



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

CESAR SANTOS-GARCIA,	§	No. 08-13-00324-CR
Appellant,	§	Appeal from the
v.	§	120th District Court
THE STATE OF TEXAS,	§	of El Paso County, Texas
Appellee.	§	(TC# 20120D04146)
	§	

OPINION

Cesar Santos-Garcia appeals his conviction on one count of aggravated assault with a deadly weapon. In three issues, Santos-Garcia challenges the legal sufficiency of the State's case, the jury's rejection of his justification defense, and the propriety of a defense-of-others charge given by the trial court.

We affirm Santos-Garcia's conviction.

BACKGROUND

This case arises out of an East El Paso bar fight. While the facts surrounding the fight are disputed, neither side contests the fact that the fight culminated in a parking lot shooting that left Adrian Moreno with a bullet in his spinal cord, paralyzed from the waist down. The central questions at trial were the identity of the shooter and whether the shooting was justified.

The State's Case

The Bar Fight

The night of the shooting, Moreno met up with his friends John Garcia, Steven Alvarez, and Jesus Campuzano at a bar called On the Rocks, located on Zaragosa Drive. While the State called all four men to the stand at trial, the State's case largely hinged on the testimony of Garcia; Moreno could not remember the specifics of what happened that night, and Alvarez and Campuzano testified they were inside the bar at the time of the shooting and did not witness what happened outside in the parking lot.

Garcia's Recollection

Garcia testified that after his group of friends at the bar, he saw a girl named Nicole that he briefly dated. Garcia had a short conversation with Nicole before returning to a table where other members of his friend group were sitting. According to Garcia, Moreno told him that he noticed the men sitting at Nicole's table were staring at and "mad-dogging" Garcia. Several men from the other table also repeatedly bumped into Garcia as they passed by his table. This continued for about 20 to 30 minutes. Garcia testified that Moreno perceived the bumping to be intentional.

Eventually, Moreno exited the bar to confront one of the men in the parking lot. Garcia followed. Moreno and the man from the other table argued, but Garcia broke up the argument and made "peace." As Garcia and Moreno began returning to the bar, Garcia turned around and saw two men running toward him. Garcia testified that he pushed Moreno, who was wearing a walking boot due to a previous ankle injury and walking with a limp, into the bar and then went back outside to talk to the men. Garcia put his hands up and said "everything's cool," but the man punched Garcia in the face. The man who threw the punch fell face-down on the ground. Garcia testified that he kicked the man so hard that the man turned over onto his back. Garcia then turned

to the other man and assumed a fighting stance; the other man began backing away. At this point, Garcia said, Moreno came back outside. Garcia saw two other men from the other group approaching him from behind, but then the men stopped. Garcia then heard “a loud band or pop,” and Moreno fell to the ground with a gunshot in his back. Garcia called 911. Garcia saw an SUV drive away from the scene and gave the license plate number to the operator. Garcia denied having or using a knife that night, and he testified that Moreno did not have or use a knife, either. Garcia could not identify any of the men involved in the fight at trial.

Other Eyewitness Recollections

An independent witness who was not associated with either group, Erik Hernandez, was smoking outside at the time of the fight. Hernandez testified that he saw two different groups of people interacting inside the bar that night. Later, as Hernandez was smoking on the bar’s patio, he saw people from both groups exit the bar and begin arguing and pushing each other. Two men, one of whom was wearing a cast, began walking back inside the bar when one of the men got “sucker punched” by a man from the other group. Hernandez was standing about ten feet away. According to Hernandez, by the time the man with the cast returned, the “scuffle” has finished. Hernandez described the fight as not very serious. Hernandez did not see any knives or weapons used in the fight, but he admitted on cross-examination that his view was partially obstructed by cars in the parking lot. After the fight died down, Hernandez heard a loud bang. Hernandez testified that two men from the second group ran away toward an SUV. Another witness relayed the SUV's license plate number to Hernandez, who in turn relayed it to 911.

