Reversed and Remanded; Opinions of August 10, 2000 Withdrawn, and Substituted Majority and Dissenting Opinions filed December 28, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00070-CR

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ROBERT D. LAVERN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause No. 774,597

SUBSTITUTED MAJORITY OPINION

We withdraw our opinion of August 10, 2000 and substitute the following opinion.

We once again address whether or not the record raises some evidence of self defense in an aggravated assault case. Robert D. Lavern appeals his conviction for aggravated assault of an undercover police officer. The plain clothed officer purchased $20 worth of drugs from appellant. A gunfight ensued in which first appellant was wounded then the undercover officer and his companion were also wounded. Appellant also raises an issue whether he was entitled

to a lesser included offense because he did not know the drug buyer was an officer, and a legal sufficiency and a factual sufficiency issue. We affirm on the sufficiency issues. We reverse and remand for the unwarranted refusal to submit to the jury the requested defensive issue of self defense and the lesser included offense.

Facts

Garbed in street cloths, Officer Ralph Chaison approached appellant waving $20. Chaison purchased two rocks of crack cocaine from him. Appellant and a male companion were standing on private property inside the security gates of a Houston apartment complex when Chaison and fellow undercover Houston Police Officer Vonda Higgins arrived to conduct an undercover narcotics "buy-walk." The officers' intent was to make drug buys, investigate and infiltrate drug operations. The officers completely concealed their identities, wore plain clothes, and arrived in an unmarked Dodge pickup. Higgins remained in the vehicle.

After the drug buy, as Chaison walked away, appellant told him to put the crack in his mouth, questioning whether Chaison was police. Chaison told appellant he wasn't a police officer. The two men argued briefly whether Chaison was an officer. Chaison told appellant at least two times he was not police and that the drugs were for his companion in the truck. According to Chaison, appellant then stated, "you're the law and I'm not afraid of the law." Appellant is said to have lifted up his jacket which allowed Chaison to see a pistol in appellant's waistband. The two men were then between five and ten feet apart. Chaison said that he pulled his gun and fired in one smooth motion wounding appellant. At another point in the record, Chaison testified he went for his pistol at the same time appellant went for his and but appellant's pistol got hung up on his shirt. Another variation had Chaison firing when appellant's pistol cleared his waistband. Chaison also stated that he shot appellant in the leg with his first volley. Appellant then dropped to the ground and retreated, crawling behind a car. Chaison stated it was not until then, when appellant was wounded, that he was certain appellant first returned fire.

Lesser Included Offense

We first address appellant's claim that he was entitled to a lesser included offense charge of aggravated assault. Appellant was charged under section 22.02 of the penal code, which states, in relevant part:

> (a) A person commits an offense if the person commits assault as defined in Section 22.01 and the person:
>
> (1) causes serious bodily injury to another, including the person's spouse; or
>
> (2) uses or exhibits a deadly weapon during the commission of the assault.
>
> (b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if the offense is committed:
>
> (1) by a public servant acting under color of the servant's office or employment;
>
> (2) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty.

TEX. PEN. CODE ANN. § 22.02.

Appellant argues that because there was evidence he did not know Chaison was an officer, he was entitled to the lesser included offense of the second-degree felony of aggravated assault of a civilian.

A defendant is entitled to a charge on a lesser-included offense where the proof of the charged offense includes the proof required to establish the lesser-included offense and there is some evidence permitting a jury to rationally find that if the defendant is guilty, he is guilty only of the lesser-included offense. *See Forest v. State*, 989 S.W.2d 365, 367 (Tex. Crim. App. 1999). Anything more than a scintilla of evidence is sufficient to entitle a defendant to a lesser charge. *Id*. Essentially, the evidence should establish the lesser-included offense as a "rational alternative" to the charged offense. *Id*. This is accomplished if the evidence "casts doubt" on an element of the greater offense, providing the jury with a rational alternative by voting for the lesser-included offense. *Id*. It does not matter if the evidence was strong or

weak, unimpeached or contradicted. *Jones v. State*, 984 S.W.2d 254, 257(Tex. Crim. App. 1998).

