to defend himself against the Mercado and Howell on February 11, 2023.

Even when viewing the evidence in the light most favorable to the jury's verdict, a rational trier of fact would not have found the essential

elements of murder beyond a reasonable doubt. The State has failed to prove that Appellant did not have a reasonable belief that Mercado and Howell were attempting to use unlawful deadly force against him by attempting to commit aggravated assault or even murder against him for some unknown reason. Therefore, the evidence is legally insufficient to sustain Appellant's conviction for murder.

POINT OF ERROR NO. 2

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTED CHANGES TO THE JURY CHARGE IN THE GUILT-INNOCENCE PHASE OF THE TRIAL

At the close of evidence, Appellant requested an instruction for the issue of Necessity to be included in the jury charge. (R.R. Vol. 4 at 150) The trial court denied Appellant's request. (R.R. Vol. 4 at 152)

"In analyzing a jury-charge issue, we first determine if error occurred and, if so, we conduct a harm analysis. A jury-charge error requires reversal when, after proper objection, the appellant suffers "some harm" to his rights. **Ngo v. State**, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005) An accused has the right to an instruction on any defensive issue raised by the evidence, whether the evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. **Granger v. State**, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999)

The defense of necessity requires a showing that (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm, (2) the desirability and urgency of avoiding the harm

clearly outweighs, 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, Section 9.22 (West 2024)**

“Necessity is a confession-and-avoidance defense requiring the defendant to admit to his otherwise illegal conduct. **Maciel v. State**, 631 S.W.3d 398, 400 (Tex. Crim. App. 2021) The affirmative defense of necessity is a justification defense because the defense does not negate any element of the offense, but only excuses what would be otherwise criminal conduct. **Gomez v. State**, 380 S.W.3d 830, 834 (Tex. Crim. App. 2013) “To be entitled to a defensive instruction for necessity, a defendant must put on evidence that essentially admits to every element of the offense, including the culpable mental state. **Maciel**, at 400.

While Appellant may not have admitted to shooting Mercado to the police, Appellant claims that he admitted to the killing of Mercado during the telephone call to his uncle, Tennille Coates. In this telephone call, Appellant made the following statements:

- 1) I met every prong of Penal Code sections 9.31 and 9.32,

- 2) I didn't provoke them,
- 3) I didn't confront them,
- 4) It was self-defense,
- 5) I had a valid reason to do what I did,
- 6) It was more than one person,
- 7) I don't know if either had a weapon, and
- 8) I was scared.

Appellant's statements made during the telephone call to his uncle clearly show that he admitted to the killing of Mercado, but they also showed that he justified the shooting as self-defense against two people who were confronting him and who he reasonably believed were going to kill him. His statements satisfy the confession and avoidance requirements of **Maciel**. Moreover, his statements showed that he reasonably believed that he had to shoot the two men because it was immediately necessary to avoid imminent harm from them and because the urgency of avoiding the harm clearly outweighed the law against killing Mercado. Appellant contends that his statements also satisfy the requirements of Section 9.22 of the Texas Penal Code.

Based on this evidence, it was for the jury to decide whether or not to believe his jail call testimony fell under the affirmative defense of necessity. Therefore, the trial court erred in denying Appellant's requested instruction of necessity to the jury charge.

CONCLUSION

For the reasons stated, Appellant Coates prays the Court to reverse and acquit or in the alternative to reverse and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Brief, as calculated under Texas Appellate Rule of Appellate Procedure 9.4, contains 6848 words as determined by the Word program used to prepare this document.

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CERTIFICATE OF SERVICE

I do hereby certify that on this the 11th day of January 2025, a true and correct copy of the foregoing Appellant's Brief was served by E-service in compliance with Local Rule 4 of the Court of Appeals or was served in compliance with Article 9.5 of the Rules of Appellate Procedure delivered to the Assistant District Attorney of Harris County, Texas, 1201 Franklin St., Suite 600 Houston, Texas 77002 at caird_jessica@dao.hctx.net.

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