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COURT OF CRIMINAL APPEALS
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PD-_____
APP. CT. CAUSE NO. 13-15-00600-CR

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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

WILLIAM ROGERS,

PETITIONER,

VS.

THE STATE OF TEXAS,

RESPONDENT.

On Appeal in Trial Court Cause No. 2013-4-5466
In the 24th Judicial District Court of Refugio County, Texas
The Hon. Joergen "Skipper" Koetter, Judge Presiding.

PETITION FOR DISCRETIONARY REVIEW

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ATTORNEY FOR PETITIONER
WILLIAM ROGERS
March 11, 2019

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 38.1(a), the parties to the suit are as follow:

APPELLANT	**WILLIAM ROGERS**
APPELLEE	**THE STATE OF TEXAS**
TRIAL JUDGE	**HON. SKIPPER KOETTER**
STATE'S ATTY AT TRIAL:	**HON. RAYMOND J. HARDY** **HON. REID MANNING** Assistant District Attorneys Refugio County Courthouse Refugio, TX 78377
DEFENSE ATTYS AT TRIAL:	**HON. GENE GARCIA** Attorney-at-Law 809 S. Port Corpus Christi, TX 78405 **HON. ALLEN C. LEE** Attorney-at-Law 810 Oriole Corpus Christi, TX 78418
STATE'S APPELLATE ATTY:	**HON. ROBERT LASSMAN** 24th Judicial District Attorney DeWitt County Courthouse 307 N. Gonzales Cuero, Texas 77954
APPELLATE DEFENSE ATTY:	**HON. LUIS A. MARTINEZ** P.O. Box 410 Victoria, Texas 77902

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APP. CT. CAUSE NO. 13-15-00600-CR

IN THE COURT OF CRIMINAL APPEALS
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WILLIAM ROGERS,

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On Appeal in Cause No. 2013-4-5466 in the
In the 24th Judicial District Court of Refugio County, Texas
Hon. Joergen "Skipper" Koetter, Judge Presiding.

PETITION FOR DISCRETIONARY REVIEW

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, **WILLIAM ROGERS,** Petitioner in this matter and respectfully submits this PETITION FOR DISCRETIONARY REVIEW arising from the latest judgment and decision of the 13th Judicial District Court of Appeals' affirming the conviction imposed in the trial court after a jury convicted him of the offense of "Burglary of a Habitation," a First Degree Felony.

This appeal originally arises from the 24th Judicial District Court of Refugio County, Texas, the Honorable Joergen "Skipper" Koetter, Judge Presiding, in District Court Cause Number 2013-4-5466, in which the Petitioner, WILLIAM ROGERS, was the Defendant and the State of Texas was the Plaintiff.

I.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner respectfully requests that this Honorable Court of Criminal Appeals grant review and allow him the opportunity to argue his case before the Court of Criminal Appeals. Petitioner believes that this matter requires that the Court of Criminal Appeals ask his counsel questions regarding the facts and circumstances in this case in order to adequately present his grounds for review. Petitioner believes it to be essential that he, through his counsel, be allowed to interact with the Court of Criminal Appeals to explain his position and interpretation of the cases relied upon.

II.

STATEMENT OF THE CASE

Would a reasonable person think being approached by your lover's husband who is holding a knife, while in a closet in the husband's home, was an immediately dangerous situation necessitating self-defense? Yes. Undoubtedly,

this is enough to warrant instructions to a jury to at least consider and resolve the issues of necessity and self-defense.

Petitioner was charged in two indictments after an incident that occurred at the alleged victim's home. In Tr. Ct. Cause No. 2013-4-5466, Petitioner was charged with "Burglary of a Habitation." Petitioner elected to go to trial before a jury. At the charge conference, Appellant requested both a necessity and a self-defense instruction be placed in the charge to the jury. The Trial Court denied the requests. After the charge was read to the jury, and arguments were presented by both parties, Petitioner was found "Guilty" and convicted of "Burglary of a Habitation." The convicting jury sentenced Petitioner to forty (40) years in the Texas Department of Criminal Justice-Institutional Division, a fine and court costs.

III.

STATEMENT OF PROCEDURAL HISTORY

Appellant was formally charged with Burglary of a Habitation by written indictment filed with the Refugio County District Clerk on, or about, April 9, 2013. [CR-5466-8].