To be entitled to an instruction on the requested lesser-included offense in this case there must have been some evidence permitting a jury to find appellant did not know complainant was a police officer. The State argues that because appellant himself told Chaison, "you're the law," there is not even a scintilla of evidence to suggest that appellant did not know Chaison was an officer. However, the record also reveals that Chaison specifically and purposefully led appellant to believe he was *not* a police officer. He came to the scene in an unmarked pickup, presented himself to appellant in plain clothes, bought illegal drugs, and emphatically denied several times to appellant he was a police officer. Though we do agree that appellant's statements are strong evidence that he did indeed know Chaison was an officer, we cannot ignore the evidence of Chaison's efforts to dissuade him of the notion. *See Jones*, 984 S.W.2d at 257 (in determining whether defendant is entitled to lesser-included offense, it does not matter if the evidence was strong or weak, unimpeached or contradicted). We find this constitutes more than a scintilla of evidence that appellant did not know Chaison was an officer. *See Forest*, 989 S.W.2d at 367. We note that when Chaison stated he was not a police officer, that the mere words did not establish as a matter or law he was not a police officer. Equally true, appellant saying Chaison was police, did not establish by the mere words the mind set of the 17 year old appellant. We conclude the lesser assault issue is raised. Therefore, the trial court erred by not including the lesser-included offense in the charge.

Because appellant properly objected to the absence of the lesser included offense in the charge, reversal is required if the error was calculated to injure the rights of the defendant. *See Hamel v. State*, 916 S.W.2d 491, 494 (Tex. Crim. App. 1996); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) If the jury were to believe the that appellant did not know Chaison was an officer, he would have been guilty of only a second degree felony, punishable by two to twenty years. TEX. PEN. CODE ANN. § 12.33. He was convicted of a first degree felony punishable up to ninety-nine years, TEX. PEN. CODE ANN. § 12.32, and was

assessed twenty-four years. Because of this, the failure to include the lesser included offense significantly affected appellant's chance of receiving a lighter sentence. We therefore conclude the trial court's error was calculated to injure appellant's rights. Appellant's issue is sustained.

Self-Defense

Appellant next contends that the trial court erred by refusing to charge the jury on self-defense. A defendant is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of unlawful force. *See* TEX. PEN. CODE ANN. § 9.31. The force used by a defendant must be reasonable as contemplated from the defendant's point of view. *See Hudson v. State,* 956 S.W.2d 103, 105 (Tex. App.–Tyler 1997, no pet.). A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence, whether that evidence be strong, feeble, unimpeached, or contradicted. *See Brown v. State*, 955 S.W.2d 276, 279 (Tex. Crim. App. 1997). The weight of the evidence supporting a defensive charge is immaterial. *See Woodfox v. State,* 742 S.W.2d 408, 410 (Tex. Crim. App. 1987). The defendant need not testify in order for the evidence to support a defensive charge. *Id.*

We agree that there was some evidence raising the issue of self-defense. The offense alleged in the indictment stated, in part, that appellant shot in the direction of complainant. During cross-examination, appellant elicited testimony from Chaison indicating that Chaison not only pulled his weapon first but also fired first. Appellant did not return fire until after he was shot by Chaison and had retreated behind a car. Thus, there is evidence in the record that the charged offense did not occur until after Chaison (still claiming not to be police) shot appellant in the leg and that appellant had fallen to the ground and retreated. In light of the requirement that we view the evidence from appellant's point of view at the time of the offense, we hold the jury could find that appellant reasonably believed the force he used was immediately necessary to protect himself against the use or attempted use of unlawful force

when he returned Chaison's fire. From appellant's point of view (or from the perspective of a disinterested bystander), there was evidence that appellant was protecting himself against the use or attempted use of deadly force or greater force than necessary. Chaison was attempting a drug buy, not an arrest, although sometime during the melee he states he recanted and yelled he was a policeman after all. Unfortunately, this was only after shots had been first fired. In other words, the police played the role of drug buyers until so late in the episode that gunfire had already been initiated by the police.

