Affirmed and Majority and Concurring Opinions filed September 16, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01236-CR

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WAYNE BATEMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Cause No. 754,578

M A J O R I T Y O P I N I O N

Appellant was charged by indictment with the offense of aggravated assault. The jury convicted appellant of the charged offense and assessed punishment at two years confinement in the Texas Department of Criminal Justice--Institutional Division, probated, and a fine of $2,000.00. We affirm.

I. Factual Summary

Appellant, a 75-year-old disabled, retired police officer, and the complainant were

friends and became intoxicated after spending the evening together at appellant's home. Although there is conflicting evidence as to its source, an argument ensued during which appellant shot the complainant. Additionally, the complainant sustained a cut on her arm from appellant's broken china cabinet.

II. Necessity Instruction

In his first point of error, appellant contends the trial court erred in not charging the jury on the law of necessity. The State counters that appellant was not entitled to such an instruction because the jury was instructed on self-defense. For the following reasons, we agree with the State.

Section 9.22 of the Texas Penal Code provides that 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 prescribing 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 (Vernon 1994).

Section 9.32 of the Texas Penal Code provides that a person is justified in using deadly force against another:

> (1) if he would be justified in using force against the other under Section 9.31 of this code;
>
> (2) *if a reasonable person in the actor's situation would not have retreated*; and
>
> (3) when and to the degree he reasonably believes the deadly force is immediately necessary:
>
> (A) to protect himself against the other's use or attempted use of unlawful

deadly force; . . .

TEX. PEN. CODE ANN. § 9.32 (Vernon 1994).

In *Butler v. State*, 663 S.W.2d 492, 496 (Tex. App.--Dallas 1983), *aff'd*, 736 S.W.2d 668 (Tex. Crim. App. 1987), the defendant was charged with murder and requested a jury instruction on self-defense and necessity. The trial court provided the instruction on self-defense, but refused the requested instruction on necessity. *See id.* On appeal, the court of appeals held that where self-defense becomes the "immediately necessary" conduct, section 9.22 is rendered inapplicable. *See id.* The court reasoned that if the court provided a self-defense instruction and a necessity instruction, the "retreat" requirement of self-defense would be rendered worthless, and would nullify the legislative purpose to impose a higher standard where the use of deadly force is sought to be justified. *See id.* In other words, one of the requirements of the necessity defense would not be met because a legislative purpose to exclude the justification claimed for the conduct plainly appears. *See* TEX. PEN. CODE ANN. § 9.22(3) (Vernon 1994).

Stated yet another way, the use of deadly force is justified only where the requirements of section 9.32 are satisfied, including that *a reasonable person in the actor's situation would not have retreated*. Because the defense of necessity does not impose the duty to retreat, it does not justify the use of deadly force. *See Epley v. State*, 704 S.W.2d 502, 506 (Tex. App.--Dallas 1986, pet. ref'd). Any other interpretation would circumvent the "retreat" requirement of section 9.32 and, thus, thwart the legislative purpose to impose a higher standard where the use of deadly force is sought to be justified.

Appellant responds by arguing that the law does not impose upon appellant the duty to retreat from his own home before resorting to self defense. Therefore, there would be no conflict in charging the jury on both necessity and self-defense under the unique circumstances of this case. Appellant is incorrect. The duty to retreat *is* applicable to the defendant, even in

his own home. *See Valentine v. State*, 587 S.W.2d 399, 402-03 (Tex. Crim. App. 1979) (citing *Sternlight v. State*, 540 S.W.2d 704 (Tex. Crim. App. 1976)).

Finally, appellant argues *Butler* is not controlling because it dealt with the offense of murder, while in this case, the offense is aggravated assault. We disagree with appellant's suggestion that the holding in *Butler* is limited by the type of offense committed. *See Hermosillo v. State*, 903 S.W.2d 60, 67 (Tex. App.--Fort Worth 1995, pet. ref'd) (applying *Butler* rationale to aggravated robbery scenario).

We overrule point of error one.

III. Injury to Elderly or Disabled Person Instruction

In his second point of error, appellant contends the trial court erred in denying appellant's requested instruction regarding the offense of injury to an elderly or disabled person. The requested instruction was a combination of the self-defense instruction and the law regarding commission of an offense involving injury to an elderly or disabled person. *See* TEX. PEN. CODE ANN. § 22.04 (Vernon 1994). Appellant requested this instruction because of his age and disability. We find, however, that no statutory provision requires such an instruction. Therefore, appellant was not entitled to an additional instruction regarding his age or disability.

