COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

EDWIN ODELL COLLINS, JR.,	§	No. 08-15-00103-CR
Appellant,	§	Appeal from
v.	§	66th District Court
THE STATE OF TEXAS,	§	of Hill County, Texas
Appellee.	§	(TC # 38,327)

O P I N I O N

Edwin Odell Collins, Jr. was convicted of the murder of his daughter, Judith Collins, and sentenced to forty years in prison. His appeal challenges (1) the sufficiency of the evidence to support the jury's finding of guilt, (2) the omission of jury instructions addressing self-defense, defense of third persons, and mistake of fact, and (3) the appointment of a pro tem prosecutor to try the case for the State. Finding no error, we affirm.[1]

FACTUAL SUMMARY

Describing the facts of this case as both tragic and bizarre is something of an understatement.[2] Appellant lived in a rural part of Hill County off of Farm to Market Road 933.

[1] This case was transferred from Waco Court of Appeals pursuant to the Texas Supreme Court's docket equalization efforts. *See* TEX.GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedence of that court to the extent they might conflict with our own. *See* TEX.R.APP. P. 41.3.

[2] The evidence surrounding the events of July 24, 2012, came principally from Wes Collins (no relation to Appellant), who is an investigator for the Hill County Sheriff's Department, and Alex Collins, who is Appellant's son. Investigator Collins recounted the events as Appellant described them to him the next day. Alex Collins

At the time of these events, his three children, Alex then aged 17, Judith aged 14, and Logan, aged 11, were staying with him. Appellant was divorced from the children's mother. For several years before these events, he had been living with Kelli Longwith, who was described as his girlfriend. His house was situated in a cluster of houses at the end of a private road. Appellant's parents lived in another one of the residences. Other houses in the cluster were available for leasing. Appellant's parents ran a small convenience store called the Hitching Post which was located at FM 933, just at the entrance to the private road. A fireworks stand is located on other side of the private road.

On the evening of July 23, 2012, Appellant went to Longwith's house to attempt to reconcile after an argument. While there, he ingested methamphetamines. He left sometime after midnight and a surveillance camera near the entrance to the private road showed Appellant turn towards his house at 1:59 a.m.

When he arrived home, Alex was still up playing video games. His daughters were in bed. For a time, Appellant got on his home computer. He later told a sheriff's investigator that he then saw a light outside a window. Appellant asked Alex to check that all the windows in the house were locked. Up to that point, Alex had not noticed anything unusual, nor had he seen any lights. Appellant woke the two girls and told everyone to get dressed. He gave Alex a baseball bat, and he armed himself with a semi-automatic shotgun.[3] During that time, Alex thought he heard something hit the side of the house. Appellant told his children that he was going to check around the house, and gave them the option to go with him or stay in the house. They all left the residence and got into a passenger van parked next to his parents' house.

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recounted the events as he perceived them that night. We distinguish the source of the factual recitations where necessary.

[3] Appellant, who was a truck driver by trade, had gotten the shotgun from his father several days or weeks before because he had caught someone messing around one of the trailers of his 18-wheeler.

A surveillance camera showed the van drive to the end of the private road and come to a stop near the fireworks stand at 3:43 a.m. Appellant and his children exited the vehicle and walked around to the back of the Hitching Post. Appellant's father would have been inside the store as it was open twenty-four hours a day. In a later statement made to the police, Appellant said he did not want to go in the front door of the store carrying a shotgun, and by the time he got the rear of the building, he heard something that sounded like a gunshot, so he did not go in.

Instead, he then took his children into an open field behind the Hitching Post. As they walked towards a concrete structure in the field, Alex heard what sounded like a banging noise. They continued on, walking to a tree in the middle of a field, along a fence line, and then toward a stand of trees. Alex also thought he heard footsteps when they were in the woods. Appellant claimed to see what he described as a flashlight moving around, but he never actually saw a person. Alex saw what looked like flashlights by the firework stand.[4] Appellant fired three shots at these lights, later telling an investigator that he was trying to kill whoever had them.

[4] Alex admitted that in an earlier statement he was starting to doubt what he saw and it may have been reflections off of his glasses. But at trial, Alex was adamant that he heard and saw something:

> Q. That night are you sure you saw lights?
>
> A. Yes, sir.
>
> Q. That night are you sure you heard noises?
>
> A. Yes, sir.
>
> Q. Are you sure you heard noises and saw lights from a direction other than you and your sisters or your dad?
>
> A. Yes, sir.
>
> Q. Did you think somebody was out there?
>
> A. Yes, sir.

At some point before Judith died, he lost his glasses, and acknowledged his eyesight was "really bad."

While in the field he called a friend and then called 911. The 911 call was disconnected before Appellant gave a location, or even his name, but the 911 operator recorded this statement:

> UNIDENTIFIED MALE: Hey, we're down here at Hitching Post. We've got a bunch of cars driving all over the -- had a couple of cars enter the property and haul ass out. We don't know what's going on. You think you could...[5]

The 911 operators were able to determine the location call was near the Hitching Post and sent a sheriff's car to investigate. The officers went to the Hitching Post and left two minutes later. The surveillance camera showed the sheriff unit responded at 4:40 a.m.