The State argues that appellant was not entitled to a self-defense issue because, as a matter of law: (1) appellant provoked Chaison; (2) appellant was the aggressor; and (3) appellant could not have reasonably believed Chaison was using unlawful deadly force. *See* TEX. PEN. CODE ANN. § 9.31(b)(4). We disagree these points were conclusively established.

First, the State did not conclusively prove appellant provoked Chaison. The question of whether a defendant's acts were reasonably calculated to cause an attack by the victim so as to trigger the provocation doctrine is ordinarily a question of fact for the jury. *See Smith v. State,* 965 S.W.2d 509, 517 (Tex. Crim. App. 1998). The rule of law is that if the defendant provoked another to make an attack on him so that the defendant would have a pretext for killing the other under the guise of self-defense, the defendant forfeits his right of self-defense. *Id.* Here, appellant's intent to provoke Chaison was not established as a matter of law. The events giving rise to appellant's gunfire unfolded very rapidly out of an argument between two men whose paths had just crossed for the first time moments before. Appellant did not know Chaison from Adam, had not met or spoken until seconds before. Therefore, at best, there was a fact issue whether appellant had any premeditated intent to provoke Chaison into firing at him. Appellant's acts may have entitled the State to a charge on "provoking the difficulty" in response to defendant's self-defense issue, but it did not as a matter of law preclude the self-defense issue. The State's cases of *Coble v. State,* 871 S.W.2d 192 (Tex. Crim. App. 1993), and *Dyson v. State,* 672 S.W.2d 460 (Tex. Crim. App. 1984) are not in point. In both cases, the court of criminal appeals held self-defense was precluded as a matter

of law because the undisputed evidence showed the defendants had a premeditated intent to kill or provoke confrontation with the victim. *See Coble*, 871 S.W.2d at 202; *Dyson*, 672 S.W.2d at 463-64. To all appearances this was a not a drug bust, but rather an ordinary drug buy. As discussed in the previous issue, there was some evidence that appellant did not know Chaison was an officer because he portrayed himself as a drug user, not a law abiding citizen. In conducting the drug buy Chaison testified unequivocally he only sought information, not an arrest. Chaison initiated the contact, the purchase, then continuously and vehemently denied he was a police officer.

There was also some evidence appellant was not the aggressor. As discussed, Chaison himself provided testimony that he fired at appellant first, wounded him, and that appellant did not return fire until after he had retreated behind the car. Thus, a reasonable jury could find that appellant was not the aggressor at the time he returned fire. For the same reasons, there was some evidence that, viewed from his perspective, appellant could have reasonably believed Chaison was using more force than necessary in the encounter. We therefore hold that there was some evidence to require a self-defense issue.

The dissent reasons that there was insufficient evidence for a jury to conclude that the force being used against appellant was unlawful, thus he was not entitled to a self-defense charge. However, we note that the relevant consideration is not whether the force used against appellant was, in fact, lawful, but whether there was some evidence the appellant reasonably believed it was unlawful. *See Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App. 1980) (question not whether there is any evidence that complainant's use of force unlawful; appellant entitled to self-defense instruction if any evidence he reasonably believed that complainant's use of force unlawful). Additionally, despite the requirement we view the evidence in the light most favorable to the appellant, the dissent nonetheless goes on to analyze much of the evidence in a manner inconsistent with this standard. For instance, the dissent views the evidence in the light most favorable to the State by incorrectly assuming, as a matter of law, that appellant heard Chaison identify himself as a police officer. It implicitly makes this

conclusion even though Chaison admitted at trial that the gunfire was "so very loud" and the two men were separated by a significant distance after they both retreated. Unequivocally, the record reveals the police identification came after Chaison had fired at appellant and appellant returned fire which hence seriously undermines the materiality of the dissent's appraisal.

We also note that the dissent emphasizes the moment at which appellant initially revealed his weapon. However, the evidence viewed in the light most favorable to appellant would indicate that appellant did not fire his weapon, and thus did not commit the offense, until after he had been shot and had retreated behind the car. Even though we believe appellant was unjustified in initially showing his weapon, appellant was not necessarily barred as a matter of law from defending himself in light of the events subsequent to his showing his gun. While the appellant hardly presents a sympathetic figure,[1] in this context we are nonetheless mandated to view the evidence in the light most favorable to him. And if we do so by detached application of the required principles, we believe we have no choice but to conclude he was improperly denied a self-defense charge.

