IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1130-19

MARVIN RODRIGUEZ, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
TARRANT COUNTY**

KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and HERVEY, RICHARDSON, NEWELL, SLAUGHTER, and MCCLURE, JJ., joined. YEARY and WALKER, JJ., concurred.

OPINION

Appellant was charged with murder. At trial he requested jury instructions on the defenses of necessity, self-defense, and defense of a third person. The trial court denied his request, and he was convicted of murder. The court of appeals affirmed on grounds that Appellant failed to satisfy the confession-and-avoidance doctrine. *Rodriguez v.*

State, No. 02-17-00371-CR, 2019 WL 3491647, at *3–5 (Tex. App.—Fort Worth, August 1, 2019) (mem. op., not for publication).

We granted Appellant's petition for discretionary review to consider whether his actions and admissions satisfied the doctrine of confession and avoidance, whether *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989), is still good law, and whether the facts leading to the charged conduct are relevant. We conclude that he did satisfy the requirements of confession and avoidance in that his testimony equivocated about his commission of the charged conduct, *Martinez* still stands, and all the facts surrounding the charged conduct may be relevant in deciding whether a defensive issue has been raised. Consequently, we reverse the judgment of the court of appeals and remand the case for a harm analysis.

I. Confession and avoidance

Confession and avoidance is a judicially imposed requirement that requires defendants who assert a justification defense to admit, or at a minimum to not deny, the charged conduct. *See Bowen v. State*, 162 S.W.3d 226, 230 (Tex. Crim. App. 2005); *see also Juarez v. State*, 308 S.W.3d 398, 401–02 (Tex. Crim. App. 2010). Texas Penal Code Section 9.02 states that "[i]t is a defense to prosecution that the conduct in question is justified under this chapter." Tex. Penal Code § 9.02. Conduct "means an act or omission and its accompanying mental state." Tex. Penal Code § 1.07(a)(10). Logically, one cannot both justify and deny conduct. Thus the Penal Code implies that the evidence

must support, or at least not negate, the act and accompanying mental state that the defense seeks to justify. *See* Tex. Penal Code § 9.02.

The evidence need not unequivocally show that the defendant engaged in the conduct. *See Juarez*, 308 S.W.3d at 404–05; *Gamino v. State*, 537 S.W.3d 507, 512–13 (Tex. Crim. App. 2017). Whether the evidence supports the requested justification is viewed in the light most favorable to the requested instruction. *See Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001). Credibility is for the jury to decide; the courts' only role is to determine if there is some evidence—even if weak, inconsistent, or contradictory—that a rational jury could find supports the defense. *E.g.*, *Juarez*, 308 S.W.3d at 404–05; *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

The traditional confession-and-avoidance formulation is that the defendant must admit to "all elements of the charged offense" to warrant an instruction on a justification defense. *See Juarez*, 308 S.W.3d at 401–02. However, that formulation has been rephrased and even seemingly undermined. *See id.* (discussing different applications of the doctrine); *compare id. with Gamino v. State*, 537 S.W.3d at 512 ("Admitting to the conduct does not necessarily mean admitting to every element of the offense."). One case stands out in this apparent conflict: *Martinez v. State*.

Martinez was charged with murder for shooting his wife's uncle. *Martinez*, 775 S.W.2d at 645–46. He testified that the victim was being violent towards him, so he pulled out his gun and fired it in the air. *Id.* at 646. He did not intend to kill the victim, but his mother-in-law grabbed his arm as he was firing the gun into the air, causing him

to shoot the victim. *Id.* He testified that his mother-in-law's finger was over his, which forced his finger to remain on the trigger. *Id.* This Court held that his denial of intent to kill did not "preclude an instruction on self-defense," since he had admitted that his finger was on the trigger at the moment the lethal shot was fired. *Id.* at 647. The Court went on to hold that he was nevertheless not entitled to a self-defense instruction because no evidence supported a justification for his use of deadly force. *Id.* at 647–48.

Juarez treated *Martinez* as an anomaly in our jurisprudence, citing it as an instance where we ignored the general rules of confession and avoidance to hold that Martinez was entitled to a self-defense instruction even though he denied any intent to kill the victim and instead asserted accident. *See Juarez*, 308 S.W.3d at 403. But the opinion also held that Juarez satisfied confession and avoidance even though he denied intentionally biting his victim. *Id.* at 405–06. Juarez did not "flatly deny" a culpable mental state because such a mental state "could have reasonably been inferred from his testimony about the circumstances surrounding his conduct." *Id.* Although he denied biting the victim intentionally, knowingly, or recklessly, he admitted biting him because the victim was causing him to suffocate. *Id.* at 405. Thus *Juarez* and *Martinez* are consistent: a defendant's testimony explicitly denying a culpable mental state or asserting accident does not automatically foreclose a justification defense if his testimony may otherwise imply a culpable mental state. *Juarez* and *Martinez* are not anomalous in so holding.