As they moved through the fields, Appellant had his three children in front of him because he claimed the threat was behind them. They eventually got to a double fence line. Appellant told the children to go back a certain distance and wait for him. He explained what happened next to the investigator this way: "[I] told the kids, you know, this is it. I'm going to stand here, and I'm going to -- I'm going to stay here. I'm going to confront whoever this is and kill them. I want y'all to take off running behind me about 100 yards." As the children moved toward the double fence line, Alex claimed something was blocking his path and he began moving sideways He heard some noise, perhaps a fence clanging, just before the shot was fired. Appellant told the investigator that he heard a yelp, and thought whoever it was with these flashlights, had circled around behind him. He then turned and fired the shotgun in the direction of the yelp. He hit Judith in the back. The shotgun pellets punctured both her heart and liver. Medical testimony suggested she died a few minutes later.

Alex recalled seeing Appellant holding his sister, heard her say something, then Appellant, Alex, and Logan ran and hid in some tall grass until dawn. By then, Alex no longer had his phone because Appellant had told him to throw it away. They then walked back to the

[5] There was no record of a call to 911 before July 24, 2012 complaining of suspicious activity, and no other call from that night, or the early morning, even though the houses and the Hitching Post all had land lines, and Appellant, Alex, and Judith all had cell phones with them.

Hitching Post. Before going inside, Appellant told his children not to say anything about Judith being shot. Nor did Appellant tell his father (and Judith's grandfather) that she was dead. They left the store and went back to the house. The surveillance camera shows them leaving the Hitching Post at 6:46 a.m. While at the house, Appellant again checked his computer, and then broke into another vehicle so he could drive to the sheriff's office.

By 7:45 a.m., Appellant, Alex, and Logan were in the lobby of the Hill County Sheriff's Department. Appellant approached sheriff's investigator Wes Collins (no relation) and said he needed to talk about a situation. Appellant was wearing torn jeans, a torn shirt, his arms were scratched, and while not distraught, he appeared a little excited. He accompanied the investigator back to an office and began talking about being with his girlfriend the night before in Bynum. It was not until five minutes into the interview that he mentioned that he had shot his daughter.

With Alex's help, the sheriff investigators located Judith's body. She was laying on the south side of a barbed wire fence. The walking stick she had been using was just to the north of the fence. A shard of clothing suggested she had gotten caught on the barbed wire fence. Her feet were within one or two feet from the fence. She had a small circular gunshot wound on the left side of her back. It was later determined by test firing the actual shotgun, and using the same ammunition, that the "muzzle to victim" distance was greater than three feet but less than five feet.

None of the children actually saw any other person there that night, nor did Appellant The record contains testimony that Appellant intended to fire the gun and intended to shoot what he perceived as the threat. Alex was still living with Appellant at the time of trial and testified that Appellant did not intend to kill Judith. He was equally clear that Appellant had intended to

fire the gun and kill who he was firing at; he simply thought Judith was one of the "bad guys, and he turned and shot her."

At Appellant's request, an investigator later went to the house to confirm Appellant's claim that there was some kind of spyware on his computer which was somehow the key to the people with the lights. The investigator was not able to locate any spyware.

PROCEDURAL BACKGROUND

Appellant was indicted for murder. The State claimed Appellant intentionally or knowingly caused Judith Collins' death by shooting her a firearm. It further alleged that Appellant, with intent to cause serious bodily injury to Judith Collins, committed an act "clearly dangerous to human life" that caused her death.

Prior to trial, Appellant filed a motion to admit a polygraph exam which purported to show that he gave truthful answers when denying that he intentionally caused the death of his daughter, or that he knew before firing the gun that the person he was shooting at was Judith. He was also purportedly truthful when stating that he fired the gun at a person he believed was going to cause him harm. The trial court denied that motion.

The jury charge included a transferred intent instruction stating that a person is "criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that a different person or property was injured, harmed, or otherwise affected." The application portion of the jury charge permitted the State to prove murder either by showing that Appellant intentionally or knowingly caused the death of "an unknown individual or Judith Collins" by shooting Judith Collins with a firearm. Alternatively, the jury could return a guilty verdict if the State proved that Appellant "with intent to cause serious bodily injury to an unknown individual or Judith Collins" committed an act clearly dangerous to human life that caused Judith's death by shooting her. The charge also

permitted the jury to consider manslaughter as a lesser included offense. The trial court refused Appellant's tendered instructions on self-defense, defense of third persons, and mistake of fact. The jury found Appellant guilty of murder, and following the punishment phase, assessed a forty year sentence and a $7,500 fine.

ISSUES ON APPEAL

Appellant brings six issues for our review. He first claims that the evidence is legally insufficient to support the charge of murder. In his second issue, he contends that had correct instructions been given on self-defense, defense of third persons, or mistake of fact, the State's evidence is legally insufficient to support a conviction. In Issues Three, Four, and Five, he contends the trial court abused its discretion in not charging the jury on those defenses. And finally in Issue Six, he complains the trial court erred in allowing the elected district attorney to recuse from the case, and in appointing attorneys pro tem in the district attorney's stead. We address each of these issues, but in a somewhat different order.