On, or about, November 30, 2015, this cause proceeded to trial with Cause No. 2013-4-5468, and an Assistant Refugio County District Attorney read the indictment aloud to the jury, but only Paragraph B of Count I. Appellant entered a

plea of "Not Guilty." [RR-IX-6-7].

Appellant's trial continued until December 3, 2015, when the jury delivered a verdict of "Guilty" as to Count I, Paragraph B. [RR-XII-95-96].

On, or about, December 3, 2015, the punishment phase of the trial began. [RR-XIII-1]. Both sides presented evidence to the jury and rested and closed. [RR-XIII-37]. The jury assessed forty (40) years imprisonment in the Texas Department of Criminal Justice. [RR-XIII-38; CR-5466-294].

The Trial Court indicated in its "Trial Court's Certification of Defendant's Right of Appeal" that this matter was not a plea bargain case, and that Appellant had the right to appeal. [CR-5466-326].

Appellant's Notice of Appeal was timely filed. [CR-5466-298].

The Honorable 13th Court of Appeals issued an opinion on, or about, March 9, 2017, affirming Appellant's conviction in Tr. Ct. Cause No. 2013-4-5466; App. Cause No. 13-15-00600-CR.[1]

A motion for rehearing was timely filed on, or about, March 24, 2017. Petitioner's motion for rehearing was denied on, or about, April 19, 2017.

A petition for discretionary review was filed with the Clerk of the Court of Criminal Appeals of Texas regarding the 13th Court of Appeals' decision regarding

[1] Petitioner was also indicted in a separate indictment with Aggravated Assault made the basis of the appeal in Cause No. 13-15-00601-CR with Aggravated Assault; the conviction in Cause No. 13-15-00601-CR was vacated and dismissed on double jeopardy grounds by the 13th Court of Appeals.

harm. The petition was granted on, or about, August 23, 2017.

After briefing by both Appellant and the State, the case before this Honorable Court was decided without oral argument. On or about June 27, 2018, this Honorable Court of Criminal Appeals reversed the 13th Court of Appeals' decision regarding harm and remanded the case for a determination of whether the trial court erred in refusing to instruct the jury on self-defense and necessity.

On January 10, 2019, the Honorable 13th Court of Appeals issued an opinion concluding that Appellant was not entitled to a jury instruction on self-defense or necessity, and, accordingly, the trial court did not abuse its discretion by failing to include such in the jury charge.

Appellant timely filed his Motion for Rehearing in accordance with and pursuant to T.R.A.P. 49.1. Appellant's Motion for Rehearing was overruled on, or about February 7, 2019.

Appellant timely files, this, his Petition for Discretionary Review.

IV.

GROUNDS FOR REVIEW

In accordance with Rule 68.4 of the Texas Rules of Appellate Procedure, Petitioner presents the following grounds for review:

GROUND FOR REVIEW NUMBER ONE:

Did the 13th Court of Appeals err in the analysis for error considering the evidence in the record of this case?

V.

ARGUMENT

GROUND FOR REVIEW NUMBER ONE:

Did the 13th Court of Appeals err in the analysis for error considering the evidence in the record of this case?

The Trial Court erred by refusing the instructions on self-defense and necessity because the evidence in the record raised the defenses requiring their inclusion in the jury charge.

A trial court's decision to deny a defensive issue in a jury charge is reviewed for an abuse of discretion. *See Wesbrook v. State,* 29 S.W.3d 103, 122 (Tex. Crim. App. 2000). However, a trial court is ***required*** to instruct the jury on statutory defenses, affirmative defenses, and justifications when they are raised by the evidence and requested by the defendant. *Walters v. State,* 247 S.W.3d 204, 208-09 (Tex. Crim. App. 2007). A defendant is ***entitled*** to a jury instruction on self-defense if the issue of self-defense is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). A trial court errs by denying a self-

defense instruction if there is some evidence, from any source, when viewed in the light most favorable to the defendant, that will support the elements of self-defense. *Gamino,* 537 S.W.3d at 150.