Because appellant properly objected to the absence of self-defense in the charge, reversal is required if the error was calculated to injure the rights of the defendant. *See Hamel v. State*, 916 S.W.2d 491, 494 (Tex. Crim. App. 1996); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984) Appellant was positively implicated as the shooter at trial. Because of this, the failure to include self-defense foreclosed appellant's only chance of an acquittal. We therefore conclude the trial court's error was calculated to injure appellant's rights. We sustain appellant's self-defense issue.

Legal Sufficiency

[1] Like the dissent, we deplore the grievous and paralyzing injury sustained by Officer Higgins. Every day, hundreds of brave and dedicated officers and deputies risk their lives and limbs. These outstanding people fight crime on our behalf and ultimately to uphold the rule of law.

Appellant argues that the evidence was legally insufficient evidence to prove that he knew appellant was a police officer. In reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict to determine if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A legal sufficiency review is in sharp contrast to the significantly lower level of evidence requiring a jury instruction. The evidence at trial showed appellant himself accused Chaison of being "the law." There was also evidence from Chaison and two bystander witnesses that Chaison shouted he was a police officer several times during the gunfight. Though it was not conclusively established that appellant heard Chaison, this and appellant's own words provided legally sufficient evidence for a rational jury to conclude beyond a reasonable doubt that appellant knew Chaison was a police officer. We therefore overrule appellant's legal sufficiency issue.

Because we find the trial court committed reversible error by failing to include a self-defense issue, we need not address appellant's remaining issues. *See* TEX. R. APP. P. 47.1.

The judgment of the trial court is reversed and remanded for a new trial.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed December 28, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson, and Wittig.
Do not Publish — TEX. R. APP. P. 47.3(b).

Reversed and Remanded; Majority and Dissenting Opinions of August 10, 2000 Withdrawn and Substituted with Majority and Dissenting Opinions filed December 28, 2000.

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NO. 14-99-00070-CR

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ROBERT D. LAVERN, Appellant

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D I S S E N T I N G O P I N I O N

As Justice Cardozo observed: "The concept of fairness must not be strained till it is narrowed to a filament." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934). "[J]ustice, though due to the accused, is due to the accuser also." *Id*. Here, the majority's decision is so detached from reality, so strained in its analysis—it threatens to bring contempt upon the criminal law.

The majority speculates that appellant may not have known, at the time he tried to kill the complainant, that he was a law enforcement officer. This position is pure conjecture, however, because appellant did not testify at his trial or offer any evidence regarding his state of mind at the time of the shooting. Moreover, it dismisses appellant's stated purpose for assaulting the complainant, namely, that he was a police officer. Further, it trivializes the fact that during the shootout, the complainant repeatedly identified himself as a police officer. The majority opines that appellant might not have heard the complainant identify himself over the sound of the gunfire. Of course, this again is pure supposition because appellant never testified.

While appellant had no obligation to testify or offer a defense at his trial, the Fifth Amendment is a shield, not a sword. Here, the majority has crafted from appellant's silence the "evidence" needed to achieve the desired result. Mere guess or conjecture, however, is not probative evidence. *See Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 448 (Tex. App.—Fort Worth 1997, no writ).

The only *actual* evidence before us on these issues came entirely from the State's witnesses. Officer Chaison, the complainant, testified the transaction initially seemed like an ordinary undercover narcotics transaction. Separated by a wrought iron fence at an apartment complex, Chaison purchased two rocks of crack cocaine from appellant. As Chaison attempted to turn and walk away, appellant said, "Hey, put it in your mouth." Appellant repeated the demand and added, "If you're not the police, put it in your mouth." Chaison replied, "Don't put that jacket on me," and explained that the cocaine was for the girl (Officer Higgins) who was waiting in his truck. Appellant then said, "You're the law and I'm not afraid of the law."