SUFFICIENCY OF THE EVIDENCE FOR MURDER

Built on the premise that Appellant never intended to cause any harm to Judith, Appellant's first issue challenges the legal sufficiency of the evidence to support the jury's murder finding.

Standard of Review

Our legal sufficiency standard is articulated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). *See Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex.Crim.App. 2010)(finding no meaningful distinction between the legal and factual sufficiency standards and applying *Jackson v. Virginia* as the only standard in Texas). The relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime

beyond a reasonable doubt." [Emphasis in original]. *Jackson*, 443 U.S. at 318-19, 99 S.Ct. at 2789.

Under the *Jackson* standard, the jury is the sole judge as to the weight and credibility of the evidence. *Brooks*, 323 S.W.3d at 894-95. If the record contains conflicting inferences, we must presume the jury resolved such facts in favor of the verdict and defer to that resolution. *Id.* We consider both direct and circumstantial evidence and all reasonable inferences that may be drawn from the evidence. *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007); *Arzaga v. State*, 86 S.W.3d 767, 777 (Tex.App.--El Paso 2002, no pet.). On appeal, we serve only to ensure that the jury reached a rational verdict; we may not reevaluate the weight and credibility of the evidence; nor may we substitute our judgment for that of the fact finder. *King v. State*, 29 S.W.3d 556, 562 (Tex.Crim.App. 2000).

We first address two pieces of evidence that Appellant asks us to consider as a part of our review. First, he argues that we must include the results of a polygraph exam that he passed, but which was never admitted at trial. His rationale for this request is language from *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex.Crim.App. 1999) which holds, "when conducting a legal sufficiency review, this Court considers all evidence in the record of the trial, whether it was admissible or inadmissible." *See also Winfrey v. State*, 393 S.W.3d 763, 767 (Tex.Crim.App. 2013)(repeating the same maxim).

Reading these cases in context, however, we are convinced that we can consider only the evidence that the fact finder had before it (whether it might ultimately be found that some of that evidence should not have been admitted). In *Winfrey*, for instance, the defendant asked the court to place no weight on a dog-scent lineup that was admitted into evidence, but which the defendant claimed was unreliable. *Id.* at 767 ("Thus, regardless of whether the dog-scent lineup evidence was properly admitted, such evidence is properly considered in a review of the

sufficiency of the evidence."). And similarly in *Dewberry*, the defendant asked the court to ignore certain testimony admitted before the jury because it included hearsay. 4 S.W.3d at 740. The court refused to do so, noting its evidentiary review required it consider all the evidence (admissible or not) that was before the trier of fact. *See also Conner v. State*, 67 S.W.3d 192, 197 (Tex.Crim.App. 2001)("When conducting a sufficiency review, we consider *all the evidence admitted*, whether proper or improper.")[Emphasis added]. It does not follow from these cases, however, that a reviewing court should also consider everything offered, but which was never seen or considered by the jury.

We decline to consider the polygraph because it was not part of the evidence before the jury. Moreover, the Court of Criminal Appeals has held for more than sixty years that the results of polygraph examinations are inadmissible over proper objection because the tests are unreliable. *See Leonard v. State*, 385 S.W.3d 570, 577 (Tex.Crim.App. 2010)(op. on reh'g).

Nor are we inclined to go outside the record to take judicial notice of information on methamphetamines as Appellant also requests that we do. The record includes testimony from Michelle Mello, a DPS toxicologist, who analyzed Appellant's blood. His blood was drawn at 1:18 a.m. on July 25, 2012, which would be somewhere between twenty-five to thirty hours after Appellant would have ingested the drug, based on when he arrived and when he left Longwith's house. The initial screen of that blood sample was positive for amphetamines, but on final testing, the amount did not meet the minimum detection threshold. Mello testified that she would not be surprised that the final screen did not reach the detection threshold if the drug was ingested twenty-four hours earlier. Methamphetamines have a half-life of about ten hours, meaning that half of the drug would be eliminated from the blood in a ten hour period. Appellant, however, asks that we refer to a NHTSA fact sheet that purportedly shows there

should have been some detectable amount in his blood if Longwith was testifying truthfully.[6] Nothing in the publication, even were we to consider it, disproves Longwith's testimony.[7]

Turning to the merits of the challenge, we begin with what the State needed to prove. A person commits the offense of murder if he intentionally or knowingly causes the death of another. TEX.PENAL CODE ANN. § 19.02(b)(l)(West 2011). Alternatively, a person commits murder when they intend to cause serious bodily injury and commit an act clearly dangerous to human life that causes the death of an individual. *Id*. at § 19.02(b)(2). "Murder is a result of conduct offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death." *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex.Crim.App. 2003)(internal quotations omitted). A person acts intentionally with respect to a result of his conduct when it is his conscious objective or desire to cause the result. TEX.PENAL CODE ANN. § 6.03(a)(West 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. TEX.PENAL CODE ANN. § 6.03(b).

