Affirmed and Opinion filed July 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-00-00693-CR

VICTOR CORRALES ANDUJO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 21st District Court
Washington County, Texas
Trial Court Cause No. 13,107

M E M O R A N D U M O P I N I O N

Appellant, Victor Corrales Andujo, was charged by indictment with two counts of manslaughter. Appellant was tried separately on one count of manslaughter, for the death of Tyler Karr. Over his plea of not guilty, a jury found appellant guilty of the lesser included offense of criminally negligent homicide. The jury assessed punishment at one year confinement in a state jail and a fine of $10,000. In four points of error, appellant contends the trial court erred by refusing to submit his requested jury charge on the defense of necessity and in overruling his objection to the State's jury argument. We affirm.

F A C T U A L B A C K G R O U N D

On July 11, 1999, appellant was traveling south on Highway 36, and attempted to pass the vehicle in front of him. Appellant crossed a solid yellow lane divider indicating a no passing zone. A white Ford Tauras, traveling north on Highway 36, came over a hill and collided with appellant's vehicle. The Tauras was demolished. It was driven by Janet Karr and her passengers were her husband Michael Karr, a daughter, and two sons. Janet Karr was pinned inside the vehicle and was severely injured. Michael Karr and his daughter sustained cuts and bruises. However, both sons, Austin and Tyler, were thrown from the vehicle and killed as a result of the collision. Appellant brings this appeal from his conviction for causing the death of three year old Tyler by criminal negligence.

Necessity

Appellant contends in his first three points of error that the trial court erred in failing to give him the requested charge of necessity. Section 9.22 of the Texas Penal Code sets out the required elements of the defense of necessity as follows:

> 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 1994).

This Court has held in order to warrant a plea of justification based on necessity, the appellant must specifically admit to the offense. *Allen v. State*, 971 S.W.2d 715, 720 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *Auston v. State*, 892 S.W.2d 141,

145 (Tex. App.—Houston [14th Dist.] 1994, no pet.). This includes admission of the culpable mental state. *Klein v. State*, 662 S.W.2d 166, 170 (Tex. App.—Corpus Christi 1983, no pet.). In *Allen*, this Court held that because the defendant did not admit to committing the offense, she could not maintain she committed it out of necessity. 971 S.W.2d at 720. Here, appellant did not admit to committing the offense of crossing the solid yellow line. Therefore, the defense of necessity was not available. We overrule points of error one, two, and three.

Improper Argument

In his fourth point of error, appellant asserts that the trial court erred in overruling his objection to State's argument involving matters outside the record. Appellant's complaint involves the following colloquy:

> **Defense Counsel**: And consider the fact the type of person [appellant] is, if you send him to the *penitentiary* with hardened criminals, whether that would be more punishment than you would want to extract from a family man. You know, is that what you want? Do you want to send [appellant] to be among those hardened criminals?
>
> **Prosecution:** Now, what have you got to do? You've got to decide what is the appropriate punishment. We talked about a wide range of punishment and now it's narrowed down to a much smaller amount of punishment. I'm talking about not less than 180 days in a *state jail facility*. We're not talking about the *penitentiary*. We're not talking about where hardened criminals are sent. We're talking about a state jail, where first-time offenders are sent.
>
> **Defense Counsel:** Objection; that's outside the evidence.
>
> **Court:** It's outside the record; sustained.
>
> . . .
>
> **Prosecution:** Judge, if I may, that was in response to his invited argument. He was talking about sending [appellant] to where hardened criminals are. I think I have a right to explain that.
>
> **Court:** Let me overrule the objection.

Texas has both penitentiaries and state jail facilities. Appellant was convicted of criminally negligent homicide, a state jail felony. TEX. PEN. CODE ANN. § 19.05 (Vernon 1994). An individual adjudged guilty of a state jail felony is punished by confinement in a state jail for a term of not more than two years or less than 180 days, and in addition may be fined not more than $10,000. TEX. PEN. CODE ANN. § 12.35(a);(b) (Vernon 1994). If defense counsel invites argument, it is appropriate for the State to respond. *Albiar v. State*, 739 S.W.2d 360, 362 (Tex. Crim. App. 1987). In this case, defense counsel invited the prosecutor's argument when he mischaracterized the difference between a penitentiary and a state jail facility. The prosecutor's argument was merely a response to and clarification of defense counsel's mischaracterization. It was proper for the prosecutor to respond to defense counsel's statements. *Soto v. State*, 864 S.W.2d 687, 693 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). Therefore, we overrule appellant's fourth point of error.

We affirm the judgment of the trial court.

/s/ John S. Anderson
Justice

Judgment rendered and Opinion filed July 12, 2001.

Panel consists of Justices Yates, Anderson and Seymore.

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