Witnesses Rene Portillo and Jacqueline Hinojos were also nearby outside when the shooting took place. Portillo testified that he and Hinojos were leaving the bar and were directly in front of the entrance door when he heard the gunshot. Portillo turned around and saw the victim

face down on the ground. Portillo aided the victim until paramedic arrived about 10 to 15 minutes later. Portillo also saw two men running in the opposite direction and a large SUV leaving the parking lot. Portillo did not see who fired the gun and did not know the victim or any of the men involved in the fight.

Hinojos testified that as she and Portillo left the bar, she saw what seemed like a confrontation between several individuals, but she described it as more of a verbal argument, and she did not witness any physical fighting. As Hinojos and Portillo approached her vehicle, Hinojos heard a gunshot. She then saw “at least one” individual and possibly several running toward a light-colored SUV. As the SUV drove off, Hinojos got the license plate number for the vehicle.

Aftermath and Investigation

Officer Louis Evans of the El Paso Police Department (EPPD) testified he received a dispatch call that there had been a shooting at the On the Rocks bar and that a vehicle was seen heading south on Zaragosa Drive. Approximately five minutes receiving the call, Officer Evans, assisted by other officers, conducted a felony stop of a vehicle matching the description and license plate number of an SUV that had left the scene of the shooting. At trial, Officer Evans positively identified Santos-Garcia as the driver. EPPD Officer Alvaro Sepulveda, who assisted with the felony stop, testified that the passenger of the SUV, Amador Cedeno, was not cooperating with instructions, which led police to push him down to the ground for not complying. Officer Sepulveda noticed that the passenger had blood smeared on his arm and hands, so EPPD requested paramedics, who bandaged Cedeno’s arm and transported him to the hospital. Officer Sepulveda testified that Cedeno was not injured when officers pushed him down on the ground to make the arrest. Meanwhile, Officer Charles Burns, conducted a search of the vehicle and saw open containers of beer and a handgun in plain view inside the open center console of the SUV.

Forensic testing performed by Thomas Rusk White, a forensic chemist with the Texas Department of Public Safety (DPS) crime lab, showed that Santos-Garcia had gunshot residue (GSR) on his hands, but Cedeno did not. White testified that the presence of GSR on someone's hands indicates that the person recently fired a weapon, was near a firing weapon, or handled an item with GSR on it, such as a weapon or a cartridge case. Texas Department of Public Safety firearms and toolmark examiner Joseph Correa testified that a shell casing found at the scene of the shooting was fired from the gun recovered from the SUV.

Santos-Garcia's Case

Following the close of the State's case-in-chief, Santos-Garcia moved for a directed verdict, contending that the State failed to prove that he was the shooter or that he acted with the requisite intent. The trial court overruled Santos-Garcia's motion. Santos-Garcia then put on a defensive case centered on a defense-of-a-third-person justification theory. Namely, Santos-Garcia argued that he shot Moreno to defend Cedeno from serious bodily harm, as Santos-Garcia believed that Cedeno was being stabbed.

Defense Witness Recollections

Zamora's Recollection

Andrea Zamora, who is Santos-Garcia's girlfriend and the mother of his child, testified that she was with Santos-Garcia, Cedeno, and Nicole at On the Rocks the night of the shooting. At some point, Cedeno and Nicole exited the bar and went to the parking lot to look for Nicole's cell phone. Zamora testified that "like five guys" from another table followed Cedeno and Nicole outside, so Zamora went to see what was happening. Once outside, Zamora saw Santos-Garcia and Cedeno arguing with five other men. She said she saw Santos-Garcia break up the argument. Santos-Garcia and Cedeno then tried to re-enter the bar, but the men continued harassing them.

Zamora testified that the group then “jumped” Cedeno, with two men on top of him and three men standing around.¹ At that point, Santos-Garcia went to his truck, retrieved a gun, and shot the man on top of Cedeno. Santos-Garcia then took Cedeno to Cedeno’s truck and drove off. Zamora followed the vehicle until police pulled Santos-Garcia and Cedeno over on George Dieter Drive.