Moreover, the self-defense instruction given to the jury adequately allowed the jury to consider appellant's special circumstances:

> In determining the existence of real or apparent danger, you should consider all the facts and circumstances in the case in evidence before you, together with all relevant facts and circumstances going to show the condition of the mind of the defendant at the time of the occurrence in question, and in considering such circumstances, *you should place yourselves in the defendant's position at that time and view them from his standpoint alone.*

(emphasis added).

When the court's charge covers the essence of appellant's request to consider the evidence as viewed by the appellant, no additional instruction is warranted. *See Rodriguez v. State*, 710 S.W.2d 60, 62 (Tex. Crim. App. 1986). We overrule point of error number two.

IV. Protection of Property Instruction

In his third point of error, appellant contends the trial court erred in failing to include appellant's requested instruction on deadly force to protect property. Section 9.42 of the Texas Penal Code provides, in pertinent part:

> A person is justified in using deadly force against another to protect land or tangible, movable property:
>
> (1) if he would be justified in using force against the other under Section 9.41; and
>
> (2) when and to the degree he reasonably believes the deadly force is immediately necessary;
>
> (A) to prevent the other's imminent commission of . . . criminal mischief during the nighttime; or
>
> (3) he reasonably believes that:
>
> (A) the land or property cannot be protected . . . by any other means; or
>
> (B) the use of force other than deadly force to protect . . . the land or property would expose the actor or another to a substantial risk or death or serious bodily injury.

TEX. PEN. CODE ANN. § 9.42 (Vernon 1994).

Appellant contends the evidence supported this instruction. To justify the use of deadly force against another to protect property, all three of the circumstances listed in section 9.42 must be present. *See Hernandez v. State*, 914 S.W.2d 218, 223-24 (Tex. App.--El Paso 1996, pet. ref'd). The only evidence offered in this case concerned the destruction of the china cabinet, which occurred *before* the shooting. The investigating police officers testified the china cabinet was the only damaged item in the house and the house was not in disarray.

Appellant's speculation that the complainant might have done additional damage does not satisfy the elements for defense of property. *See Fry v. State*, 915 S.W.2d 554, 559 (Tex. App.--Houston [14th Dist.] 1995, no pet.). Accordingly, appellant was not entitled to the requested instruction. We overrule point of error number three.

V. Jury Argument

In his fourth point of error, appellant contends the trial court erred in denying his motion for mistrial, which was requested during the State's closing argument at the guilt/innocence phase of the trial.

During the State's rebuttal argument, the following occurred:

> Simple fact of this matter is that – look at the law in this case. That's really what I want you to do is focus on the law. And I asked you during voir dire, Mr. Bateman he's older, he's sympathetic. I know people have a tendency, very young, very old, handicapped and disabled, you can feel sorry for them. I can understand that.
>
> What I want you to do in this case and this part of the trial is to follow the law. Because I looked at each of you when I asked that question and I said: Are you going to cut him a break, cut him loose, even though he violated the law, simply because he's older, handicapped or disabled person?
>
> And each one of you - I asked you to raise your hand. Each one of you on this jury said you wouldn't. Said you make him follow the law.
>
> You may be thinking to yourself: Well, but you know, I am a little bit sympathetic towards him. That's fine. There will be another part of the trial called punishment.

DEFENSE COUNSEL: Objection. There should be no other part of this trial. Objection, Your Honor.

THE STATE: That's part of the trial –

DEFENSE COUNSEL: Objection. You have specifically instructed this jury that it's only guilt/innocence. He's asking them to compromise their vote, throw away their verdict. I first object –

THE STATE: No objection –

THE COURT: Let me stop it right there. It is the duty of the jury at this time in this case to determine the guilt or innocence of the defendant. Move along.

DEFENSE COUNSEL: My objection please for the record. For the record, I object to his comments there will be another part and they can fix something bad they do now. I object and I ask for a ruling on my objection for the record please, Your Honor.

THE COURT: I've instructed the jury that they're only –

DEFENSE COUNSEL: The objection is sustained and they're instructed?

THE COURT: Yes.

DEFENSE COUNSEL: No instruction – I move for a mistrial.

THE COURT: You didn't want the instruction.

DEFENSE COUNSEL: I did want the instruction. Even instructing them, he's telling them if they had a reasonable doubt to resolve it against the defendant.

THE STATE: Judge, that's not what I'm saying.

THE COURT: Let's stop it right here. The Court's overruled the motion for mistrial.

Our law recognizes four general areas of permissible jury argument: (1) summation of evidence; (2) reasonable deductions from the evidence; (3) answer to the argument of opposing counsel; and (4) pleas for law enforcement. *See Cook v. State*, 858 S.W.2d 467, 476 (Tex. Crim. App. 1993). Appellant contends the State's argument was improper. We agree.

