Affirmed and Opinion filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00627-CR

MAGDALENO JIMENEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 802,592

O P I N I O N

Appellant, Magdaleno Jimenez, was charged by indictment with the felony offense of possession with intent to deliver cocaine, weighing at least 400 grams by aggregate weight, including any adulterants and dilutants. The jury found him guilty and the court sentenced appellant to twenty years' confinement and assessed a fine of $10,000. In three points of error, appellant claims the trial court erred in refusing to submit the requested jury instruction on necessity in violation of: (1) the fifth, sixth, and fourteenth amendments to the United States Constitution, (2) article I, sections 13, 15, and 19 of the Texas Constitution, and (3) articles 36.14, 36.15, and 36.16 of the Texas Code of Criminal Procedure. We affirm the judgment of the trial court.

FACTUAL BACKGROUND

On the afternoon of January 12, 1999, Elindoro Diaz Gonzalez and appellant left an apartment at 6300 Windswept in Houston. With Gonzalez at the wheel, they drove a green Dodge truck to an apartment complex at 15100 Ella. Appellant opened the door to apartment 2006, and Gonzalez and he went inside. Shortly thereafter, appellant left the apartment complex and returned a couple of minutes later in the passenger seat of a white truck driven by Juan Munoz. Munoz parked the white truck in the garage of the complex. Appellant exited and went to the green truck, where he retrieved a small suitcase that appeared to be light in weight. He then entered the apartment. A few minutes later, the white truck left and drove to a nearby car wash. Appellant, accompanied by Gonzalez, left the apartment carrying the same small suitcase which now appeared to be extremely heavy. Appellant put the suitcase inside the green truck, and they left, with Gonzalez driving.

Later, police officers stopped the white truck, and although a police canine alerted to the bed of the truck, the officers found no narcotics. Police officers also stopped the green truck. After obtaining a consent to search from Gonzalez, they found a small empty suitcase four to five inches from appellant.

Appellant was in possession of several items tying him to the apartment on Ella, including a key to the apartment, the garage door opener, and the apartment gate opener. One of the police officers asked appellant whether the white truck dropped off ten, twenty, thirty, forty, eighty, or a hundred kilos. Appellant responded, “Well, maybe twenty.” Appellant then told the officer that the kilos were dropped off in a cardboard box.

Police officers took appellant back to the apartment on Ella and found it to be a "stash house," where narcotics dealers store their inventory. Appellant took the officers to a bedroom closet in the "stash house" and pointed at a cardboard box where thirty kilos of cocaine were located. Tests revealed the substance weighed 29.2 kilograms and was 68.9% pure cocaine.

About a month later, on January 13, a police canine alerted on the green truck, which had been impounded. Police officers obtained a search warrant and recovered twenty packages of cocaine from inside a hidden compartment in the rear of the truck's cab. Tests revealed that the substance weighed 19.8

kilograms and was 68.5% pure cocaine. The twenty packages fit perfectly in the small suitcase which the officers found in the green truck.

DEFENSE OF NECESSITY

In three points of error, appellant claims the trial court erred in refusing to submit the requested jury instruction on necessity in violation of: (1) the fifth, sixth, and fourteenth amendments to the United States Constitution, (2) article I, sections 13, 15, and 19 of the Texas Constitution, and (3) articles 36.14, 36.15, and 36.16 of the Texas Code of Criminal Procedure. In addressing appellant's contentions, we first determine whether the jury charge contained error and then determine whether sufficient harm resulted to require reversal. *See Mann v. State*, 964 S.W.2d 639, 641 (Tex. Crim. App. 1998).

The legal defense of necessity justifies conduct that would otherwise be criminal. *See Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App.), *cert. denied*, 120 S.Ct. 618 (1999). To raise necessity as a defense, the accused must admit committing the offense; then, he or she "offers necessity as a justification which weighs against imposing a criminal punishment for the act or acts which violated the statute." *Id.*; *see also McGarity v. State*, 5 S.W.3d 223, 227 (Tex. App.—San Antonio 1999, no pet.) (finding defendant was not entitled to a necessity instruction where he did not admit to the offense even though he raised evidence to support a necessity charge); *Hagens v. State*, 979 S.W.2d 788, 794 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (finding defendant was not entitled to a necessity instruction where she did not admit to the offense); *Allen v. State*, 971 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (finding defendant was not entitled to a necessity instruction where she did not admit to the offense). *But see Darty v. State*, 994 S.W.2d 215, 219 (Tex. App.—San Antonio 1999, pet. ref'd) (finding defendant was entitled to a necessity instruction even though he did not admit to the offense when he admitted to the conduct that constitutes the offense and there was evidence to support a necessity charge). The accused must admit to the offense because the plea of necessity addresses the accused's state of mind, requiring the accused to "reasonably believe his conduct is immediately necessary to avoid imminent harm." *Hagens*, 979 S.W.2d at 794.

In *Young*, trial counsel argued the defendant acted reasonably and that the actions he took were necessary to save his life. 991 S.W.2d at 839. Counsel argued the defendant did not commit the offense

because (1) he did not have the requisite intent and (2) he did not perform the actions the state alleged. *See id.* The Court of Criminal Appeals held that because the defendant did not first admit to the offense, he did not raise the defense of necessity. *See id.*

In *McGarity*, the defendant was charged with the offense of assault causing bodily injury. 5 S.W.3d at 227. He had reason to believe a person was suicidal and that person was heading towards the window. *See id.* He admitted to grabbing her and throwing her on the bed to stop her from jumping. *See id.* He did not admit to hitting her. *See id.* Though the defendant may have reasonably believed that throwing her on the bed prevented her from committing conduct with impending harm, throwing her on the bed was not the conduct with which he was charged. *See id.* The appellate court held that because the defendant did not admit to the conduct with which he was charged, the evidence submitted failed to raise a defensive issue. *See id.*

In the trial court, appellant's counsel argued appellant did not possess the cocaine voluntarily, and if the jury found he did, he was under duress. Appellant did not admit that he voluntarily, knowingly and intentionally possessed cocaine with intent to distribute in an amount over 400 grams. He testified that Gonzalez told him he would not get out of the truck alive unless he immediately complied with Gonzalez's order to load the twenty packages of cocaine into two hidden compartments in the truck. Significantly, however, appellant was not charged with loading twenty packages of cocaine into two hidden compartments. Because appellant did not admit to committing the offense of possessing cocaine with intent to distribute in an amount over 400 grams, he did not raise the defense of necessity; therefore, the instruction on necessity was properly omitted. Accordingly, we overrule all three points of error.

The judgment is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Amidei, Anderson and Frost.

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