# IN THE COURT OF CRIMINAL APPEALS
# OF TEXAS

**NO. PD-1199-18**

**OBINNA EBIKAM, Appellant**

**v.**

**THE STATE OF TEXAS**

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY**

**YEARY, J., filed a dissenting opinion in which WALKER, J., joined.**

## DISSENTING OPINION

We granted review in this case to decide "whether a defendant's failure to admit the exact manner and means of an assault as set out in a charging instrument is a sufficient basis to deny a jury charge on self-defense." In applying the so-called "confession and avoidance" principle to the facts of this case, the Court declares that "a flat denial of the conduct in question will foreclose an instruction on a justification defense." Majority Opinion at 8. I agree, of course, that a justification defense must be raised by the evidence, but I find no basis in the statutory scheme to impose a requirement that the defense must refrain from "flatly denying" the offense before the defendant

may be entitled to a jury instruction. Because I believe the evidence in this case adequately raised self-defense, I respectfully dissent.

A justification defense does not deny any element of the charged offense. Instead, it justifies what would otherwise constitute a prosecutable offense; it creates a defense to prosecution, a reasonable doubt about which will require the jury to acquit. *See* TEX. PENAL CODE § 9.02 ("It is a defense to prosecution that the conduct in question is justified under" Chapter 9 of the Penal Code); *id*. § 2.03(d) ("If the issue of the existence of a defense is submitted to the jury, the court shall charge that a reasonable doubt on the issue requires that the defendant be acquitted."). Under Section 2.03(c) of the Penal Code, "[t]he issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense." TEX. PENAL CODE § 2.03(c). But while there must be evidence to support a jury finding of "the existence of a defense," the statute does not attempt to characterize that evidence, much less restrict its source. *See Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007) ("[U]nder § 2.03(c), 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."). Insofar as Section 2.03(c) is concerned, any evidence will do—so long as it supports a rational jury finding.

Absolutely nothing in this statutory scheme requires the defense to concede the elements of the offense, in whole or in part, before the defendant may be entitled to a justification defense. Nor should his steadfast denial necessarily result in the refusal of a justification instruction—so long as there is other evidence in the record from which a jury could rationally conclude: 1) that the defendant did indeed commit the elements of the offense, notwithstanding his denial; but also, 2) that he was justified in doing so under Chapter 9 of the Penal Code. Such cases will undoubtedly

prove exceedingly rare, but the Court should not categorically rule out the possibility as a matter of law. The statutes certainly do not.[1]

Of course, if the jury could rationally reject the defendant's steadfast denial, *and* there is *no* evidence from which it could rationally find that his conduct was justified under Chapter 9 (which will likely be typical, but not universal), then of course the defendant should receive no defensive instruction. He has simply contested the offense. And, in the absence of evidence raising the justification, an application paragraph requiring the State to convince the jury of the elements of the offense beyond a reasonable doubt will adequately protect the defendant's rights.

In this case, I believe, there is some evidence from which the jury could have been convinced that Appellant caused the injury sustained by the victim, notwithstanding Appellant's denial that he struck her with his hand. There was also evidence that he caused that injury (albeit not with his hand) as a response to the victim's own use of force. And the evidence, in my view, was sufficient to support a rational jury finding that Appellant was justified in causing the injury. As a result, I conclude that his requested instruction should have been given.

The information alleged that Appellant committed simple assault by intentionally, knowingly, or recklessly causing injury to the victim by striking her with his hand. As the Court observes, assault is a result-oriented offense. Majority Opinion at 11 (citing *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008)). Oddly enough, the information did not specify the

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[1] In *Juarez v. State*, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010), the Court acknowledged that Section 2.03(c) of the Penal Code does not impose a "confession and avoidance" requirement, at least in the context of the justification of necessity. TEX. PENAL CODE § 9.22. But, the Court reasoned, "confession and avoidance" was judicially incorporated within the statute defining the necessity justification itself. *Juarez*, 308 S.W.3d at 404–05. The Court held that the more specific statute (Section 9.22, as judicially construed) governed the more general statute (Section 2.03(c)), thus rationalizing adherence to the "confession and avoidance" principle for purposes of the necessity justification. The instant case does not involve necessity. But more importantly, I see absolutely nothing in the statutory language of Section 9.22 *itself* that incorporates the "confession and avoidance" principle for purposes of the necessity justification; I therefore perceive nothing about Section 9.22 that could possibly "trump" the plain language of Section 2.03(c).

injury—the result contemplated by the assault statute—that Appellant caused to the victim. It specified only the manner or means by which he injured her—an allegation to which the State is not bound. *Id*. at 12 (citing *Johnson v. State*, 364 S.W.3d 292, 295 (Tex. Crim. App. 2012), and *Hernandez v. State*, 556 S.W.3d 308, 316 (Tex. Crim. App. 2017)). The only injury shown by the evidence was that which the victim testified to; namely, a bloody lip. Appellant denied having caused that injury by striking her with his hand, but his own testimony circumstantially identified another way—another use of non-deadly force by him—by which he might have recklessly caused the only injury identified by the evidence—the bloody lip.

Appellant testified that the victim attempted to "barge" into his home, and that he resisted her by pushing back against the door. He was able to successfully keep her out until, eventually, he decided to grab his nearby cell phone to call the police. Only when he reached for the phone was the victim able to get through the doorway. Appellant denied having ever struck her with his hand. The prosecutor then asked him, "So then how did she get that busted lip?" He replied: "To answer the question, well, you know, someone is trying to struggle to get into someone's apartment, and in the process, the lips are so tender, I didn't hit her. If she sustained any injury, I did not see."

I believe that, under all the attendant circumstances, the jury could have rationally inferred from this testimony that Appellant caused the victim's split lip as he was pushing back against the door, even if Appellant himself claimed not to realize that he had done so. If he acted at least recklessly with respect to whether he might cause her that specific injury in that specific way, then he still committed conduct that would otherwise constitute the offense. *See* TEX. PENAL CODE § 22.01(a)(1) ("A person commits an offense if the person . . . intentionally, knowingly, or recklessly causes bodily injury to another[.]"). But if the jury also believed that he only did so as a reasonable response to her "barging" into his apartment, then his conduct in committing the offense may have been found to be justified as a use of non-deadly force in response to a perceived use of non-deadly

force against him. *See* TEX. PENAL CODE § 9.31(a) ("[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."). There was some evidence to justify submitting the requested instruction.

I would reverse the judgment of the court of appeals, not remand the cause to that court for further proceedings. I respectfully dissent.

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