

NO. 14-24-00019-CR

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS**

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DEBORAH M. YOUNG
Clerk of The Court

ORLANDO RODNEY JAMES

VS

STATE OF TEXAS

Appeal from the 12th Judicial District Court
Grimes County, Texas
Cause No. 19202

APPELLANT'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all names and addresses of all parties to the Trial Court's final judgment and the names and addresses of all trial counsel:

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STATEMENT OF THE CASE

This is an appeal of a jury trial, wherein the jury on December 20, 2023, found Appellant guilty of *Penal Code Sec. 22.01(b)(1), Assault of a Peace Officer*, a felony of the third degree. (CR 140; RRIV 171-173) On December 21, 2023, the Court, after finding that two enhancement paragraphs were true, assessed punishment at **30 years confinement**. (CR 142; RRV 143).

Sole Issue Presented:

THE COURT ERRED IN NOT SUBMITTING DEFENSE OF
NECESSITY (RRIV 119)

Sole Issue Restated:

The record contained some evidence supporting the charge of necessity.
(RRIV 119)

STATEMENT OF FACTS

On June 14, 2023, sometime after 6 PM, in the Grimes County jail, Appellant got into a fight with officer Telthorster, after Telthorster entered Appellant's separation cell concerning a mop bucket and the cleaning of the cell. The events were substantially captured on jail surveillance video. The presentation of the State's case consisted primarily of repeated playing of the video with frequent pauses and rewinds with simultaneous commentary by Telthorster, and then Officer Berg, a qualified expert in the use of force. (RRIII 17, 24, 29-59; RRIV 16-58) Appellant didn't testify, present any separate witnesses, or deny that the assault occurred.

The incident began after Appellant requested a mop bucket to clean his separation cell, a small cell that he alone occupied. However, rather than clean his cell, Appellant sat on his bunk and watched TV, claiming the mop bucket water was dirty. A short while later, Deputy Telthorster entered the cell, stepped towards Appellant and addressed the issue with the mop bucket. At such point, Appellant jumped up from his bunk and got his fingers close to Telthorster's face. Telthorster then shoved Appellant back with his right hand, creating distance, and then moved a couple of small additional steps towards Appellant, ending with his right foot back in his stance. Appellant then took a fighting posture, immediately closed any gap between the two parties, and engaged in a fight with Telthorster. Both parties were then taking swings at the other. (*RRIII* 24, 28-30; *RRIV* 44-45).

Included among the fighting actions taken against Telthorster were Appellant grabbing Telthorster by the shirt, striking him in the face, and charging into Telthorster with his head down while pushing Telthorster into a concrete wall. The fight ended almost immediately thereafter, when two other inmates from the hall entered the cell and pulled Appellant from Telthorster. (*RRIII* 32-33).

SUMMARY OF THE ARGUMENT

The evidence admitted at trial amounted to more than a mere scintilla supporting Appellant's requested charge of necessity. (*RRIV* 109).

ARGUMENT and AUTHORITY

Penal Code Sec. 9.22 states:

NECESSITY. Conduct is justified if:

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

Appellant contends that evidence was admitted during the trial that supports the defense of necessity, and therefore *Penal Code Sec. 2.03(c)*, providing for its exclusion, doesn't control. Specifically, Telthorster was the first person to actually use force or make physical contact against the other party. Telthorster entered the cell more than needed to confront Appellant and inquire about not cleaning and not using the mop bucket, albeit within his authority to do so.

Officer Berg, testifying as an expert on the use of force, stated that when Telthorster entered the cell, he would say that Telthorster was “***moving with a purpose.***” (*RRIV 55*) Berg agrees that at this point, the mop bucket had already been removed from view. (*RRIV 54*) Berg notes that Telthorster then ***raises his right hand*** and then takes two really small additional steps towards Appellant, who is swaying back and forth. (*RRIV 56*) Berg says that Telthorster's footing is “based out,” which gives Telthorster a more firmed base to work from “should

something -- a violent encounter occur.” (RRIV 24) Berg confirms that his observations of Appellant’s stance also tend to indicate that Appellant was *expecting a fight*. (RRIV 46) Berg agrees that Appellant now has his fingers within inches of Telthorster’s face and there appears to be a heated conversation between the two. (RRIV 56) Berg states that Telthorster then “posts” Appellant with his right hand, *knocking Appellant back* and creating space between them. (RRIV 22, 56-57)

“A defendant is entitled to an instruction on every defensive issue raised by the evidence, whether the evidence is strong, weak, unimpeached, or contradicted, and even when the trial court thinks that the testimony is not credible.” *Granger v. State*, 3 S.W.3d 36, 38 (Tex.Crim.App. 1999); *Muniz v. State*, 851 S.W.2d 238, 254 (Tex.Crim.App. 1993). “A reviewing court must decide whether the evidence adduced by either party, when viewed in the light most favorable to appellant, is sufficient to raise the issue of necessity.” *Granger* at 38.

Viewed in the light most favorable to Appellant, Appellant reasonably could have believed that Telthorster, moving with a purpose into his cell while raising his hand with an angry voice over the mop bucket which was already removed; taking a “based out” stance; and then shoving Appellant back further into his cell, leaving Appellant with no place to go; was about to suffer an unlawful use of force by

Telthorster. Under such circumstances, the admitted evidence suggests that Appellant might have reasonably believed that he was entitled to use force against Telthorster out of necessity.

CONCLUSION

Viewed in the light most favorable to Appellant, more than a mere scintilla of evidence was admitted that supported Appellant's requested charge of necessity.

PRAYER

Wherefore, Premises Considered, Appellant prays that this Court reverse the trial court's judgment and remand this case to the trial court for a new trial.

Respectfully submitted,

/s/ John W. Williford, Jr.

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CERTIFICATE OF SERVICE

I, John W. Williford, Jr., certify that on this the 30th day of August, 2024, a true and correct copy of the above Appellant's Brief was forwarded to the District Attorney's Office for Grimes County, Texas, the counsel for the Appellee by electronic delivery and to the Appellant by mail, at:

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/s/ **John W. Williford, Jr.**

John W. Williford, Jr.

CERTIFICATE OF COMPLIANCE

(With Word Count)

I, John W. Williford, Jr., certify pursuant to the provisions of TEX. R. APP. P. 9.4(i)(3), that the word count of the foregoing Appellant's brief is **1,452 words**.

Respectfully submitted,

/s/ **John W. Williford, Jr.**

John W. Williford, Jr.

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