Intent and knowledge are fact questions for the jury and are almost always proven through the circumstances surrounding the crime. *Manrique v. State*, 994 S.W.2d 640, 649 (Tex.Crim.App. 1999). A jury may rely on its collective common sense and common knowledge when determining intent. *Rodriguez v. State*, 90 S.W.3d 340, 355 (Tex.App.--El Paso 2001, pet. ref'd). A jury may infer intent or knowledge from any fact that tends to prove its existence, including the acts, words, conduct of the accused, and the method of committing the offense. *Guevara v. State*, 152 S.W.3d 45, 50 (Tex.Crim.App. 2004).

[6] At most, the fact sheet states that "Normal [blood] concentrations in recreational use are 0.01 to 2.5 mg/L (median 0.6 mg/L)." http://www.nhtsa.gov/people/injury/research/job185drugs/methamphetamine.htm.

[7] One would have to know the DPS' minimum detection threshold for methamphetamines, and then work backwards from that level to see whether Appellant could have had a blood concentration consistent with "normal recreational use" at the time of this event. Even at that, we suspect that there are unaccounted for variables, such as Appellant's size and how he ingested the drug, which might affect the analysis.

As the jury charge instructed, a person is criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked, is that a different person was injured, harmed, or otherwise affected. TEX.PENAL CODE ANN. § 6.04(b)(2). This statutory principle is commonly referred to as transferred intent. *See Manrique*, 994 S.W.2d at 647 (McCormick, J., concurring); *Delacerda v. State*, 425 S.W.3d 367, 397 (Tex.App.--Houston [1st Dist.] 2011, pet. ref'd). Transferred intent is raised when there is evidence that a defendant with the required culpable mental state intends to injure or harm a specific person but instead injures or harms a different person. *Delacerda,* 425 S.W.3d at 397. The classic example is "the act of firing [a gun] at an intended victim while that person is in a group of other persons. If the intended person is killed, the offense is murder. If a different person in the group is killed, the offense is murder pursuant to Texas Penal Code § 6.04(b)(2) . . . ." *Id., quoting, Roberts v. State*, 273 S.W.3d 322, 330 (Tex.Crim.App. 2008); *Sneed v. State*, 10-14-00207-CR, 2015 WL 2170232 at *3 (Tex.App.--Waco May 7, 2015, pet. ref'd)(not designated for publication)(firing gun at one officer when defendant likely believed it was another officer).

A rational jury could have convicted Appellant under the transferred intent theory. Appellant had the intent to shoot and kill the person(s) behind the flashlights that he envisioned that night. He shot at them three times earlier, and at the instant that he killed Judith, he turned and fired at the noise (the yelp) that he heard behind him. The State presented testimony from its investigator that Appellant admitted he was firing at that unknown person and intended to kill him or her. Alex similarly testified that Appellant was intending to shoot at the person or persons with the lights. A rational jury could conclude that Appellant intentionally or knowingly fired his shotgun, a lethal weapon, at an unidentified person intending to kill. It just so happened that Appellant was shooting at Judith at the time. See *Adanandus v. State,* 866 S.W.2d 210, 215

(Tex.Crim.App. 1993)(the inference of intent to kill is almost conclusive when a deadly weapon is used in a deadly manner); *Womble v. State*, 618 S.W.2d 59, 64 (Tex.Crim.App. [Panel Op.] 1981)(when a deadly weapon is fired at close range and death results, the law presumes an intent to kill); *Watkins v. State*, 333 S.W.3d 771, 781 (Tex.App.--Waco 2010, pet. ref'd)(firing AR-15 rifle and .45 caliber pistol at close range supported jury finding of intent).

The same act was intended to cause serious bodily injury and was an act clearly dangerous to human life. *Forest v. State*, 989 S.W.2d 365, 368 (Tex.Crim.App. 1999)("[F]iring a gun in the direction of an individual is an act clearly dangerous to human life."). Appellant responds to the Section 19.02(b)(2) theory by citing us to a multitude of cases where individuals committed various acts which were found to be clearly dangerous to human life (e.g. kicking a person in the head and abdomen,[8] shooting into a vehicle,[9] beating a child in the head and stomach[10]). He then reasons that in each of these cases, the various acts were only clearly dangerous to human life because they were done without any legal cause, justification, or excuse. From this proposition, Appellant then argues that he acted appropriately to defend himself or his children that night. We address the self-defense and defense of third persons contention below. If those defenses were viable, they may well justify the use of force. But they do not negate that intentionally firing a shotgun at a person at close range is still an act clearly dangerous to human life. The jury heard evidence that Appellant did just that--he fired a shotgun at a person who was three to five feet from the end of his barrel. We overrule Issue One.

[8] *Amis v. State*, 87 S.W.3d 582 (Tex.App.--San Antonio 2002, no pet.).

[9] *Edwards v. State*, No. 05-10-00559-CR, 2011 WL 6034508 (Tex.App.--Dallas, Dec. 6, 2011)(not designated for publication).

[10] *Bowen v. State*, 640 S.W.2d 929, 931 (Tex.Crim.App. 1982).