"Raised by the evidence" means "there is some evidence, from any source, on each element of the defense that, if believed by the jury, would support a rational inference that th[e] element is true." *Shaw v. State,* 243 S.W.3d 647, 657-58 (Tex. Crim. App. 2007). In determining whether the testimony raised a defensive theory, the evidence is viewed in the light most favorable to the defendant. *VanBrackle v. State,* 179 S.W.3d 708, 712-13 (Tex.App.-Austin 2005, no pet.). The defendant's testimony alone may be sufficient to raise the defensive theory requiring that the court submit a charge on that defense. *Hayes v. State,* 728 S.W.2d 804, 807 (Tex. Crim. App. 1987); *Warren v. State,* 565 S.W.2d 931, 934 (Tex. Crim. App. 1978).

The 13th Court's opinion of January 10, 2019, primarily focuses the analysis on the reasonableness of the belief that deadly force or Appellant's conduct was immediately necessary. A person is justified in using deadly force against another when and to the extent that he reasonably believes that deadly force is immediately necessary to protect himself from the other's use or attempted use of unlawful deadly force. *Gonzales v. State*, 474 S.W.3d 345, 349 (Tex. App.—Houston [14th

Dist.] 2015, pet. ref'd); *see also* Tex. Penal Code §§ 9.31, 9.32; *Gamino*, 537 S.W.3d at 510.

Under a claim of self-defense, a person must reasonably believe that the use of force is "immediately necessary" to protect himself against the other's use or attempted use of unlawful force. *Henley v. State*, 493 S.W.3d 77, 89 (Tex. Crim. App. 2016). However, that reasonable belief may be based upon an apparent danger as well as a real danger. As noted in *Hamel*, this Court recognized that "A person has the right to defend himself from apparent danger to the same extent he would if the danger were real." *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996). Thus, a defendant is entitled to a self-defense instruction if the defendant "reasonably perceives that he is in danger, even though that perception may be incorrect." *Id*. A reasonable belief is one that would be held by an ordinary and prudent person in the same circumstances as the defendant. *See* Tex. Penal Code § 1.07(42).

The heart of this Petition for Discretionary Review is boiled down to the following question:

> ***Would a reasonable person think being approached by your lover's husband who is holding a knife, while in a closet in the husband's home, was an immediately dangerous situation requiring self-defense?***

Viewed through the lens of Appellant's testimony, without regard to whether it was strong or weak, unimpeached or contradicted, and regardless of what the trial court may have thought about the credibility of the defenses, there was ample evidence to support the inclusion of the necessity and self-defense instructions. Appellant's own testimony about his acts, as well as the the alleged victim's acts, raised the defenses by establishing Appellant's belief that he needed to defend himself and that such defense was necessary. Moreover, Appellant's testimony clearly provided a basis for a jury to consider and ultimately decide whether Appellant reasonably perceived an immediate need for him to act in self-defense or necessity in this case, justifying his conduct.

The simplest facts in the record in this case establish the entitlement to, and requirement of, the instructions requested. Appellant was having an affair with the alleged victim's wife. Appellant was in the alleged victim's home. Appellant was in a closet in the alleged victim's home when discovered by the alleged victim. Appellant clearly testified that he heard the alleged victim shout "You!" and approach him in the confined space of a closet with a knife. Appellant testified that when the alleged victim grabbed the gun Appellant was holding, Appellant pulled the trigger. Was that an apparent dangerous situation that a reasonable person could perceive it was necessary to take immediate action to defend oneself? Yes, it is.

In addition to the testimony itself, the rational inferences from Appellant's testimony further establish the requirement of the requested instructions. The alleged victim yelled at Appellant and shouted, "You!" Obviously the alleged victim recognized Appellant as opposed to a complete stranger in his home. As Appellant testified, he had been having an affair with the alleged victim's wife. A jury could conclude that Appellant reasonably perceived a threat from the husband of the woman he was having an affair with and was recognized as such. It would also seem reasonable to perceive the alleged victim's conduct as a threat given that Appellant testified the alleged victim was holding a knife. The aforementioned would be compounded by the fact that Appellant was in the alleged victim's home. The defenses of necessity and self-defense are also reasonable given that the knife wielding alleged victim was close enough to grab the gun in Appellant's hand. It is also a fair, if not an indisputable inference, that if the alleged victim was close enough to grab the gun, he was also close enough to cause serious bodily injury or death to Appellant with the knife. The presence of the knife's use as described by Appellant clearly establishes that Appellant perceived and believed that the knife in the alleged victim's hand was being used, or intended on being used, as a deadly weapon by the alleged victim. Based upon all the circumstances, it was reasonable for Appellant to believe that the alleged victim was using the knife or attempting to use the knife to cause Appellant serious bodily injury.

