Affirmed and Memorandum Opinion filed December 21, 2010.

In The

Fourteenth Court of Appeals

NO. 14-10-00132-CR

ALONSO ORDONEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 1589063

MEMORANDUM OPINION

In this appeal of his conviction for misdemeanor assault on a family member, appellant Alonso Ordonez argues that the trial court erred in refusing his request for jury instructions on the theories of self-defense and protection of property. Because these theories were not raised by the evidence, we affirm.

I. BACKGROUND

On March 25, 2009, approximately three months after appellant and complainant Paola Rojas ended their seven-year relationship, Rojas dropped her daughter off at school

and saw appellant sitting in his vehicle in the school parking lot. Rojas drove away, but appellant followed. When Rojas stopped at a red traffic light, appellant exited his truck and walked to Rojas's vehicle, but she refused to open the door. According to Rojas, she attempted to call 911 on her cell phone, but appellant, who had another set of keys to the vehicle, opened the door, took the cell phone from her, and stomped on it. As Rojas later testified, appellant repeatedly hit her in the head and face with a closed fist, pulled her hair, choked her, and placed his hands over her nose and mouth as if to suffocate her. At some point, appellant walked back to his vehicle, and Rojas got out of her car to retrieve her cell phone and call for help, but appellant returned, threw her on the ground, and again punched her repeatedly in the face.

Motorists Patricia Trevino and Kelly Janis each were stopped at the intersection where the confrontation occurred and witnessed portions of these events. Each called 911 and reported that a man was beating a woman at the intersection of FM 1960 and Sugar Pine, and each stated that the man returned to his vehicle, drove over the median, and left the scene. Both Trevino and Janis were able to give police the man's license plate number. Rojas also left the scene, but stopped at a store where she saw a police officer and told him what had happened. The officer sent her back to the scene where she was met by Deputy T.L. Moore. According to Moore, Rojas was shaken, upset, and had red marks on her face and neck. She gave Moore appellant's telephone number, and after Moore contacted appellant and he failed to meet with Moore as requested, a warrant was issued for appellant's arrest. He was charged with assaulting Rojas by "unlawfully intentionally and knowingly caus[ing] bodily injury to Paola Rojas . . . by striking [her] with his hand."[1]

[1] Capitalization normalized.

At trial, appellant testified that Rojas was "very violent," and had hit him in the past. He stated that the vehicle she was driving on the date of the incident was his, and that he was simply trying to get it back. According to appellant,

> When I opened the door, I told her to give me the keys to the car. When I got close, then she lunged at me and she was very aggressive, and so I was pushing her back, but she kept lunging at me and lunging at me and that's when she scratched me . . . .

When asked about the red marks Moore had observed on Rojas's face, appellant responded, "I did not hit her, but I don't know that when she lunged at me and I would hold her back, that that's when it happened. But she would hit me."

In contrast, neither Trevino nor Janis saw Rojas attempt to strike appellant. Trevino testified that she saw appellant punching Rojas repeatedly, and Janis testified that she saw appellant "swinging crazily" with both an open hand and a closed fist, striking Rojas in the head, face, neck, and the ribs or stomach. Rojas also testified that she did not hit appellant; moreover, she stated that she was the one paying for the vehicle she was driving. According to Rojas, the vehicle was titled in appellant's name only because Rojas was not an American citizen and had no driver's license.

The jury found appellant guilty as charged and assessed punishment at 90 days' confinement in the county jail; the trial court probated the sentence for one year. Appellant now appeals his conviction on the grounds that the trial court erred in refusing to charge the jury on the defensive theories of self-defense and protection of property.

II. ANALYSIS

A. Self-Defense

When evidence from any source raises a defensive issue, and the defendant properly requests a jury charge on that issue, the trial court must submit the issue to the jury, regardless of whether the evidence is weak or strong, contradicted or unimpeached, credible or unbelievable. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex. Crim. App. 1993) (en banc). A reviewing court must decide whether the evidence adduced by either party, when viewed in the light most favorable to appellant, is sufficient to raise the issue of self-defense. *Granger v. State*, 3 S.W.3d 36, 38 (Tex. Crim. App. 1999).

"[A] defensive instruction is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense *including* the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct." *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007). With certain exceptions inapplicable here, 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 Supp. 2009). To raise the issue of self-defense, appellant must admit that he performed the conduct alleged and offer self-defense as a justification for his actions. *See Young v. State*, 991 S.W.2d 835, 839 (Tex. Crim. App. 1999) (en banc) (finding defendant was not entitled to a jury instruction on the analogous defense of necessity because he argued that he did not commit the offense). Thus, the assertion of self-defense is inconsistent with a denial of the conduct. *Ford v. State*, 112 S.W.3d 788, 794 (Tex. App.—Houston [14th Dist.] 2003, no pet.). To the contrary, because self-defense is a justification for one's actions, it necessarily requires admission that the conduct occurred. *See Young*, 991 S.W.2d at 838.