In *Atkins v. State*, 919 S.W.2d 770 (Tex. App.–Houston [14th Dist.] 1996, no pet.), this court was presented with a similar argument. In *Atkins*, the prosecutor argued: ". . . sympathy has no place in this part of the trial. That's exactly right; that's what I was pointing out. *This man may not even get jail time in this case. I mean, the Judge can give this man probation."* *Id*. at 776 (emphasis in the original). We held the prosecutor's argument in *Atkins* did not fall within the four accepted areas, stating "argument which invites the jury to ignore their duty to decide guilt or innocence because punishment is the only real issue in the case is harmful error." *Id*. (citing *Cherry v. State*, 507 S.W.2d 549 (Tex. Crim. App. 1974); *Kelly v. State*, 903 S.W.2d 809 (Tex. App.--Dallas 1995, no pet.)). Similarly, in *Kelly*, the prosecutor argued that the "real" issue in the case was what the punishment should be. 903 S.W.2d at 811. The Dallas Court of Appeals held that this type of argument was improper because it encouraged the jury to overlook its duty to determine guilt or innocence. *See id*.

at 812.

We find, however, that the error was cured by the trial court's instruction: "It is the duty of the jury at this time in this case to determine the guilt or innocence of the defendant." An instruction to disregard will cure error committed during jury argument unless the prosecutor's remark was so inflammatory that its prejudicial effect could not reasonably be overcome by such an instruction. *See Wilkerson v. State*, 881 S.W.2d 321, 327 (Tex. Crim. App. 1994) (citing *Kinnamon v. State*, 791 S.W.2d 84, 89 (Tex. Crim. App. 1990)). We overrule point of error number four.

VI. Evidence of Prior Sexual Relationship

In his fifth point of error, appellant claims the trial court erred by allowing the State to introduce evidence of appellant's past sexual relationship with a person, other than the complainant, during the State's case-in-chief. Appellant objected to the complainant's testimony concerning appellant's previous sexual relationships. Appellant's objections were based on hearsay and lack of personal knowledge. Appellant now argues that the admission of such evidence was a violation of rule 404(b) of the Texas Rules of Evidence. An objection on appeal must comport with the legal theory argued at trial, thereby giving the trial court an opportunity to rule on the issue. *See Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990) (citing *Rezac v. State*, 782 S.W.2d 869, 879 (Tex. Crim. App. 1990); *Zillender v. State*, 557 S.W.2d 515, 517 (Tex. Crim. App. 1997)). An appellate complaint that does not comport with the objection raised at trial preserves nothing for appellate review. *See id.* Appellant fails to point to any portion of the record where he objected to the complainant's testimony based on rule 404(b). Thus, appellant has presented nothing for appellate review. *See Johnson*, 803 S.W.2d at 292. We overrule point of error number five.

VII. Improper Cross-Examination

In his sixth point of error, appellant contends the trial court erred by allowing the State to cross-examine appellant concerning a past sexual relationship with a person other than the

complainant and other bad acts not amounting to convictions. Appellant objected to this evidence at trial based on relevance and materiality. On appeal, appellant argues the evidence was inadmissible under rule 404(b). For the reasons stated in part VI. of this opinion, we overrule point of error number six.

We affirm the trial court's judgment.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinions filed September 16, 1999.

Panel consists of Chief Justice Murphy, and Justices Yates and Baird.[1]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Former Judge Charles F. Baird sitting by assignment.

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C O N C U R R I N G O P I N I O N

I disagree with the majority's conclusion that the prosecutor's remark was improper and thus constitutes error. Merely mentioning "punishment" during the guilt/innocence phase does not always constitute error. Here, the prosecutor was simply pointing out that sympathy is a more appropriate consideration at the punishment phase than at the guilt phase. I find this argument to be much different from the argument we found to be improper in *Atkins v. State*, 919 S.W.2d 770 (Tex. App.—Houston [14th Dist.] 1996, no pet.). Clearly, the prosecutor's remark in *Atkins*, that the "Judge can give this man probation," was improper because it invited

the jury to ignore their duty to decide guilt or innocence. Unlike the statement in *Atkins*, when considered in its entirety, it is clear that in this case the prosecutor was reminding the jury of their duty to follow the law and not to let sympathy influence their duty to decide the issue of appellant's guilt. I believe this was a proper plea for law enforcement.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinions filed September 16, 1999.

Panel consists of Chief Justice Murphy and Justices Yates and Baird.[1]

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