SELF-DEFENSE AND DEFENSE OF THIRD PERSON

In Issues Three and Five, Appellant complains of the failure to include a charge instruction on self-defense and defense of third persons. He contends that he presented some evidence suggesting that he was protecting either himself or his children from the person or persons with the lights. In his second issue, he complains that the State failed to present legally sufficient evidence to negate these defenses beyond a reasonable doubt. We measure the sufficiency of the evidence by reference to the elements of the offense as defined in a hypothetically correct jury charge. *Villarreal v. State*, 286 S.W.3d 321, 327 (Tex.Crim.App. 2009). This second issue thus presupposes that there was some evidence raising these defenses such that they should have been included in that hypothetically correct charge. Because these issues overlap, we address them together.

We review charge error using a two-step process. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex.Crim.App. 2012); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984)(op. on reh'g). First, we must determine whether error occurred. *Wooten v. State*, 400 S.W.3d 601, 606 (Tex.Crim.App. 2013). If there is error in the charge, we must then analyze whether sufficient harm requires reversal. *Wooten*, 400 S.W.3d at 606. Under this second step, the degree of harm necessary for reversal usually depends on whether the defendant properly preserved the error by objection. *Middleton v. State*, 125 S.W.3d 450, 453 (Tex.Crim.App. 2003). Here, Appellant's counsel objected to the omission of a self-defense and defense of third person instruction, and accordingly, we determine whether there is "some harm." *Sakil v. State*, 287 S.W.3d 23, 25-26 (Tex.Crim.App. 2009). "Some harm" means "any harm, regardless of degree, is sufficient to require reversal." *Druery v. State*, 225 S.W.3d 491, 504 (Tex.Crim.App. 2007).

The claimed error is the omission of defensive instructions. The "defendant has a right to an affirmative instruction on every defensive issue raised by the evidence whether the evidence

is produced by the state or by the defense, whether it is strong or feeble, whether it is unimpeached or contradicted, or whether it is conflicting." *Saxton v. State*, 804 S.W.2d 910, 913 n.9 (Tex.Crim.App. 1991); *see also Juarez v. State*, 308 S.W.3d 398, 404-05 (Tex.Crim.App. 2010)(defendant's conflicting statements did not negate duty of the trial judge to submit defense). The defendant's only burden is to present that minimum quantity of evidence sufficient to support a rational jury finding each element of the defense. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex.Crim.App. 2007)("a defense is supported (or raised) by the evidence if 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 that element is true."). This rule preserves the jury's role as the arbiter of the credibility of the witnesses. *Miller v. State*, 815 S.W.2d 582, 585 (Tex.Crim.App. 1991)(op. on reh'g).

Self-defense is statutorily defined. 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. "The Penal Code justification for self-defense focuses on the existence of some necessity, the circumstances under which the force was used, the degree of force used, and the type of conduct against which the force was used." *Tidmore v. State*, 976 S.W.2d 724, 728 (Tex.App.--Tyler 1998, pet. ref'd). Under certain circumstances not applicable here, an actor's belief that force was necessary is presumed. *Id.* at § 9.3 l(a)(l)-(3).[11]

A person is justified in using *deadly force* when the elements of Section 9.31 are met, and additionally, the "actor reasonably believes the deadly force is immediately necessary . . . to

[11] Those situations include when one believes that another: (1) "unlawfully and with force" entered or is attempting to enter the actor's occupied habitation, vehicle, or place of business or employment; (2) unlawfully and with force removes or is attempting to remove the actor from the actor's habitation, vehicle, or place of business or employment; or (3) is "committing or attempting to commit aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." The actor cannot have provoked any of these actions, and must not otherwise be engaged in certain defined criminal activity himself. *Id.* at § 9.3 l(a)(l)-(3).

protect the actor against the other's use or attempted use of unlawful deadly force" or to prevent the imminent commission of certain listed crimes (aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery). *Id.* at § 9.32(a)(2)(A). A person is justified in using force or deadly force against another to protect a third person if these same elements are met with regards to the protection of a third person. TEX.PENAL CODE ANN. § 9.33. Because Appellant used deadly force, there must be some evidence to satisfy the requisites of Sections 9.31 (use of force), 9.32 (use of deadly force), and with regard to his children's protection, Section 9.32(a)(2)(A)(defense of third persons). *See Dyson v. State*, 672 S.W.2d 460, 463 (Tex.Crim.App. 1984)(firing shotgun at shadowy figure at front door required proof of deadly force elements).

The strongest evidence Appellant can raise is that sometime between 1:59 a.m. and 3:43 a.m. he saw lights outside a window and could have heard what sounded like someone or something hitting the outside of his home. Somewhat later, when he was behind the Hitching Post, he heard what sounded like a gunshot. After walking some distance from the Hitching Post, he called 911 and reported only that a "couple of cars enter[ed] the property and haul[ed] ass out. We don't know what's going on." He claimed to see lights, but Alex said they were back near the fireworks stand. When Appellant turned and fired the shotgun toward Judith, he could provide no additional detail about the unknown persons other than he heard a yelp. He could offer no details that would allow a jury to evaluate the nature of the threat he claimed, or why deadly force was appropriate for the circumstances.