For example, in *Merritt v. State*, we held that if the circumstances around the homicide gave Merritt "the legal right to defend against an unlawful attack . . . causing him to have a reasonable expectation or fear of death or serious bodily injury, his right of self-defense would inure regardless of whether the discharge of the pistol was accidental or otherwise." 213 S.W. 941, 942 (Tex. Crim. App. 1919).

In *Garcia*, the murder defendant testified that her husband was "very mad" at her and was reaching into his pocket as though to draw a knife while threatening to kill her. *Garcia v. State*, 492 S.W.2d 592, 595–96 (Tex. Crim. App. 1973). She grabbed a shotgun, but "[j]ust to scare him so he'd stop and leave me alone"; "I don't know if I had my hand on the trigger or not, but it slid part on. It was not all the way shut and it went like this and it went off[.]" *Id.* at 594. We held that she testified that she "did not intend to shoot the gun," but based on her testimony, the jury "may have had a reasonable doubt as to whether she was defending herself against an unlawful attack, real or apparent, giving rise to a reasonable apprehension of losing her life or suffering serious bodily injury." *Id.* at 596. She was entitled to an instruction on self-defense. *Id.*

In *Sanders v. State*, cited by *Martinez*, the defendant testified that he was under attack by a group of people; he fired a warning shot as he fled, hitting one of the attackers. *Sanders v. State*, 632 S.W.2d 346, 346–47 (Tex. Crim. App. 1982). He testified he did not intend to hurt anyone, but he also testified he was trying to protect himself. *Id.* at 347. We held that Sanders was entitled to an instruction on self-defense because self-defense is available even if a defendant denies intent to harm. *Id.* at 348.

Similarly, in *Alonzo v. State*, Alonzo testified that his victim was stabbed in a mortal struggle over a metal spike, but he didn't "remember hitting [the victim] with it" or even having "possession of the weapon." 353 S.W.3d 778, 779 (Tex. Crim. App. 2011). We held the trial court erred to deny an instruction on self-defense for the lesser included offense of manslaughter because one need not intend the death of his attacker to be entitled to self-defense with deadly force. *Id.* at 783.

Refusing the defensive instruction in cases like *Martinez*, *Juarez*, *Merritt*, *Garcia*, *Sanders*, and *Alonzo* would violate a court's duty to look at the evidence in the light most favorable to the requested instruction. The refusal would depend on accepting as true the defendant's express denial of intent and ignoring his admissions about having hurt or killed the victim in response to the victim's aggression. Such admissions imply the requisite intent even if the defendant otherwise denies it. But granting the instruction would allow the jury to resolve the conflict in the evidence. Consequently, in a case of conflicting evidence and competing inferences, the instruction should be given.

II. The evidence in this case

Appellant was charged with murder for shooting and killing Richard Sells. The events took place in the Cowboys Stadium parking lot after a football game. Appellant had been tailgating along with his brothers, Candido and Javier, and several others, including the victim, Sells. As people were fixing to leave, a fight broke out between Candido, and two other men, Miguel and Francisco. The fight grew into a chaotic brawl that culminated in Appellant shooting and killing Sells.

The State's evidence showed Sells was trying to break up the fight and help Candido out of the fight when Appellant shot him. Sells' fiancée testified that she saw Appellant push Sells away once, and when Sells attempted to go back, Appellant came up behind Sells and shot him. Another tailgater, Rodney Webb, also believed Sells was breaking up the fight. He testified that by the time Appellant arrived with the gun, there were only two men still wrestling, and that as they were getting up, Appellant told one man to move, pointed the gun at Sells, and shot him. Webb also said that he did not see Appellant get hit or injured. Anthony Aguirre, another tailgater, testified that he did not see Sells strike anyone and saw Appellant shoot Sells.

The defense's evidence showed that Candido was sucker punched and attacked by Miguel and Francisco and that several people were involved in a violent fight. Candido testified that after the initial strike he fell unconscious; when he came to, he was on the ground being choked, punched, and kicked by multiple people. At one point he was slammed against a retaining wall. He ended up facedown on the ground. He felt the weight of someone on his back as he was being punched, blood was running down his throat, and he couldn't breathe. He thought he would lose consciousness and feared for his life. Candido yelled for his brothers. He heard a gunshot, and the weight lifted, allowing him to breathe again.

Appellant testified that he saw Candido get sucker punched and attacked by multiple people. He tried to intervene with his fists and was hit several times, getting knocked down twice. He then retrieved a gun from his brother's Hummer. He got the

gun because he feared he would be severely injured and that he needed to defend Candido but was unable to with just his fists. He denied the intent to kill anyone but instead got his gun to scare away the attackers.