At the end of the day, Appellant's testimony and the reasonable inferences therefrom would have allowed a jury to at least consider and determine whether Appellant's conduct was reasonable when he reached for a gun while in the closet, and any other actions, in order to defend himself from the threat that he perceived.

One of the cases relied upon by the 13th Court of Appeals, is the *Preston* decision. *See Preston v. State*, 756 S.W.2d 22 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). In *Preston*, the complainant was in the appellant's house playing music too loudly according to the appellant. After asking the complainant to turn down the music, appellant eventually left the room and returned with a firearm and ordered the complaint to leave his house. The complainant was unarmed and there apparently were no words spoken by him. The appellant fired, shot and killed the complainant. The facts of this case differ from those in *Preston* in an important respect. The facts differ between the immediate case and *Preston*, most notably in that the alleged victim was unarmed and the alleged victim in Appellant's case was holding a knife. Although the facts may be distinguishable from the case *sub judice,* the *Preston* court did comment as follows:

> If the accused, by his own testimony or by other evidence, raises the issue of self-defense, he is entitled to an instruction and charge *so long as* such evidence shows the complainant, by words or acts, caused the accused to reasonably believe he was in danger *and* to reasonably believe deadly force was immediately necessary.

Preston v. State, 756 S.W.2d 22, 24-25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). The instructive value of *Preston* is in the 14th Court of Appeals pointing out that words, ***or acts***, could cause the accused to believe he was in danger and to reasonably believe deadly force was immediately necessary. In this connection, Appellant testified regarding the alleged victim's acts in this case in order to satisfy the elements for self-defense and necessity: the alleged victim wielding a knife and approaching him (on overt act) in the confined space in a closet. In short, the alleged victim's acts establish that the complainant, by words ***or acts***, caused Appellant to reasonably believe he was in danger *and* to reasonably believe deadly force was immediately necessary. As such, he was entitled to the jury instructions that he requested and was denied.

Put simply, Appellant's own testimony raised the defenses of necessity and self-defense. As such, he was entitled to the requested jury instructions and the Trial Court was required to put the requested instructions in the jury charge. It was, therefore error for the Trial Court to deny Appellant the required instructions.

VI.

CONCLUSION AND PRAYER

WHEREFORE, for the reasons set forth above, Petitioner submits that the 13th Court of Appeals erred in affirming Petitioner's conviction for Burglary of a Habitation. Petitioner prays that the Court of Criminal Appeals grant this Petition

for Discretionary Review and allow Petitioner to brief the issues raised in this brief and allow oral argument. Following the briefing and oral argument, Petitioner respectfully prays that this Honorable Court reverse and render the sentence below and/or reverse and remand this case to the 13th Court of Appeals for further proceedings, and/or to reverse and directly remand Appellant's case to the Trial Court for a new trial. Petitioner further prays for general relief, and any other relief he is entitled to in law or in equity.

Respectfully Submitted,

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By: 

Luis A. Martinez
State Bar No. 24010213

ATTORNEY FOR PETITIONER
WILLIAM ROGERS

VII.

CERTIFICATE OF COMPLIANCE

In accordance with Texas Rule of Appellate Procedure 9.4(i)(3), the undersigned, Luis A. Martinez, I hereby certify that the number of words in the above Petition for Discretionary Review, excluding those matters listed in Rule

9.4(i)(3), is 2,608 words.

Luis A. Martinez

VIII.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing document was served upon the persons below in the manner indicated on this 11th day of March, 2019, pursuant to the Texas Rules of Appellate Procedure.

Luis A. Martinez

Via E-Mail: rclassman1@sbcglobal.net
The Hon. Robert C. Lassman
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The Hon. Carrie Moy
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IX.

APPENDIX

1. Opinion of the 13th Court of Appeals in Cause No. 13-15-00600-CR; *Rogers v. State*, issued on, or about, January 10, 2019.

2. Judgment of the 13th Court of Appeals in Cause No. 13-15-00600-CR; *Rogers v. State,* issued on, or about January 10, 2019.

