

**Affirmed and Opinion filed March 28, 2002.**



**In The**  
**Fourteenth Court of Appeals**

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**NO. 14-97-00936-CR**

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**ANTHONY RANDOLPH FERREL, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from 182nd District Court  
Harris County, Texas  
Trial Court Cause No. 731,230**

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**OPINION ON REMAND**

Anthony Randolph Ferrel appealed his conviction for aggravated assault with a deadly weapon<sup>1</sup> on the grounds that the trial court erred in failing to instruct the jury on: (1) the lesser included offense of misdemeanor assault, (2) self-defense, and (3) apparent danger. On original submission, this court sustained the first two points, did not address the third, and reversed the conviction. *See Ferrel v. State*, 16 S.W.3d 861 (Tex. App.—Houston [14th Dist.] 2000). The Court of Criminal Appeals determined that appellant was not entitled to

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<sup>1</sup> *See* TEX. PEN. CODE ANN. §§ 22.01(a)(1) (Vernon Supp. 2002), 22.02(a)(2) (Vernon 1994). A jury convicted appellant and sentenced him to six years confinement and a \$2500 fine.

an instruction on self-defense or misdemeanor assault, reversed our decision, and remanded the case. *See Ferrel v. State*, 51 S.W.3d 586, 591 (Tex. Crim. App. 2001). Finding no error in appellant's remaining contention that he was entitled to an instruction on apparent danger, we affirm the conviction.

In determining that appellant was not entitled to a self-defense instruction, the Court of Criminal Appeals concluded that appellant used deadly force when he struck the complainant with a bottle, resulting in his death. *Id.* at 592. Because the use of deadly force in self-defense is justified only by a real or apparent threat of deadly force,<sup>2</sup> circumstances justifying the use of non-deadly force do not provide a defense to the use of deadly force. In that appellant used deadly force in this case, the Court of Criminal Appeals held that refusing his request for a self-defense instruction on non-deadly force was not error. *Id.*

As with appellant's request for an instruction on self-defense, his complaint regarding the denial of an instruction on apparent danger is also based on his use of non-deadly force. Because the Court of Criminal Appeals found that appellant used deadly force, an apparent danger of non-deadly force is no defense,<sup>3</sup> and, thus, he was not entitled to an instruction on apparent danger based on non-deadly force. Accordingly, the denial of such an instruction was not error, appellant's third point of error is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman  
Justice

Judgment rendered and Opinion filed March 28, 2002.

Panel consists of Justices Hudson, Fowler, and Edelman.

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

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<sup>2</sup> Compare TEX. PEN. CODE ANN. § 9.31(a) (Vernon 1994), with *id.* § 9.32(a)(3) (Vernon Supp. 2002).

<sup>3</sup> See *supra* note 2.