Cedeno’s Recollection

The second defense witness, Cedeno, testified that at the time of the shooting, he was in the Marine Corps reserves and that he had previously served on active duty in the Marines, where he received training in hand-to-hand combat. Cedeno stated that Nicole spent the entire night with Santos-Garcia’s group and that she never spoke with anyone in Moreno’s group. During the evening, Nicole mentioned that she had lost her phone and that she had possibly left it in her car, so Cedeno offered to help her look for it. In the parking lot, a drunk man who was “pretty wasted” approached Cedeno and Nicole and began insulting Cedeno and using profanity. Then another drunk man who was also using profanity and acting aggressively approached. Santos-Garcia came up to Cedeno and asked what was happening, but Cedeno told him not to worry about it and said they should go back into the bar and not get into any problems. Cedeno and Santos-Garcia then walked back toward the bar, but because Zamora called Santos-Garcia over to her, Santos-Garcia went a separate way. Then, the first man who had confronted Cedeno punched Cedeno in the face, so Cedeno punched him back. The man Cedeno punched fell to the floor. Cedeno, who is 5’8” tall and weighed 150 to 160 pounds at the time, described the man he punched as being around his height. Cedeno was then struck by the second man from the parking lot, who was about 6’1” or 6’2” tall and weighed between 280 and 300 pounds. Cedeno testified that he fell down, and he

¹ Zamora also testified that she heard someone yell that Cedeno was being stabbed. The State objected on hearsay grounds and asked that the statement be stricken from the record. The trial court did not explicitly rule on the objection but stated that “[a]ny hearsay statement will be stricken from the record.”

was struck by what he believed were four individuals. The larger man was crouched down over him, and two other men were standing shoulder-to-shoulder. Cedeno, who stayed in the fetal position as he was being attacked, then felt an “excruciating sharp pain” on the inside of his elbow, which he believed came from a weapon, and Cedeno’s arm began bleeding. The larger man then collapsed on top of Cedeno after being struck by a bullet. Santos-Garcia then pulled Cedeno out from under the man and into Santos-Garcia’s vehicle. The trial court admitted photographs of Cedeno at a medical facility, including one depicting a laceration on his arm that Cedeno described as a stab wound. Cedeno thought the laceration was serious, but he also testified that until the vehicle was stopped by police, he intended on treating the wound himself. On cross-examination, Cedeno admitted he never saw any weapon that would have caused the laceration on his arm.

Santos-Garcia’s Recollection

Santos-Garcia, testifying in his own defense, said that when Cedeno and Nicole exited the bar, “about four” men from the other group followed Cedeno outside, so Santos-Garcia went to see what was going on. Santos-Garcia positively identified John Garcia as the man who was confronting Cedeno in the parking lot; he opined that Garcia was about the same size as Cedeno. Santos-Garcia also identified Moreno as the person standing next to Garcia during their confrontation with Cedeno. Santos-Garcia testified that he and Moreno were both about 6’2” tall, but that he (Santos-Garcia) weighed about 185 pounds, whereas Moreno was heavier. Santos-Garcia asked Cedeno what was going on, and Cedeno told him the two men had tried to fight with him. Santos-Garcia then told Cedeno “[l]et’s go.” Santos-Garcia and Cedeno then began walking back to the bar, but they separated from one another; Cedeno walked in between two cars toward the front entrance of the bar, and Santos-Garcia walked over toward where Zamora was standing before walking toward the entrance. Zamora told Santos-Garcia something, and Santos-Garcia

turned and saw Cedenó go to the ground in between two parked vehicles. Santos-García testified that he saw someone with a knife making a thrusting-down motion, so he ran to his car to get his gun. Santos-García further testified that he was worried that Cedenó was being stabbed. Santos-García racked the gun and pointed it at a man who was running toward him. That man ran away. Santos-García then fired at the man who was on top of Cedenó. Santos-García and Cedenó then got into Santos-García's car. Santos-García testified that Cedenó had a wound on his arm that was squirting blood, so he ripped off his shirt and used it as a tourniquet on Cedenó's arm. Santos-García testified that he intended to take Cedenó to the hospital at the time he was stopped by police. On cross-examination, Santos-García admitted that he had been convicted of a crime involving moral turpitude, namely, assault/family violence.