Here, appellant was charged with intentionally or knowingly causing bodily injury to Rojas by striking her with his hand. *See* TEX. PENAL CODE ANN. § 22.01(a)(1) (defining "assault"). For the evidence to have supported submission of an instruction on

self-defense, appellant first had to admit that he committed the offense. *See Ford*, 112 S.W.3d at 794. But appellant not only failed to make such an admission, he expressly denied that he hit Rojas. *See Arguijo v. State*, No. 14-06-00654-CR, 2008 WL 2133196, at *2 (Tex. App.—Houston [14th Dist.] May 20, 2008, no pet.) (mem. op., not designated for publication) (trial court was not required to submit self-defense instruction where the accused testified that he grabbed the complainant to stop her from hitting him but denied striking her); *cf. Torres v. State*, 7 S.W.3d 712, 716 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (holding that the accused who admitted "possibly hitting her in the face when he grabbed the hair and her forehead, struggling with her, and pushing her away" sufficiently admitted the conduct alleged to permit a self-defense instruction).

Appellant further testified that all of the witnesses were lying. *See Villarreal v. State*, No. 03-09-00291-CR, 2010 WL 4053668, at *3 (Tex. App.—Austin Oct. 13, 2010, no pet.) (mem. op., not designated for publication) (defendant who testified that witness who claimed to have seen defendant punching the complainant was lying was not entitled to a self-defense instruction). Because appellant did not admit the offense as charged and then offer self-defense as the justification for his conduct, but instead denied that he hit Rojas or that he acted with the requisite mental state, the issue of self-defense was not raised by the evidence. *See Ex parte Nailor*, 149 S.W.3d 125, 132–33 (Tex. Crim. App. 2004) (appellant, who testified that he accidently knocked an object from the complainant's hand and the falling object struck complainant, testified in effect to the absence of culpable mens rea, and was not entitled to a self-defense instruction).

On this record, we conclude that the trial court did not err in denying the instruction. We therefore overrule appellant's first issue.

B. Defense of Property

Appellant argues in his second issue that he was entitled to a jury instruction under section 9.41(a) of the Penal Code on the use of force for the protection of one's own property. *See* TEX. PENAL CODE ANN. § 9.41(a) (West 2003). Under this provision, "[a] person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property." *Id.* Appellant, however, testified that he approached the complainant "[b]ecause I wanted the vehicle, because it had been almost three, four months since I had known anything about the vehicle." Thus, according to his own uncontroverted testimony, as well as the testimony of Rojas, it was the complainant and not the appellant who was in possession of the vehicle at the time of the altercation.

Where, as here, the alleged owner of property already had been dispossessed of property and was attempting to regain possession at the time force was used, it is not section 9.41(a) but section 9.41(b) of the Penal Code that applies:

> A person unlawfully dispossessed of land or tangible, movable property by another is justified in using force against the other when and to the degree the actor reasonably believes the force is immediately necessary to reenter the land or recover the property *if the actor uses the force immediately or in fresh pursuit after the dispossession* and:
>
> (1) the actor reasonably believes the other had no claim of right when he dispossessed the actor; or
>
> (2) the other accomplished the dispossession by using force, threat, or fraud against the actor.

Id. § 9.41(b) (emphasis added). Appellant presented no evidence that on March 25, 2009, appellant used force against Rojas "immediately or in fresh pursuit after the dispossession" of the vehicle. To the contrary, he testified that he first asked complainant to return the vehicle ten days after she had taken it, and complainant had been in possession of the

vehicle for approximately three months at the time of the assault. *See Salley v. State*, No. 14-97-00656-CR, 2000 WL 552193, at *3 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (not designated for publication) (appellant's use of force was not immediately after or in fresh pursuit after dispossession when he walked down to his van, retrieved a shotgun, returned upstairs, and shot the complainant who had refused to return appellant's revolver); *Hall v. State*, No. 01-88-00511-CR, 1989 WL 21835, at *2 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (not designated for publication) (appellant who used force in an attempt to recover a wrecker approximately one hour after it was taken did not act "immediately or in fresh pursuit"); BLACK'S LAW DICTIONARY 667 (6th ed. 1990) ("One from whom property has been taken may use reasonable force to retake it if such force is used immediately after the taking. Sometimes referred to as hot pursuit."). We accordingly overrule appellant's second issue.

III. CONCLUSION

Because the trial court did not err in refusing to charge the jury on appellant's theories of self-defense and protection of property, we affirm the trial court's judgment.

/s/ Tracy Christopher
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.
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