NUMBER 13-15-00600-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

WILLIAM ROGERS, **Appellant,**

v.

THE STATE OF TEXAS, **Appellee.**

On appeal from the 24th District Court of Refugio County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Benavides and Longoria
Memorandum Opinion by Justice Longoria

Appellant William Rogers was convicted of aggravated assault, a second-degree felony, *see* TEX. PENAL CODE ANN. § 22.02(a)(2) (West, Westlaw through 2017 1st C.S.), and burglary of a habitation with intent to commit aggravated assault, a first-degree felony. *See id*. § 30.02 (West, Westlaw through 2017 1st C.S.). This is the second time this appeal is before us. In our prior opinion, we vacated the aggravated assault

conviction on double jeopardy grounds because it was a lesser-included offense of the burglary charge. *See Rogers v. State*, 527 S.W.3d 329, 336 (Tex. App.—Corpus Christi 2017), *rev'd*, 550 S.W.3d 190, 191 (Tex. Crim. App. 2018). We also held that the trial court's failure to include jury instructions on necessity and self-defense, if error, was harmless. *See Rogers*, 527 S.W.3d at 336. The Texas Court of Criminal Appeals granted review on the burglary conviction and held that if there was any error, it was harmful. *See Rogers*, 550 S.W.3d at 191. It then remanded back to this Court to decide if it was error for the trial court to not give jury instructions on self-defense and necessity. *See id*. We affirm.

I. Background

The complainant, David Watson, testified that appellant was hiding in his master bedroom closet and ambushed him with a gunshot to the scrotum, whilst shouting "motherfu****," when he came home from work on February 14, 2013. Upon being shot, David grabbed appellant with one hand and the pistol with the other, jamming his fingers into the trigger mechanism to prevent appellant from firing again. He rammed appellant backwards into the closet, and then they struggled over the gun throughout the house. During the struggle David managed to grab a hunting knife, and they struggled over that, too. Eventually, appellant escaped David's grasp and fired at him but missed. When appellant retreated to a bedroom, David left via the front door and ran a zigzag pattern to his neighbor's house while appellant shot at him from the front porch, again missing him. David and neighbors saw appellant drive away.

Appellant, on the other hand, claimed that he had been engaged in an affair with the complainant's wife, Sandra Watson, and that he entered the house that day at her

request to feed her cats. According to appellant, David arrived home unexpectedly, and appellant could not open the back door or a window to exit undetected, so he hid in the closet. According to appellant, David approached the closet while holding a knife; upon opening the closet, David simply exclaimed, "You!" Appellant then reached for the .380 pistol that was next to him on top of a gun safe. David grabbed his hand, and appellant pulled the trigger. He and David then struggled throughout the house for control of the knife and the gun until appellant dropped the knife, and David twisted the .380 out of his hand. Appellant then pulled his .45 pistol from his pocket and shot back toward David to get him to stop. David then exited the house through the front door. Still unable to open the back door, appellant left through the front door. He heard a "pop" and saw David behind a tree. Appellant returned fire in David's direction and tried to flee. He stumbled and dropped his gun but managed to reach his truck and got away.

Appellant submitted requested jury charges on the theories of self-defense and necessity. The trial court refused to give either charge. The jury returned a verdict of guilty on both counts of burglary of a habitation and aggravated assault with a deadly weapon. *See* TEX. PENAL CODE ANN. §§ 30.02, 22.02(a)(2) (West, Westlaw through 2017 1st C.S.).

In our initial opinion, we reasoned that appellant's failure to rely on self-defense or necessity before the jury weighed against a finding of harm; therefore, assuming there was any error, we concluded that it was only harmless error. *See Rogers*, 527 S.W.3d at 336. The Texas Court of Criminal Appeals held that "[a]ppellant's jury, unlike Cornet's, had no opportunity to consider the defensive issues; and unlike the medical care defense at issue in *Cornet*, necessity and self-defense applied to both charges that Appellant

faced." *Rogers*, 550 S.W.3d at 192 (citing *Cornet v. State*, 417 S.W.3d 446, 449 (Tex. Crim. App. 2013)). The Court ultimately held that if it was error to not instruct the jury on self-defense and necessity, it was harmful. *See id*. at 196. Consequently, the Court reversed and remanded to our court to determine whether the trial court erred in refusing to instruct the jury on self-defense and necessity. *See id*.