As the two men stared at each other, appellant pulled up his jacket and reached for an automatic pistol in his waistband. Chaison testified that after twenty years of police experience, including four shootouts, he had no doubt that appellant was going to shoot him based upon his statements, actions, and demeanor. Officer Chaison then drew a concealed handgun as appellant was attempting to draw his own weapon. Fortunately, appellant's weapon

became entangled in his clothing, allowing Chaison to clear his weapon first. After appellant cleared his waistband, but before he was able to point the muzzle of his weapon at Chaison, Chaison opened fire, striking appellant in the leg. Appellant may also have fired, but Chaison was not hit. Appellant hobbled behind a parked car while Chaison retreated behind a small tree.

An extended gun battle then ensued with appellant firing two round bursts from beneath the automobile. To conserve ammunition, Chaison attempted to return one round for every two fired by appellant. Chaison yelled to a bystander standing near appellant that he was a police officer and ordered him to get on the ground. The bystander obeyed the command and remained on the ground throughout the shootout. Chaison identified himself to appellant at least three times as a police officer. Appellant, however, continued to fire in two round bursts.

During this time, Chaison also yelled to his partner, Officer Higgins, instructing her to call for additional police units. Shortly thereafter, when Higgins attempted to come to the aid of her partner, appellant shot her in the neck, paralyzing her for life. While Chaison turned his attention to Higgins, appellant retreated, limping across an open driveway. Chaison held his fire, purposely allowing appellant to escape so he could fully attend to Higgins.

Self-defense Instruction

Section 9.31 of the Texas Penal Code provides that a person is "justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other's use or attempted use of *unlawful* force." TEX. PEN. CODE ANN. § 9.31 (Vernon Supp. 2000) (emphasis added). Because there is no evidence suggesting appellant responded to, or believed he was responding to, the use of *unlawful* force, he was not authorized to use deadly force in his own defense.

A defendant is entitled to an instruction on any properly requested defensive issue raised by the evidence, regardless whether the evidence is weak or strong, unimpeached or contradicted, or credible or not credible. *See Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999); *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). The issue before

us, therefore, is whether the evidence, viewed in the light most favorable to appellant, is sufficient to raise the issue of self-defense. *See Preston v. State*, 756 S.W.2d 22, 24 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). While a non-testifying defendant may be entitled to a charge on self-defense, it is rare for the defense to be raised when the defendant fails to testify. *See Alaniz v. State*, 865 S.W.2d 529, 532 (Tex. App.—Corpus Christi 1993, no pet.).

The majority asserts three arguments in support of a self-defense charge: (1) Chaison pulled his gun first; (2) Chaison fired his gun first; and (3) appellant did not return fire until after he was shot by Chaison. However, it is undisputed that appellant was the aggressor.

First, the uncontroverted evidence shows *appellant was the first person to display a weapon*. Moreover, the law provides that a person has the right to reasonably defend himself from apparent danger. *See Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). Further, Chaison's apprehension that he was about to be shot was both reasonable and justified by the circumstances. Appellant had just committed a felony offense by selling him cocaine. Appellant at first suspected and then announced that Chaison was a police officer. Appellant articulated his disdain for the police and attempted to draw a handgun. While Chaison may have cleared his weapon before appellant, this simply shows Chaison was perhaps faster and more fortunate than appellant. Thus, Chaison's drawing of his own weapon was both a reasonable and lawful response to appellant's unlawful threat of deadly force.

Second, while Chaison may have fired first, he was not required to wait until appellant had begun firing before he could lawfully protect himself. *See Burke v. State*, 652 S.W.2d 788, 790 (Tex. Crim. App. 1983). It is undisputed that Chaison did not fire until appellant's weapon had cleared his waistband. Believing it was immediately necessary to protect himself from appellant's attempted use of unlawful deadly force, Chaison was entitled to respond with deadly force. *See* TEX. PEN. CODE ANN. § 9.32 (Vernon Supp. 2000). Thus, while Chaison may have fired the first shot, he was completely within his rights to strike the first blow. *See Sheppard v. State*, 545 S.W.2d 816, 819 (Tex. Crim. App. 1977). Appellant, on the other

hand, had no right of self-defense because he could not legally resist Chaison's use of lawful force. *See Johnson v. State*, 715 S.W.2d 402, 407-08 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd).