Verdict

The jury rejected Santos-García's defense and found him guilty of aggravated assault with a deadly weapon. This appeal followed.

DISCUSSION

I.

Legal Sufficiency

We begin with Santos-García's legal sufficiency points. In Issue One, Santos-García contends the evidence is legally insufficient to support the identity and mens rea elements of aggravated assault. In Issue Two, Santos-García maintains that even if the State was able to establish a prima facie case for aggravated assault, the jury could not have rationally rejected his justification defense—namely, that his actions were done to defend a third person, Amador Cedenó, from harm.

We disagree with Santos-García on all points. The jury could have found him guilty of aggravated assault beyond a reasonable doubt and rationally rejected his defensive theory.

A.
Standard of Review

On legal sufficiency review, we assess all trial evidence “in the light most favorable to the prosecution,” to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Clayton v. State*, 235 S.W.3d 772, 778 (Tex.Crim.App. 2007), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). We measure legal sufficiency based on the statutory elements of the offense and the indictment. *Malik v. State*, 953 S.W.2d 234, 239 (Tex.Crim.App. 1997). We review all record evidence—direct or circumstantial, properly admitted or not—in making this determination. *Clayton*, 235 S.W.3d at 778. “Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction.” *Hooper v. State*, 214 S.W.3d 9, 13 (Tex.Crim.App. 2007).

In this procedural posture, we are not permitted to sit as “thirteenth jurors” and substitute our judgment for that of the fact finder. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex.Crim.App. 2010), *Goodman v. State*, 66 S.W.3d 283, 286 n.4 (Tex.Crim.App. 2001). Even so, we act as a procedural failsafe against irrational verdicts, and we may reverse a conviction on legal sufficiency grounds where no rational juror could find guilt beyond a reasonable doubt based on the evidence presented at trial. *Clayton*, 235 S.W.3d at 778. This encompasses both situations in which the State has failed to prove an essential element of the crime as a matter of law (i.e. the evidence is quantitatively insufficient) and situations in which some evidence exists on every element, but no reasonable person could convict based on the state of evidence as a whole, even when viewed in the light most favorable to the prosecution (i.e. the evidence is qualitatively insufficient). See *Jackson*, 443 U.S. at 320, 99 S.Ct. at 2789 (constitutional legal sufficiency standard in criminal cases higher than “mere modicum” evidence standard); *Brooks v. State*, 323 S.W.3d 893, 906-07

(Tex.Crim.App. 2010).

B. Identity

In the first subpoint of Issue One, Santos-Garcia maintains that the State did not meet its burden in establishing the shooter's identity in its case-in-chief because no witness could positively identify Santos-Garcia as the gunman in court, and the remainder of evidence the State presented was circumstantial. He argues that because the State's case rested on qualitatively insufficient evidence, the trial court erred by failing to render an acquittal, and we must grant him that relief on appeal. We disagree; the evidence establishing identity was legally sufficient.

At the outset, Santos-Garcia urges us to limit the scope of our review on the identity question to the evidence introduced at the time he made his motion for directed verdict. We cannot do so. We take well Santos-Garcia's point that the State must always be held to its burden of proving its case beyond a reasonable doubt, nor do we lightly disregard his argument regarding the error of overruling a motion for directed verdict in the event the State's prima facie case is fatally flawed. However, "[i]ntermediate courts are bound by the decisions of the high courts." *Ex parte Barrientez*, No. 08-14-00004-CR, 2015 WL 3505248, at *2 (Tex.App.--El Paso June 3, 2015, no pet.)(not designated for publication). Case law makes clear that we must treat his challenge to the directed verdict denial as a request for legal sufficiency review on appeal, and in situations like this one in which a defendant presents a defensive case after the trial court overrules his motion for a directed verdict at the close of the State's case, we are bound by the Texas Court of Criminal Appeals' instruction to conduct a legal sufficiency review that embraces "the evidence presented at trial by *both* the State and defendant[.]" [Emphasis added]. See *Cook v. State*, 858 S.W.2d 467, 470 (Tex.Crim.App. 1993); accord *Burnett v. State*, No. 13-03-600-CR, 2005 WL 1714320, at *4 (Tex.App.--Corpus Christi July 21, 2005, no pet.)(mem. op., not designated for

publication); *Smith v. State*, No. 14-98-00334-CR, 2000 WL 177703, at *1 (Tex.App.--Houston [14th Dist.] Feb. 17, 2000, no pet.)(not designated for publication).