II. DISCUSSION

A. Standard of Review

A trial court's decision to deny a defensive issue in a jury charge is reviewed for an abuse of discretion. *See Wesbrook v. State,* 29 S.W.3d 103, 122 (Tex. Crim. App. 2000). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to any guiding rules and principles. *See Montgomery v. State,* 810 S.W.2d 372, 380 (Tex. Crim. App. 1990); *Reynolds v. State,* 227 S.W.3d 355, 371 (Tex. App.—Texarkana 2007, no pet.). If there is error and, as in the present case, the defendant preserves the alleged error, we must reverse as long as the error was not harmless. *See Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

B. Applicable Law

A "judge must give a requested instruction on every defensive issue raised by the evidence without regard to its source or strength, even if the evidence is contradicted or is not credible." *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *see Ferrel v. State,* 55 S.W.3d 586, 591 (Tex. Crim. App. 2001); *Gaspar v. State*, 327 S.W.3d 349, 356 (Tex. App.—Texarkana 2010, no pet.); *Guilbeau v. State,* 193 S.W.3d 156, 159 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). The defendant's testimony alone may be sufficient to require a defensive theory instruction to the jury. *Broussard v. State*, 809

S.W.2d 556, 558 (Tex. App.—Dallas 1991, pet. ref'd). However, if the evidence, when viewed in the light most favorable to the defendant, does not establish self-defense, the defendant is not entitled to an instruction on the issue. *Gaspar*, 327 S.W.3d at 356.

Under the defensive theory of self-defense, "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." TEX. PENAL CODE ANN. § 9.31 (West, Westlaw through 2017 1st C.S.).

> A person is justified in using deadly force against another:
>
> (1) if the actor would be justified in using force against the other under Section 9.31; and
>
> (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
>
> (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or
>
> (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Id. § 9.32 (West, Westlaw through 2017 1st C.S.). Under the necessity defense,

> 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.

Id. § 9.22 (West, Westlaw through 2017 1st C.S.).

> The mere fact that the accused "believed" the complainant might in some manner attack the accused, without evidence of any overt act or words that would lead the accused to *reasonably* believe he was in danger, is insufficient to give rise to a right to an instruction and charge on self-defense.

Preston v. State, 756 S.W.2d 22, 24–25 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (emphasis in original) (citing *Werner v. State*, 711 S.W.2d 639, 644 (Tex. Crim. App. 1986)); *see Mathews v. State*, 725 S.W.2d 491, 494 (Tex. App.—Corpus Christi 1987, pet. granted), *rev'd on other grounds*, 761 S.W.2d 11 (Tex. Crim. App. 1988).

C. Analysis

We now look to the evidence to determine if appellant was entitled to the requested jury instructions. *See Krajcovic*, 393 S.W.3d at 286. When viewed in the light most favorable towards appellant, the evidence does not establish self-defense or necessity. *See* TEX. PEN. CODE ANN. §§ 9.22, 9.31; *Gaspar*, 327 S.W.3d at 356.

For example, there is evidence that David approached the closet with a knife. However, the belief that David would in some manner attack or harm appellant is insufficient by itself to require an instruction on self-defense and necessity. *See Preston*, 756 S.W.2d at 24. There must be overt acts or words that reasonably caused appellant to believe the use of force was necessary. *See id*. Merely brandishing a knife is insufficient to raise the right to receive an instruction on self-defense and necessity. *See Barree v. State*, 621 S.W.2d 776, 779 (Tex. Crim. App. 1980) (holding that defendant was not entitled to self-defense instruction, even though complainant was brandishing a knife, because there was no evidence that the complainant attempted to use or even threatened to use the knife); *see also Morin v. State*, No. 14-17-00080-CR, 2018 WL 3625290, at *2 (Tex. App.—Houston [14th Dist.] July 31, 2018, no pet. h.) (mem. op., not designated for

publication) (finding that, even though the deceased complainant displayed a knife, "no ordinary and prudent person in appellant's position could have believed that deadly force was immediately necessary to protect himself from the decedent's use or attempted use of unlawful deadly force" because there was no evidence that "decedent made any threats against appellant"). The evidence here indicates that David, even upon finding appellant in his closet, made no attacks; he simply attempted to grab the gun that appellant was already holding. There were no overt acts indicating that David intended to use the knife. *See Barree*, 621 S.W.2d at 779; *Preston*, 756 S.W.2d at 24–25.