Third, while appellant may have been hit before he fired, the undisputed evidence shows that after both men had taken cover appellant continued firing, even *after* Chaison identified himself at least three times as a police officer and *after* he had yelled to his partner to summon other law enforcement units. Thus, even after appellant's position behind the automobile was relatively secure, he continued to employ deadly force against Chaison and Higgins. In fact, he never abandoned his use of deadly force until after Higgins had been tragically wounded.

A defendant is not entitled to a charge on self-defense where there is no dispute that he provoked the other's use or attempted use of force. *See Dyson v. State*, 672 S.W.2d 460, 463 (Tex. Crim. App. 1984). The majority mistakenly holds that a jury could find appellant reasonably believed the force he used was immediately necessary to protect himself against the use or attempted use of unlawful force when he returned Chaison's fire. There is simply no evidence to support such a holding.

Lesser-included Offense Charge

A defendant is entitled to an instruction on a lesser-included offense where (1) the proof for the offense charged includes the proof necessary to establish the lesser-included offense and (2) there is some evidence in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser-included offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993).

The majority begins its analysis by assuming, without discussion, that aggravated assault is always included within the proof necessary to establish an attempted capital murder. Certainly, aggravated assault *may* be a lesser included offense of attempted murder. *See Williams v. State*, 622 S.W.2d 578, 579 (Tex. Crim. App. 1981). However, the Thirteenth Court of Appeals has held that aggravated assault by threat, as distinguished from aggravated

assault by causing bodily injury, is not a lesser-included offense of attempted capital murder. *See Douglas v. State*, 915 S.W.2d 166, 169 (Tex. App.—Corpus Christi 1996, no pet.). Here, no evidence was presented to show Officer Chaison was injured in the shootout. Thus, any assault upon Chaison would have been by threat of bodily injury. *See* TEX. PEN. CODE ANN. § 22.01(a)(2) (Vernon 1994). Of course, a strong argument can be made that by attempting to kill Officer Chaison with a firearm, appellant necessarily "threatened" him with imminent bodily injury. However, this is the very rationale rejected in *Douglas*.

Moreover, even if the lesser-included offense is within the proof necessary to establish the attempted capital murder, the record is wholly devoid of any evidence showing aggravated assault to be "a valid, rational alternative to the charged offense." *Arevalo v. State*, 943 S.W.2d 887, 889 (Tex. Crim. App. 1997). To warrant an instruction on a lesser-included offense there must be some *evidence* in the record that the defendant is guilty only of the lesser-included offense. *See Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App. 1993). Here, the majority contends that appellant may not have heard Chaison's declarations that he was a police officer, and that even if he heard Chaison identify himself, he may not have believed him. Of course, it is also possible appellant's perception of the events may have been distorted by the rippling harmonic convergence of gravity waves upon the multidimensional fabric of space and time. However, the legal test in such cases is not whether an appellate justice can by his idle fancy or clever imagination conceive of an alternative offense; rather, the standard by which we must be guided is whether the record contains some conflicting *evidence* which, if believed, would permit a rational jury to find the defendant guilty only of the lesser-included offense. *See id*.

Here, there is no conflict in the evidence. The record shows Officer Chaison initially attempted to pass himself off as a felonious narcotics buyer. Appellant suspected he was a police officer, accused him of being a police officer, and attempted to shoot him *because he was a police officer*. There is simply no other logical explanation for appellant's conduct.

If appellant had testified, however feebly, that he did not know Chaison was a police officer, he would unquestionably have been entitled to a charge on aggravated assault because some *evidence* would then have been found in the record to support the instruction. Appellant, however, offered no evidence. Moreover, the evidence offered by the State did not conflict on this issue. The majority has, in my judgment, improperly substituted its speculative conjecture regarding appellant's state of mind to rectify the want of evidence.

I would find the trial court did not err in refusing appellant's requested instructions on self-defense and aggravated assault. Accordingly, I dissent.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Majority and Dissenting Opinions filed December 28, 2000.
Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.
Do Not Publish — TEX. R. APP. P. 47.3(b).