On this record, the trial court correctly omitted a self-defense, and defense of third persons instruction because Appellant never presented any evidence that the person or persons with the lights (if they existed) posed any danger of using unlawful force on him or his children. Nor is there any evidence that the danger, even if it existed, was immediate. Having never

actually seen such person or persons, he could obviously not relate any verbal threats that they made. He could not describe their number, size, or age. He could not say that they were armed, or if so, that they menaced him or his children with those arms. He could not distinguish them from a lost hiker, a hunter who wandered onto the wrong lease, or high schoolers looking for a private place. And even were there some person with some malevolent intent wandering around his farm, he could not distinguish a threat which might justify the use of some force (under Section 9.31) from a threat requiring the use of deadly force (under Section 9.32). Because we conclude that the trial judge did not err in refusing the tendered instructions on self-defense and defense of third persons, we overrule Issues Three and Five.

In Issue Two, Appellant contends the evidence does not support the verdict because the State did not disprove the self-defense or defense of third person defenses beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 912-13 (once raised by the evidence, the State carries the burden of persuasion to disprove self-defense). Because we conclude that Appellant did not raise evidence to justify submitting the defense, it further follows that a hypothetically correct charge, upon which we measure the sufficiency of the evidence, would not include these defenses. But even were we wrong in that assessment, the State carried its burden to disprove the defense by disproving the existence of the persons with lights. Neither Appellant nor his children ever actually saw any other person on the property that night. The surveillance video which shows the entrance to the private road and Hitching Post documented only Appellant's comings and goings, various cars driving along FM 933, and cars pulling into the Hitching Post, a twenty-four hour convenience store. Alex's conclusion that someone was there was effectively impeached by his statement the next day that he might have only seen reflections of light on his glasses. A reasonable jury could also conclude that Alex's other perceptions were colored by his

being ushered around the farm in the dark of night by his father. Appellant's own version of these events was distorted by the narcotic that he ingested. We overrule Issue Two.

MISTAKE OF FACT

Appellant also complains that the trial court erred in failing to submit a mistake of fact instruction. We reject this claim for a different reason. We would agree that there was some evidence that Appellant was mistaken in his belief as to whom he was shooting. He may well have believed that he was killing the person with the light, when in fact he shot his daughter. We agree with the State, however, that the mistake of fact defense does not apply in the situation where the accused shoots one person, thinking them to be another.

The Penal Code provides a mistake of fact defense if an "actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense." TEX.PENAL CODE ANN. § 8.02(a). For instance, if an accused shoots into what he believes to be an empty car, which in fact is occupied, the accused may rightly claim a mistake of fact. *See Granger v. State*, 3 S.W.3d 36, 41 (Tex.Crim.App. 1999). The facts in *Granger* were just that, and the accused in that situation was entitled to the defense because he potentially negated the culpable mental state of attempting to kill another person. *Id*. Similarly, if an accused might believe his actions would cause one degree of injury, but by mistake he caused a more severe injury, that accused might also be entitled to raise a mistake of fact defense. *Thompson v. State*, 236 S.W.3d 787, 789 (Tex.Crim.App. 2007). In *Thompson*, for instance, the defendant thought that he was just spanking a child which might cause bodily injury (a third degree felony). The beating went too far, leading to serious bodily injury (a first degree felony). Had a proper request for a mistake of fact instruction been lodged, the defendant would have been entitled to the mistake of fact instruction. *Id*.; *see also Louis v. State*, 393 S.W.3d 246, 254 (Tex.Crim.App. 2012)(affirming *Thompson* in a case where adult

while disciplining child, may have mistakenly caused injuries leading to child's death); *Beggs v. State*, 597 S.W.2d 375, 376 (Tex.Crim.App. 1980)(accused entitled to mistake of fact instruction in case where claimed mistake was in temperature of bath water that scalded child, when intent was only to require child to take a bath).

Appellant refers us to language in *Thompson* and *Louis* that might suggest a defendant is always entitled to a mistake of fact instruction whenever the State invokes a transferred intent theory. *Louis*, 393 S.W.3d at 253 ("[A] defendant who is subject to a transferred-intent provision is entitled, upon request, to a mistake-of-fact instruction."); *Thompson*, 236 S.W.3d at 799 ("The history of these two provisions reveals that the law of transferred intent with respect to offenses has been entwined with the law of mistake. Given that history, it seems probable that the Legislature intended in its enactment of the current Penal Code that these two aspects of the law go hand-in-hand."). But the context of *Thompson* and *Louis* are important. In both cases, the State raised a distinct type of transferred intent--the intent to commit one crime when the defendant in fact committed another. TEX.PENAL CODE ANN § 6.04(b)(1)("A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: (1) a different offense was committed."). In both cases, the defendants tried to discipline a child and the claimed mistake of fact was in going too far. That mistake could in turn arguably reduce the seriousness of the offense charged.

In this case, however, we deal with another distinct thread of the transferred intent statute, one which involves the same intent, but transfers that intent between victims. TEX.PENAL CODE ANN § 6.04(b)(2)("A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that: (2) a different person . . . was injured, harmed, or otherwise affected").