Similarly, according to appellant, David said nothing other than, "You!" David made no threats and said nothing of harming appellant; David spoke no overt words that would reasonably cause appellant to believe the use of force was necessary. *See Preston*, 756 S.W.2d at 24. Typically, courts require more threatening words to entitle a defendant to a self-defense instruction. *See Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017) (holding that defendant was entitled to self-defense instruction when defendant's girlfriend was threatened by three assailants and the assailants said "they were going to beat" defendant); *Walters v. State*, 247 S.W.3d 204, 207 (Tex. Crim. App. 2007) (noting that appellant received a self-defense instruction when complainant told appellant, while making a motion towards his car door, "I'm going to stop you today, once and for all"); *Semaire v. State*, 612 S.W.2d 528, 530 (Tex. Crim. App. 1980) (finding trial court erred by not giving self-defense instruction when evidence showed that complainant threatened to shoot through the door if appellant did not leave her room); *Graves v. State*, 452 S.W.3d 907, 910–11 (Tex. App.—Texarkana 2014, pet. ref'd) (finding self-defense instruction was required because the complainant told appellant he was going to "come

back and shoot the whole house up"); *Guilbeau*, 193 S.W.3d at 159 (holding that the trial court erred by failing to instruct on self-defense when the evidence showed that complainant threatened to give appellant the "beating of a lifetime"); *Halbert v. State*, 881 S.W.2d 121, 125 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (finding that the defendant was entitled to a self-defense instruction when the defendant testified that the deceased complainant told her he was going to kill her, and she believed he would); *Broussard v. State*, 809 S.W.2d 556, 559 (Tex. App.—Dallas 1991, pet. ref'd) (holding that defendant was not entitled to self-defense instruction when complainant began walking toward his car and told appellant, "we'll get it straight once and for all"); *see also Castaneda v. State*, No. 13-09-124-CR, 2011 WL 861106, at *7 (Tex. App.—Corpus Christi Mar. 10, 2011, pet. ref'd) (mem. op., not designated for publication) (holding that defendant was not entitled to self-defense instruction when complainant kept following appellant and asking him, in Spanish, "what's up?").

In summary, even in the most favorable light, appellant's version of events has him waiting in David's bedroom closet, with his own personal gun in his pants. While holding a knife, David opened the closet and exclaimed, "You!" However, David did not attack or make any movements with the knife or issue any threats. Appellant then grabbed one of David's guns in the closet; David attempted to grab the gun with his open hand but still did nothing with the knife. Appellant then shot David. There is no evidence that David spoke any words indicating his intent to attack appellant, and there is no evidence that David made an overt attack. *See Miller v. State*, 940 S.W.2d 810, 812 (Tex. App.—Fort Worth 1997, pet. ref'd); *Preston*, 756 S.W.2d at 24–25. Ultimately, there was no evidence that appellant reasonably believed that the use of force was immediately necessary to

avoid imminent harm or to protect himself against David's use or attempted use of unlawful force. *See* TEX. PENAL CODE ANN. §§ 9.22, 9.31; *Gaspar*, 327 S.W.3d at 356.

We conclude that appellant was not entitled to a jury instruction on self-defense or necessity; accordingly, the trial court did not abuse its discretion by failing to include such in the jury charge. *See Gaspar*, 327 S.W.3d at 356; *Wesbrook,* 29 S.W.3d at 122. We overrule appellant's issue.

III. CONCLUSION

We affirm the trial court's judgment.

NORA L. LONGORIA
Justice

Do not publish.
Tex. R. App. P. 47.2(b).

Delivered and filed the
10th day of January, 2019.

THE THIRTEENTH COURT OF APPEALS

13-15-00600-CR

William Rogers
v.
The State of Texas

On Appeal from the
24th District Court of Refugio County, Texas
Trial Cause No. 2013-4-5466

JUDGMENT

THE THIRTEENTH COURT OF APPEALS, having considered this cause on appeal, concludes that the judgment of the trial court should be AFFIRMED. The Court orders the judgment of the trial court AFFIRMED.

We further order this decision certified below for observance.

January 10, 2019