



One Fabulous Skyline

# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

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⚖ Vol. 18, No. 13; March 5, 2010

Case Name: [Jaime Casas Juarez, Jr. v. The State of Texas](#)

TIBA's Case of the Week

- OFFENSE: Aggravated Assault on a Peace Officer
- COUNTY: Smith
- COURT OF APPEALS: Tyler 2009
- C/A CITATION: Unpublished
- C/A RESULT: Conviction Affirmed
- CCA. CASE No. PD-0666-09 DATE OF OPINION: March 31, 2009
- DISPOSITION: Court of Appeals Reversed
- OPINION: Keasler, J. VOTE: 5-4-0
- TRIAL COURT: 241st D/C; Hon. Jack Skeen
- LAWYERS: [Austin Jackson](#) (Defense); [Mike West](#) (State)

**Ed Note:** (Background Facts) Tyler police officer JH Burge and two other Tyler officers were chasing Appellant on foot. Burge found Appellant sitting on some steps, sweaty and out of breath. Appellant put his hands in the air, but when Burge tried to handcuff him, he pulled away. Burge grabbed Appellant, and both of them fell to the ground, with Appellant facing the officer. Burge ordered Appellant to stop resisting and yelled for help. With Appellant now facing the ground, Burge had both of his hands on Appellant's back to keep him from getting up, but Appellant was pushing up with Burge on his back. Burge did not know if Appellant's face went into the ground. He presumed Appellant did not have any trouble breathing because Appellant was saying "foul" things to him. Realizing that no one heard his call for help, Burge tried to radio his location. When Burge removed his right hand from Appellant's back to use his radio, Appellant bit Burge's left index finger. Burge testified that Appellant did this intentionally, knowingly, or recklessly. Burge tried to get Appellant to let go by standing up and hitting him, but Appellant stood up and refused to let Burge's finger go. Finally, when Officer Black arrived and hit Appellant, Appellant released Officer Burge's finger. Officer Black testified that, based on his observations, Appellant's biting of Burge's finger was intentional, knowing, or reckless. Appellant continued to resist arrest by wrestling with and hitting Black. Once Officer Balderas arrived, he and Black were finally able to subdue Appellant and arrest him. Appellant remained belligerent and refused to walk to the patrol car. Burge was transported to the hospital. He testified that his trigger finger had been lacerated and that it took four weeks to heal. The treating physician described the wound to Burge's left index finger as "significant" and capable of causing permanent disfigurement and protracted loss or impairment.

⚖ **324 Court's Charge / Defensive Charges (Necessity Defense):** At trial, Appellant testified that he was with his cousin and another man on June 10th. He was the lookout while his cousin and the other man burglarized unlocked vehicles. His cousin told him that someone was peeking around the corner and looking at them, so they took off running. Appellant testified that someone yelled "Stop," not "Stop, police"; therefore, he did not know that he was being pursued by the police. He said that someone jumped on him and slammed him to the ground while he was sitting and trying to catch his breath. He told the person to get off of him. When he

heard the radio, he realized that a police officer was on top of him. His mouth was in the dirt, and the officer was pushing his head in the dirt. He was inhaling dirt and felt like he was suffocating. He got the officer's finger in his mouth somehow and bit down to get the officer off of him. "I got his finger in my mouth somehow, and I just bit down to get him off of me, because I felt like I was going to die . . . ." When the officer got up, Appellant got up with him and saw two other officers coming around the corner. He put his hands behind his back and lay down. The officers then began to hit him. On direct-examination, Appellant testified that he did not intend to bite Burge and that he was just concerned for his life. On cross-examination, Appellant testified that he did not intentionally, knowingly, or recklessly bite Burge's finger. He claimed that he did it by accident; he bit down and let it go. Appellant appealed the trial judge's refusal to instruct the jury on necessity. The State argued that Appellant was not entitled to the instruction because he refused to admit to all of the elements of the offense, in particular, the culpable mental state, which is a prerequisite for a necessity instruction. The Tyler Court of Appeals disagreed and held that a defendant need admit only the prohibited act, not the applicable mental state accompanying the prohibited conduct. The court determined that Appellant's testimony admitting to the act (i.e., the biting), even if by accident, was sufficient to entitle him to a necessity instruction. The court then held that the error was harmful. As a result, it reversed the trial court's judgment and remanded the case for a new trial.

**Holding:** The doctrine of confession and avoidance applies to the Penal Code's necessity defense. As a result, a defendant cannot flatly deny the charged conduct--the act or omission and the applicable culpable mental state. Because it can reasonably be inferred from Appellant's testimony that he intentionally, knowingly, or recklessly bit Burge, the trial judge erred in refusing Appellant's request for a necessity instruction. We affirm the Court of Appeals's judgment because it found that the trial judge's error was harmful and we did not grant review to evaluate its harm analysis. We remand this case to the trial court.

**Concurring / Dissenting Opinions:** Judge Holcomb concurred, and was joined by Presiding Judge Keller, Judge Price and Judge Johnson.

**Sidebars:** ([David A. Schulman](#)) Any evidence, from any source, no matter how weak or ridiculous. It doesn't matter that nobody who was not a member of the jury would believe it, even his mother, because a member of the jury might.