Appellant cites no case applying mistake of fact to that type of transferred intent. Nor do we see how mistake of fact could apply to that situation, without the defense swallowing Section 6.04(b)(2) in its entirety. In any situation where the accused claims that they shot the wrong the person, they might validly claim a mistake of fact was made.

The mistake of fact defense applies when the mistake negates the element of intent. TEX.PENAL CODE ANN. § 8.02(a)(mistake of fact is a defense if "actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense."). *Celis v. State*, 416 S.W.3d 419, 430 (Tex.Crim.App. 2013). Appellant's intent was unaffected by the mistake. He always intended to kill, the only question was who would be the victim. We overrule Issue Four.

APPOINTMENT OF ATTORNEY PRO TEM

Appellant's last issue challenges the decision of the trial court to grant the elected district attorney's request to be recused, necessitating the appointment of attorneys pro tem to prosecute the case. The essence of Appellant's complaint is that the original justification for the recusal was improper. He further contends that the recusal violates the separation of powers guaranteed by the Texas Constitution. We disagree.

First, we add some procedural background. On March 19, 2013, some eight months after the shooting, the newly elected district attorney for Hill County, Mark F. Pratt, filed a "Request for Recusal." This request was made before Appellant was indicted, and before the sheriff's office had finalized its investigation. The motion was premised on the "large number of cases already set for jury trial and the current caseload" for the office. The motion references other specific trials that the newly elected district attorney was handling, some of which involved defendants who had been in jail awaiting trial for as much as a year.

The motion contained no certificate of service, and was granted the same day it was filed, presumably in an *ex parte* proceeding. A separate order signed the next day appointed two attorneys pro tem to prosecute the case pursuant to TEX.CODE CRIM.PROC.ANN. art. 2.07 (West 2005)(the court "may appoint any competent attorney to perform the duties of the office during the absence or disqualification of the attorney for the state."). The appointment was for the life of the case, including the investigation and grand jury stage through appeal. In later appointments, the original pro tem counsels were replaced with the pro tem attorneys who eventually tried the case.

The case was tried to a verdict in January 2015. At a pretrial hearing held a little more than a month before trial, Appellant argued a motion challenging the appointment of the attorneys pro tem and recusal of the elected district attorney.[12] The trial court took the motion under advisement. Appellant does not cite us to any formal ruling on the motion and we find none in the record.

Failure to obtain an adverse judicial ruling generally waives a complaint on appeal. TEX.R.APP.P. 33.1(a); *Martinez v. State*, 17 S.W.3d 677, 686 (Tex.Crim.App. 2000)(failure to obtain ruling on admission of evidence); *Dunavin v. State*, 611 S.W.2d 91, 97 (Tex.Crim.App. 1981)(failure to obtain ruling on suppression motion). The record must show that the trial court either: (1) expressly or implicitly ruled on the objection, request, or motion; or (2) "refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." TEX.R.APP.P. 33 .1(a)(2). We have a duty to consider preservation issues, even if not raised by the parties. *Wilson v. State*, 311 S.W.3d 452, 473 (Tex.Crim.App. 2010).

[12] The motion itself is not in the appellate record, but it is apparent from the arguments and statements made at the hearing that such a motion was indeed filed, heard, and it included the arguments now being advanced on appeal. But other evidence regarding this issue is not in our record. At the hearing, counsel referenced a sworn statement filed by the elected district attorney, dated March 19, 2013, that is not in our record, but of which the trial court took notice. Appellant carries the burden to present an adequate record on appeal to support his claim of abuse of discretion. *Davis v. State*, 345 S.W.3d 71, 78 (Tex.Crim.App. 2011)(failure to include portions of record germane to granting continuance).

There are circumstances when the trial court implicitly denies a motion. In *Montanez v. State*, 195 S.W.3d 101, 105 (Tex.Crim.App. 2006), for instance, the Texas Court of Criminal Appeals held that a suppression issue was not waived even though the record lacked a formal ruling. The trial court's certification of the Appellant's right to appeal a pretrial ruling "unquestionably indicated" that the trial court had denied the motion to suppress, and the docket sheet in the record showed that the court had considered the suppression issue. *Id.* at 105. None of these factors are present here. Unlike in *Montanez,* the record before us does not "unquestionably" reflect that the trial court specifically denied Appellant's motion to objecting to the pro tem counsel. *See Rowland v. State*, 10-05-00178-CR, 2006 WL 1642035, at *1 (Tex.App.--Waco June 14, 2006, pet. ref'd)(mem.op.)(not designated for publication) (proceeding to trial without formal denial of speedy trial motion did not indicate trial court's implicit denial of that motion).

