Affirmed and Opinion filed August 9, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00484-CR

JOHN SKIPPER, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 99-51297

O P I N I O N

Following a jury trial, appellant was convicted of the misdemeanor offense of assault. On February 28, 2000, the trial court sentenced appellant to ninety days confinement in the Harris County Jail and a $500.00 fine. The trial court then suspended the sentence and placed appellant on community supervision for eighteen months. On March 29, 2000, appellant filed a notice of appeal. In a single issue, appellant contends the trial court erred in denying his request for a jury charge on the defense of consent. We affirm.

On November 21, 1999, appellant, his wife Kelley, and her two children returned from a trip to the mall. Upon their return, Kelley's five-year-old daughter went to the

kitchen pantry and got a Little Debbie oatmeal cookie. Appellant followed the girl, took the cookie away, and returned to the kitchen where he took all the snack cartons and placed them on the top shelf of the pantry. Kelley asked appellant why he was acting "like a jerk" and tried to explain to him that the top shelf was an unacceptable place to store the snack food because she kept the ant spray on the top shelf. Appellant left the snacks on the top shelf and went to bed because he had learned he might have to go to work in the early morning hours.

After appellant went to bed, Kelley moved the snack cartons to a lower shelf, away from the ant spray. She then left to take her son's girlfriend home. When she returned, Kelley opened the pantry door and found appellant had taken all of the snack cartons and "crushed and crumbled them up and threw them in the garbage.

Kelley, by her own testimony, was incensed. She grabbed the snack cartons from the trash and went to the bedroom where appellant was sleeping. Kelley unlocked the bedroom door and began screaming at appellant. The commotion woke appellant. According to Kelley, she threw the snack cartons on the floor. Appellant claims she threw the Little Debbie snacks at him. Kelley admitted she called appellant an idiot; appellant claimed she also called him stupid. Appellant testified he asked Kelley to leave him alone and that they could discuss the issue in the morning. He also said he told his wife he did not want to fight in front of the children. According to appellant, Kelley's yelling escalated and she began to push him. According to Kelley, however, she did not touch or threaten appellant at this time. Ultimately, appellant walked toward his wife and struck her on the face with his open hand.

At Kelley's urging, her son ran next door and called the police. When the police arrived, appellant was gone. During their investigation, appellant returned and, according to one officer's testimony, admitted striking his wife. Appellant was arrested and charged with assault.

In his sole complaint on appeal, appellant argues he was entitled to a jury charge on the defense of consent. An accused has the right to an instruction on any defensive

issue raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility fo the defense. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996); *Torres v. State*, 7 S.W.3d 712, 714 (Tex. App.–Houston [14th Dist.] 1999, pet. ref'd). If the defensive theory is raised, and the trial court is timely and properly requested to instruct the jury on that theory, the trial court must instruct the jury on the raised defensive theory. The jury is the trier of fact and only it may decide whether to accept or reject a properly raised defensive theory. *Thompson v. State*, 521 S.W.2d 621, 624 (Tex. Crim. App. 1974). It is undisputed that appellant properly requested a jury charge on the defensive issue of consent. Therefore, the only issue we must determine is whether the defense was "raised by the evidence." *See Hamel*, 916 S.W.2d at 493; *Torres*, 7 S.W.3d at 714.

> Section 22.06 of the Texas Penal Code provides, in pertinent part:
>
> A victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense to prosecution under section 22.01 (Assault) . . . if:
>
> > (1) the conduct did not threaten or inflict seriously bodily injury . . . .

TEX. PEN. CODE ANN. § 22.06(1) (Vernon 1994). The Texas Penal Code defines "consent" as "assent in fact, whether express or apparent." TEX. PEN. CODE ANN. § 1.07(11) (Vernon 1994). Thus, the issue in this case is whether there was any evidence to show (1) the victim effectively consented to the assault, i.e., whether there was any evidence that she assented in fact, either expressly or impliedly, or (2) appellant reasonably believed the victim effectively consented.

Appellant contends he was entitled to a defensive instruction on the issue of consent because of the complainant's alleged conduct, i.e., yelling, name-calling, food-throwing, and pushing, and the lack of evidence of any "serious bodily injury." Specifically, appellant argues:

> . . . the victim in this case unlocked appellant's bedroom door, barged in while appellant was asleep, began yelling at appellant and calling appellant names, hit appellant with food, and began pushing appellant. Because of the

> victim's conduct, and resort to offensive force, appellant could reasonably have believed the victim wanted to get physical and was apparently consenting to a physical confrontation.

We disagree with appellant's argument and interpretation of the evidence. First, there is absolutely no evidence in the record to support a finding of express consent by the victim. Neither the victim nor appellant testified that the assault was expressly assented to by the victim. Second, there is nothing in the record to suggest the victim implicitly assented. The victim's actions, even if as described by appellant, rise to, at best, provocation, entitling appellant to a defensive instruction on self-defense, which he received. Appellant cites no authority, nor have we found any, to suggest that offensive conduct by a victim equates to consent to an assault. There is simply no basis, legally or logically, to equate provocative action by a victim with consent to an assault. *Cf. Camp v. State*, 13 S.W.3d 805, 807 (Tex. App.—Eastland 2000, no pet.) (holding that police officer did not consent to assault merely because he knew he was in occupation in which he knew he was likely to be assaulted).

Finally, appellant never presented any evidence that he reasonably believed the victim had consented to the assault. In fact, during cross-examination appellant conceded that none of the behavior by the victim warranted "hitting her upside the head."

We hold the issue of consent was not raised by the evidence and, therefore, appellant was not entitled to the requested instruction. Accordingly, we overrule appellant's sole complaint and affirm the trial court's judgment.

/s/ Charles W. Seymore
Justice

Judgment rendered and Opinion filed August 9, 2001.

Panel consists of Justices Anderson, Hudson, and Seymore.

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