Affirmed and Opinion filed November 24, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-97-01203-CR

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LOUIS DALE ROBERTS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 753,188

O P I N I O N

Louis Dale Roberts appeals his conviction by a jury for the offense of aggravated assault. The trial court sentenced appellant to eight years imprisonment. In two points of error, appellant contends (1) the trial court erred in failing to authorize the jury to acquit the appellant if they found that appellant was justified in using nondeadly force to protect his property, and (2) the trial court erred in failing to authorize the jury to acquit the appellant if they found that appellant was justified in using deadly force to protect his property. We affirm the judgment of the trial court.

I. BACKGROUND

On May 17, 1997 appellant and Jerod Williams were "shooting" dice on a street corner. A dispute arose over whether appellant was cheating. Williams took the $4.00 pot and hit appellant. Williams then retrieved a shotgun from his house and returned to the street corner. Upon seeing Williams return, appellant drove away. Thirty minutes later appellant returned. Williams was unarmed at the time, and appellant invited him to fight. Williams declined. Appellant drove away but returned ten minutes later with a gun. Appellant shot Williams in the back as Williams attempted to run away.

II. FIRST AND SECOND POINTS OF ERROR

In two points of error, appellant challenges the trial court's decision not to instruct the jury on the right to use force to protect his property. Appellant claims that when Williams struck him, appellant's keys and cell phone fell into nearby bushes. Appellant professes that he returned to the street corner to retrieve his possessions when he saw Williams and three other men. Appellant claims that he was afraid that the four men were going to hurt him. After exiting his truck, appellant fired at Williams. According to appellant, the shot was merely to frighten Williams, not to hit him. The jury was instructed on the law of self-defense and use of deadly force. Appellant asserts that based on these facts, the trial court erred in not instructing the jury on the law of use of force and use of deadly force to protect property. We disagree.

A. Standard of Review

An accused is entitled to an affirmative instruction on any defensive issue raised by the evidence. *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App.1996); *Hutcheson v. State*, 899 S.W.2d 39, 42 (Tex. App.–Amarillo 1995, pet. ref'd). This is true irrespective of whether we or the trial court believe the evidence feeble, strong, unimpeached, contradicted, or incredible. *Id*. However, some evidence must touch upon each element of the defense. *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.–Houston [1st Dist.] 1994, pet. ref'd). Thus,

appellant is entitled to an instruction on defense of property if there existed evidence of record to show that he met the requirements of TEX. PEN. CODE ANN. § 9.41 or § 9.42 (Vernon 1994).

B. Discussion

The record indicates that the appellant used deadly force, to wit: a firearm. Deadly force is defined as a "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." TEX. PEN. CODE ANN. § 9.01(3) (Vernon 1994). Appellant contends that he shot at Williams in order to scare him and that therefore this constitutes nondeadly force under TEX. PEN. CODE ANN. § 9.04.[1] Appellant misconstrues the plain meaning of § 9.04. In order for appellant's actions to meet the requirements of § 9.04, appellant's purpose must have been limited to "creating an apprehension that he will use deadly force if necessary." TEX. PEN. CODE ANN. § 9.04 (Vernon 1994). There is nothing in the record to make the court believe that appellant sought only to create an apprehension. The fact that he shot complainant in the back makes one think the contrary. Since deadly force was used by the appellant, we must look to TEX. PEN. CODE ANN. § 9.42 (Vernon 1994).

> Texas Penal Code Ann. § 9.42 provides:
> A person is justified in using deadly force against another to protect land or other tangible, movable property:
> (1) if he would be justified in using force against the other under § 9.41 of this Code; and
> (2) when and to the degree he reasonably believes the deadly force is necessary:
> (A) to prevent the others' imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime; or

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[1] § 9.04. Threats as Justifiable Force:
The threat of force is justified when the use of force is justified by this chapter. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force.

(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

Section 9.41 of the Penal Code provides in pertinent part:

(a) a person in lawful possession of land or tangible movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the others' trespass on the land or unlawful interference with the property.

There was no evidence in the record of imminent arson, burglary, robbery, theft, criminal mischief or the commission of any of these crimes, nor was there evidence that Williams committed any such offense and was fleeing immediately thereafter. Even if appellant had a fear of potential damage to his property, there was no evidence of an imminent crime or damage to the property. In fact, nothing in the record indicates that Williams even so much as knew about appellant's discarded keys or cell phone. We need not reach the question of whether the appellant may have reasonably believed that his property could not be protected or recovered by any other means under § 9.42(3), supra, because there is no evidence that a listed crime was committed or imminent under § 9.42(2), supra. *Phoenix v. State*, 640 S.W.2d 306, 307 (Tex. Crim. App.1982). Even if that question is reached, there was no evidence suggesting a reasonable belief on the part of appellant that deadly force was necessary to protect his property. Accordingly, the evidence was insufficient to require a defense instruction of deadly force to protect property. *See Id.*; *Warren v. State*, 764 S.W.2d 906, 910 (Tex. App.–Corpus Christi 1989, pet. ref'd); *MacDonald v. State*, (Tex. App.–Houston [14th Dist.] 1988, pet. ref'd); *Jackson v. State*, 753 S.W.2d 706, 710 (Tex. App.–San Antonio 1988, pet. ref'd); *Rogers v. State*, 653 S.W.2d 122, 125 (Tex. App.–Houston [1st Dist.] 1983, pet. ref'd). Appellant's points of error one and two are overruled.

III. CONCLUSION

Because the evidence does not raise the issue of defense of property, the appellant was not entitled to such a charge. The judgment of the trial court is *affirmed*.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed November 24, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

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