2005 S.W.3d (LWC-4161); McDermott v. State (Tex.App.);

MICHAEL ROBERT MCDERMOTT, Appellant v. THE STATE OF TEXAS, Appellee

June 13, 2005.

In The Court of Appeals Fifth District of Texas at Dallas

No. 05-04-01125-CR

On Appeal from the County Court at Law No. 1 Collin County, Texas

Trial Court Cause No. 001-86638-03

OPINION

Before Justices Morris, Francis, and Lang-Miers

Opinion By Justice Francis

A jury convicted Michael Robert McDermott of unlawfully carrying a handgun by a license holder, and the trial court assessed punishment at thirty days in jail, probated for six months, and a $50 fine. In three issues, appellant complains of charge error. We affirm.

Sarah Hudson was driving west on Parker Road in Plano with five children in her vehicle. While stopped at a red light at the intersection with Alma Road, Hudson heard the vehicle behind her honking. Hudson looked in her mirror and could see the driver flailing his arms, screaming, and making obscene gestures. The man, identified as appellant, wanted to move into the left turn lane, but was blocked by Hudson's vehicle. Hudson said she could not move up enough to make room for appellant. When the light turned green, appellant passed Hudson and continued to "flip" her off and yell.

Hudson also turned left onto Alma at the light and passed appellant. Appellant again made an obscene gesture and Hudson said she made the same gesture. At the next lighted intersection at Park Boulevard, Hudson said appellant continued yelling. She could not hear what he said because her windows were up. Hudson testified that at one point, appellant motioned for her to get out of her car. Not wanting to be "bullied," Hudson said she briefly opened her car door but did not get out. She saw appellant then reach under the front seat of his car and pull a gun from a bag. He then pointed the gun at her. Hudson said she was "scared" and called the police from her cell phone.

Appellant and his wife, who was with appellant when the altercation arose, testified that Hudson was the person who began "mouthing" and making obscene gestures at the first traffic light. Both also testified that after turning left onto Alma, Hudson swerved into their lane, temporarily forcing them out of the lane, and then repeatedly tapped her brakes in an effort to cause appellant to collide with the back of her vehicle. According to Mrs. McDermott, the children were riding unrestrained in Hudson's vehicle, causing her to fear for their safety. Once both vehicles stopped at the second lighted intersection, appellant rolled down his window and asked Hudson "if that's how she always drove with kids in her car." Hudson was yelling and cussing and then got out of her vehicle and came toward appellant's vehicle. Mrs. McDermott said she was "very afraid" because she did not know what Hudson was going to do, particularly in light of the fact she had tried to "run" appellant off the road and "already tried to cause an accident." To diffuse the situation, appellant said he displayed his gun to Hudson so she would "leave us alone." At that point, Hudson returned to her vehicle. Appellant said he did not know what

else to do because Hudson had "started this thing, had chased us down, tried to make us have an accident, kept it going, and we had rolled down the windows and had an altercation." In three issues, appellant complains the trial court reversibly erred by refusing to give instructions on self-defense and the defenses of necessity and threats as justifiable force.

Appellant first complains he was entitled to an instruction on self-defense, which would have allowed the jury to consider whether he acted against the use of "unlawful force" as opposed to "unlawful deadly force." He argues he was entitled to any defensive issue raised by the evidence, and there was evidence of Hudson's "erratic behavior" and reasons why he "held a reasonable belief that force was immediately necessary to protect him against [Hudson's] use or attempted use of force." In making his argument, however, appellant completely ignores the statute under which he was convicted.

Section 46.035(a) of the Texas Penal Code makes it a crime for a person with a handgun license to intentionally fail to conceal the handgun. Subsection provides a defense: It is a defense to prosecution under Subsection (a) that the actor, at the time of the commission of the offense, displayed the handgun under circumstances in which the actor would have been justified in the use of deadly force under Chapter 9.

Tex. Pen. Code Ann. § 46.035(b) (Vernon 2003). Thus, under the plain language of the statute, appellant was entitled to display the handgun only if he would have been justified in using deadly force under Chapter 9. Under Chapter 9, deadly force is justified in limited circumstances to protect life or property. See Tex. Pen. Code Ann. §§ 9.32, 9.33, 9.34(b), 9.42 (Vernon 2003). With respect to deadly force in defense of persons, a person would have to show he was protecting himself against the other's use or attempted use of unlawful deadly force. See Tex. Pen. Code Ann. § 9.32(a)(3)(A) (Vernon 2003). Nothing in the statute allows appellant to display the weapon in response to "unlawful force." The charge included an instruction on "deadly force," and he does not complain that instruction was incorrect. We conclude the trial court did not err in denying appellant's self-defense instruction. We resolve the first issue against appellant. In his second issue, appellant argues the trial court erred by failing to give his requested instruction on the defense of necessity. Under the defense of necessity, 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 proscribing 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 2003). Having reviewed only the evidence that would support submission of the instruction, we conclude the facts of this case fail to give rise to evidence of an "imminent harm."

"Harm" means anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested. Tex. Pen. Code Ann. § 1.07(a)(25) (Vernon 2004-05). "Imminent" means something that is immediate, something that is going to happen now. Stefanoff v. State, 78 S.W.3d 496, 500 (Tex. App.-Austin 2002, pet. ref'd). Reading these definitions together, imminent harm contemplates a reaction to a circumstance that must be the result of a "split-second decision [made] without time to consider the law." Id. More than a generalized fear of harm is required to raise the issue of imminent harm. Id.

Here, the evidence showed that after Hudson swerved into appellant's lane of traffic and tapped her brakes in an effort to cause a rear-end collision, appellant pulled up at the second lighted intersection, rolled down his window, and asked Hudson if that is how she always drove with children in the car. When Hudson got out of her car, appellant said he showed her his gun. When asked why he pulled out his weapon and showed it to Hudson, appellant responded, "Because this woman - I didn't know what else to do to get the woman away from us. She had already started this thing, had chased us down, tried to make us have an accident, kept it going, and we had rolled down the windows and had an altercation. The windows were then rolled back up and I thought it was over. She got out of the car and continued it, and I wanted her to leave us alone. So I have a license to carry a handgun and I pulled out my gun and showed her I had it."

Although appellant and his wife testified that they feared Hudson as she approached their vehicle, neither testified as to any specific harm that they feared from Hudson. According to Mrs. McDermott, Hudson was not carrying any weapon. Further, Mrs. McDermott testified that she told her husband to put his gun down. Finally, appellant specifically testified that he showed Hudson the gun because he wanted her to "leave us alone." Having reviewed the evidence, we conclude the evidence failed to raise the issue of "imminent harm." At most, the evidence perhaps raised an issue of some general sense of harm, which is not sufficient to raise the necessity defense. We resolve the second issue against appellant.

In his third issue, appellant argues the trial court erred in refusing his requested instruction on threats as justifiable force. The instruction sought by appellant provides: 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. Tex. Pen. Code Ann. § 9.04 (Vernon 2003).

This provision does not apply to appellant's case. Under the specific statute under which appellant was convicted, appellant was justified in displaying his weapon only if he were justified in using deadly force. See Tex. Pen. Code Ann. § 43.065(b) (Vernon 2003). Whether appellant actually used deadly force is immaterial. We resolve the third issue against appellant.

We affirm the trial court's judgment.

MOLLY FRANCIS JUSTICE