Even were there an implicit ruling, we would overrule the issue. In Texas, "[e]ach district attorney *shall* represent the State in all criminal cases in the district courts of his district and in appeals" from those cases. [Emphasis added]. TEX.CODE CRIM.PROC.ANN. art 2.01 (West 2005). Certainly though, there are times when the district attorney may be legally disqualified from prosecuting a case, such as a specific kind of conflict of interest. *Id.* at 2.08 (adverse interest against the State requires disqualification); *Landers v. State*, 256 S.W.3d 295, 304 (Tex.Crim.App. 2008)(disqualification may be based on conflict of interest, but it must rise to the level of a due process violation); *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex.Crim.App. 1994)(orig.proceeding)(plurality op.)(same). Short of legal disqualification, Article 2.07(b-1) allows a district attorney to request that the district court permit *recusal* in a particular case for "good cause." If that recusal request is granted, the district attorney is deemed to be disqualified. *Id.*; *Coleman v. State*, 246 S.W.3d 76, 81 (Tex.Crim.App. 2008). The

decision to seek recusal rests with the district attorney, and cannot be compelled by the trial court. *Id.*

Appellant claims that the trial court erred in granting the elected district attorney's recusal request. We review this claim under an abuse of discretion standard, as the court did in *Coleman*. *Id*. at 85; *but see Id*. at 86 (Keller, J., concurring)(questioning whether the trial court even has the power to act contrary to the wishes of the district attorney). As long as a court's ruling is within the zone of reasonable disagreement, it will not be disturbed on appeal. *Salazar v. State*, 38 S.W.3d 141, 153-54 (Tex.Crim.App. 2001). In short, the trial court is given a "limited right to be wrong," as long as the result is not reached in an arbitrary or capricious manner. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex.Crim.App. 1990). We find no abuse of discretion here.

Appellant initially contends that the case load of the district attorney is not good cause as a matter of law. He cites no cases directly standing for this proposition and we have found none.[13] Had the Legislature wished to limit recusal to some narrow list of reasons, it could have done so. Instead, the Legislature used the term "good cause", which we believe gives the trial court some latitude in evaluating the diverse array of reasons which might arise. Next, Appellant challenges whether the claim of being too busy was valid given that the district attorney bowed out of the case at its inception, and twenty-two months before it actually went to trial. This view of the case, however, discounts that the district attorney may have been unable to attend to the case at the stage that it was in at the time of the recusal. When the motion was filed, the case was under investigation. A grand jury indictment was returned some five months later. Some

[13] Some earlier cases dealing with motions to extend to the time to file pleadings hold that a bare claim of being busy is insufficient to justify the extension. See *Miller v. State*, 665 S.W.2d 599, 600 (Tex.App.--Corpus Christi 1984, no writ)(claim of being "extremely busy working on other matters in his office" did not satisfy the "good cause shown" requirement for extending time to file a brief); *Montgomery Ward & Co., Inc. v. Dalton*, 602 S.W.2d 130, 131 (Tex.Civ.App.--El Paso 1980, no writ)(same). The district attorney's motion in this case referenced specific cases that he was preparing which required his immediate attention.

attorney was needed to present the case to the grand jury, and may have been needed to assist the investigating authorities. We cannot say that the trial court erred in granting the district attorney's recusal request at that time, which allowed for other counsel to step in and immediately assist in developing the case.

And once the district attorney did obtain a recusal, the appointment of counsel pro tem would continue under the terms of the order until the case was complete, or the elected district attorney chose to re-enter the case. In *Coleman*, for instance, the elected district attorney voluntarily recused from the case because he was a potential witness. 246 S.W.3d at 79-80. A pro tem attorney was appointed. A new district attorney was elected who did not have the same conflict. The accused then challenged the pro tem attorney, claiming that because the original district attorney's conflict was no longer at issue, the new district attorney should take back the case. The Court of Criminal Appeals disagreed, holding that the pro tem appointment continued for the life of the case or until the new district attorney sought to take it over. *Coleman* convinces us that if the original decision to grant the recusal was valid, we need not re-evaluate the propriety of pro tem counsel at each successive stage of the litigation.

Appellant's other thrust is that the recusal and appointment of the attorneys pro tem violates the separation of powers provision of the Texas Constitution. Article 2, § 1 of the Texas Constitution creates three distinct branches of government and "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Appellant reasons that when the elected district attorney "abdicates" his duties because he is "too busy" to prosecute a case, the elected district attorney violates this separation-of powers doctrine. The text of the constitutional provision guards against one branch exercising the powers of another, and not of one branch failing to exercise its own powers. Moreover, when the district attorney recuses and

an attorney pro tem is appointed, the pro tem attorney "stands in the place of the regular attorney for the state and performs all the duties the state attorney would have performed under the terms of the appointment." *Coleman*, 246 S.W.3d at 82. As such, from a separation of powers perspective, the appointment does little more than replace one member of a particular branch of government with a different person from that same branch. We overrule Issue Six and affirm the judgment of the trial court.

The trial court certified Appellant's right to appeal. Appellant's counsel signed the form, but Appellant did not. *See* TEX.R.APP.P. 25.2(d). To ensure Appellant understands he has a right to file a *pro se* petition for discretionary review, we ORDER Appellant's attorney to send Appellant a copy of the opinion and judgment, notify Appellant of his right to file a *pro se* petition for discretionary review, and inform Appellant of the applicable deadlines. *See* TEX.R.APP.P. 48.4, 68. Appellant's attorney is further ORDERED to comply with all of the requirements of TEX.R.APP.P. 48.4.

January 18, 2017

ANN CRAWFORD McCLURE, Chief Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., not participating

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