When he returned to the scene of the fight he drew the gun and threatened Lester Peters, who he believed was involved in the attack, and told him to leave. He then went to Candido, who was on the ground being beaten by a group of men. Sells was kneeling on Candido's back and punching him. Candido was screaming. Appellant testified that he grabbed Sells in a headlock and put the gun to his neck, at which point he felt Sells jerk away and felt someone pulling at his arm. The gun fired, mortally wounding Sells.

Appellant insisted that he never intended to fire the gun, and that he was "shocked" when it went off. On cross examination he agreed that "the only way it would have gone off" was if his "finger was on the trigger." On redirect examination, he explained that when he felt people pulling his arm and grabbing at him, his "instinctual reaction would be to pull back" and that he instinctually "gripped" the gun "tightly."

III. Did Appellant "sufficiently admit" the charged conduct?

The District Attorney argues that Appellant's testimony foreclosed any justification defense because he denied both the act and the culpable mental state. The DA points out that Appellant claimed that the shooting was involuntary—negating the act—and that he did not intend to shoot Sells—denying the culpable mental state. But the defensive evidence on these points conflicted, and Appellant equivocated on them.

III.A. Voluntary Act

Voluntariness is a low threshold. Even accidental or unintentional movements and actions are voluntary. *See Rogers v. State*, 105 S.W.3d 630, 638–39 (Tex. Crim. App. 2003) (interpreting "voluntary" under Texas Penal Code Section 6.01 versus "nonvolitional"). Only if an outside force directly causes the movement, or if the movement is the result of truly nonvolitional action such as a muscle spasm, will an action be deemed involuntary. *See id.* Appellant did not testify to an outside force causing the gun to fire.

Appellant testified that Sells tried to jerk away and other people were pulling on Appellant while he was pointing the gun at Sells. But he conceded his finger must have been on the trigger when the gun fired, and he testified that he "gripped" the gun "tightly" as part of an "instinctual reaction" to having people grab at him and the gun. A rational jury could find that by gripping the gun tightly with his finger on the trigger, Appellant fired the gun voluntarily. *See Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (holding that voluntariness is a separate issue from mental state).

III.B. Mental State

Appellant's testimony was also sufficient to support a finding of intent to kill. "[P]ointing a loaded gun at someone and shooting it toward that person at close range demonstrates an intent to kill." *Ex parte Thompson*, 179 S.W.3d 549, 556 n.18 (Tex. Crim. App. 2005). His admitted use of a deadly weapon also supported an intent to kill. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996) ("The jury may infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer

that death or serious bodily injury could result from the use of the weapon."); *Ross v. State*, 861 S.W.2d 870, 873 (Tex. Crim. App. 1993) (orig. op.) (same). If such testimony will support a conviction, then it also satisfies the confession-and-avoidance requirement.

Appellant's admissions of intent were more damning than those of Martinez because Appellant admitted to pointing the gun at Sells whereas Martinez blamed a third party for causing him to aim at his victim. *See Martinez*, 775 S.W.2d at 646–47. Thus, overruling *Martinez* would not change the outcome in this case, and we decline to overrule it now.

The DA argues that Appellant's case is like *Ex parte Nailor* where we held that Nailor was not entitled to a self-defense instruction because he did not satisfy confession and avoidance. 149 S.W.3d 125, 132–34 and n.33 (Tex. Crim. App. 2004). But *Nailor* is distinguishable from this case. Nailor testified that he did not assault the victim but that the victim was attacking him with a brass eagle figure, which was accidentally knocked out of her hands when he raised his hands to shield himself, causing the figure to fall out of her hands and strike her in the face. *Id.* at 128, 132. Unlike Nailor, Appellant did not assert that he was passively defending himself or that, in essence, his attacker caused his own injury. Appellant testified that he put Sells in a headlock and pointed the gun at his neck, and the gun went off during a struggle in which he retained control of the weapon and had his finger on the trigger. Additionally, *Nailor*'s reasoning highlighted the difference between the manner and means the State alleged and the manner and means Nailor asserted. *Id.* at 133. The manner and means in this case, shooting with a gun, is

consistent between the State's and Appellant's versions of events. For these reasons, *Nailor* is inapposite.

IV. The State's arguments re: preservation, deadly force, and *Martinez*

The DA argues that Appellant's claim is unpreserved because his assertion that he "sufficiently admitted the offense of murder" is different than his assertion at trial. The DA points to the following quote from trial counsel:

> [Appellant] testified he did not intend to cause Mr. Sells' death and that he did not intend to cause him serious bodily injury and do an act clearly dangerous to human life; in other words, that he was not guilty of murder. And under the confession and avoidance doctrine, unless there was evidence from someplace else that the defendant did intentionally cause the death, that would mean he's not entitled to self-defense on that offense. Our position is that the testimony from the other witnesses essentially that the defendant clearly did an intentional act, namely putting the gun up to the guy's head and pulling the trigger without any intervention, raises the issue of whether he did an intentional act.

