



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0257-15

GREGORY SHAWN HENLEY, Appellant

v.

THE STATE OF TEXAS

**ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
TARRANT COUNTY**

KELLER, P.J., filed a dissenting opinion in which HERVEY and NEWELL, JJ., joined.

The Court says that appellant's proffered evidence, if admitted, would not have raised the "defense of third person" because "the harm from which appellant was purportedly protecting his children was neither immediately present nor certain to occur in the immediate future." I believe that this statement misconstrues the underlying law of self-defense upon which the law of defense-of-third-persons depends.

The use of force to protect a third person is justified if, "under the circumstances as the actor

reasonably believes them to be,” he would be justified in using force to protect himself.¹ Under the self-defense statute, “a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other’s use or attempted use of unlawful force.”² This language provides that the actor’s conduct must be immediately necessary to protect against the harm, but it does not require that the harm be imminent. This language contrasts with the language of the necessity defense, which requires both that the conduct be immediately necessary and that the harm be imminent.³ The self-defense statute could have provided that conduct is justified only when the actor “reasonably believes the force is immediately necessary to protect against the other’s *imminent* use or attempted use of unlawful force,” but it does not.

This language in the self-defense statute would allow the use of self-defense to prevent a “point of no return” event from occurring. Such an event would be one that would make the later use of unlawful force probable and make preventing that use of unlawful force difficult or impossible. Suppose, for example, that a mother were planning to take a plane and fly her daughters to an area controlled by terrorists with the purpose of subjecting the girls to forced marriages. Once the plane takes off, it becomes difficult or impossible to prevent the future sexual assault of the girls.

¹ See TEX. PENAL CODE § 9.33; *Hughes v. State*, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986) (“[T]he Legislature was merely placing the accused, who is the ‘actor’ under §9.33, *supra*, in the shoes of the third person. So long as the accused reasonably believes that the third person would be justified in using deadly force to protect himself, the accused may step in and exercise deadly force on behalf of that person.”).

² TEX. PENAL CODE § 9.31.

³ TEX. PENAL CODE § 9.22 (“the actor reasonably believes the conduct is immediately necessary to avoid imminent harm”).

It might well be immediately necessary to use force to stop the mother from leaving in order to protect against the unlawful use of force against the girls, even if the harm would not occur for hours, or even days.

Because the use or attempted use of unlawful force does not have to be imminent for a person's conduct to be "immediately necessary," I disagree with the Court's analysis regarding the need for evidence of imminent harm in order to entitle appellant to an instruction on defense of third persons. I respectfully dissent.

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