The DA contrasts this statement with Appellant's argument on appeal that he sufficiently admitted to the offense of murder. Because of this difference, the DA says the issue was unpreserved, citing *Penry v. State*, 903 S.W.2d 715, 753 (Tex. Crim. App. 1995) (error was waived where trial objection and appellate argument did not comport).

Appellant counters that the quote from the record cited by the DA is out of context, and that trial counsel was making an argument in the alternative. The record supports this view. Trial counsel argued,

> So even if you were to find—and *we're not conceding this*, we believe that it is applicable. But were you to find that under confession and avoidance [Appellant] doesn't get necessity, self-defense, and defense of third person to murder, we believe his testimony establishes . . . confession and avoidance [for manslaughter].

* * *

> So our position is *even if [Appellant] didn't admit to intentionally or knowingly causing the death* or intending to cause serious bodily injury and doing an act clearly dangerous to human life, *and that's the ultimate ruling you make even though we continue to object to it*, you still have the issues of how the defense, the justifications play into manslaughter and criminally negligent homicide.

(emphasis added). These statements raise the argument that Appellant's testimony itself "sufficiently admitted" the charged conduct while raising an alternative argument should the trial court disagree.

The DA also argues that even if confession and avoidance were met in this case, there is no evidence that Sells was using or attempting to use deadly force, and Appellant therefore could not be justified in using deadly force against Sells. According to the DA, Candido was on the losing end of a fistfight, and fists cannot constitute deadly force. However, that assertion ignores the defense's evidence to the contrary. According to Candido, this was no mere fistfight—he was in fear for his life because he was being punched and kicked by multiple assailants while facedown on the concrete with a weight on his back that kept him from breathing. Other evidence put forward by the defense, including Appellant's testimony, corroborated these claims; it was a "violent" fight involving multiple attackers on Candido.

Deadly force is "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." Tex. Penal Code § 9.01(3). In the context of self-defense, actual deadly force is not required; rather, apparent danger may suffice. *Jordan v. State*, 593 S.W.3d 340, 343

(Tex. Crim. App. 2020). An assault by multiple people can constitute deadly force. *See id.* at 345, 348 (holding Jordan was entitled to self-defense instruction where he shot in defense against an apparently unarmed group attack). Preventing a person from breathing can be deadly. And even a fist or foot can be a "deadly weapon," which is "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tex. Penal Code § 1.07(a)(17)(B); *see Lane v. State*, 151 S.W.3d 188, 192 (Tex. Crim. App. 2004) (holding that the facts and injuries supported finding "that appellant used both his hand and his foot as 'deadly weapons' within the meaning of that phrase as defined by the Penal Code."). A rational jury could have believed that Appellant was justified in using deadly force.

Finally, the DA takes issue with Appellant's briefing of his second point, that "a court should view the admissions and the actions of the defendant within the context of the entire episode and not focus myopically on the moment of the defendant's final criminal act" when ruling on confession and avoidance. The DA maintains that the point is inadequately briefed because "Appellant fails to allege the analytical steps that he believes the Second Court was required to undertake[.]" But Appellant does prescribe an analysis, namely, that the court consider Appellants actions and mental state during the "entire process" of the fight, not just his denial of intent at the moment the trigger was pulled.

The State Prosecuting Attorney argues that *Martinez*'s statement that Martinez "sufficiently admitted" the charged offense was dicta because the deadly force issue

ultimately decided that case. *Martinez*, 775 S.W.2d at 647–48. However, the Court could not have reached the deadly force issue without first deciding that Appellant had raised self-defense. *See id.* at 646–47. So the "sufficiently admitted" statement was not dicta.

The SPA also argues that *Martinez* should be overruled and that the other unintentional self-defense cases that support it did not actually allow unintentional self-defense against charges of an intentional offense, but only as a defense to non-intentional offenses. It points to *Alonzo* to illustrate its point. However, Alonzo was given an instruction on self-defense to the murder charge. *Alonzo*, 353 S.W.3d at 780. We held that he was also entitled to self-defense for the lesser-included manslaughter charge; we did not hold that self-defense for the murder charge was foreclosed because he denied intent. *See id.* at 783.

V. Conclusion

Appellant satisfied confession and avoidance notwithstanding his assertion that he unintentionally fired the gun because his testimony impliedly supported the charged conduct. We reverse the judgment of the court of appeals and remand the case to the court of appeals for a harm analysis under *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984).

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