Under that standard, Santos-Garcia's sufficiency point fails here. By presenting a defensive case and admitting on the stand that he shot Moreno, Santos-Garcia essentially mooted any challenge he could bring on the issue of identity on appeal. *See State v. Ramos*, 479 S.W.3d 500, 506 (Tex.App.--El Paso 2015, no pet.)(op. on reh'g)(noting that justification defenses are "predicated on a tacit admission to otherwise criminal conduct"). His direct admission to the conduct establishes his identity as the shooter.

But even if we could only consider the evidence presented in the State's case before Santos-Garcia's motion for a directed verdict was overruled, the State still presented sufficient circumstantial evidence to prove identity. While no witness positively identified Santos-Garcia at trial, the State points out that Santos-Garcia was found driving in an area near the bar in a vehicle matching the description of a vehicle that left the bar. Police saw open alcohol containers and recovered a handgun from inside the SUV. A ballistic expert testified that a shell casing found at the shooting was consistent with the handgun found in the SUV. Of the SUV's two occupants, Santos-Garcia was the only one with GSR on his hands. And a State witness testified that the presence of GSR on a person's hands indicates either that person recently fired a gun or was close to a gun that fired. Viewing that evidence in the light most favorable to the prosecution, the jury could have reasonably inferred that Santos-Garcia shot the gun used in the crime.

In short, Santos-Garcia's contention that the State failed to prove he was the triggerman is without merit.

C. Mens Rea

Likewise, Santos-Garcia cannot prevail on his argument that the State failed to prove he

had the requisite criminal intent when he shot Moreno. In his brief, Santos-Garcia again focuses his attention on the case the State presented before his motion for directed verdict, and he complains that during that case, the State failed to provide substantial evidence of intent. But as with the identity issue, we must view the record as a whole—both the State’s case and Santos-Garcia’s case. And as with the identity issue, Santos-Garcia’s admission during his defensive case that he intentionally and knowingly fired the gun at Moreno constitutes direct evidence of intent. There is adequate evidence establishing Santos-Garcia’s mens rea in the record before us.

Issue One is overruled.

D. Rejection of Defense of Third Party Justification

Finally, we address the heart of the legal sufficiency arguments—Santos-Garcia’s defense-of others claim (Issue Two).

Santos-Garcia maintains that it was irrational of the jury to reject his third-party protection defense. The State concedes in its brief that “had the facts and circumstances of the shooting and events leading up to the shooting been as described by Santos-Garcia, Cedeno, and Zamora in their trial testimony, Santos-Garcia could possibly have been justified under the defense of necessity and/or defense of a third person in shooting the victim.” Nevertheless, the State urges us to affirm the jury’s verdict, insisting that the jury’s rejection of Santos-Garcia’s defensive theory was rational based on the following factors: evidence of a motive for the assault other than self-defense; inconsistent testimony between the State’s witnesses and the defense’s witness, among defense witnesses themselves, and between Cedeno’s statements to police and his sworn testimony; Santos-Garcia’s flight from the scene; and Santos-Garcia’s failure to call police or 911 for medical assistance.

While the record evidence is conflicting on the issue of self-defense, we ultimately agree

with the State. The jury could have rationally convicted Santos-Garcia on aggravated assault—and rejected Santos-Garcia’s defense—on the record presented.

The use of deadly force for defense of third parties is justified only “when and to the degree the actor reasonably believes the deadly force is immediately necessary ... to protect the [third party] against [another’s] use or attempted use of unlawful deadly force.” TEX. PENAL CODE ANN. §§ 9.32(a)(2), 9.33 (West 2011). Per the Texas Penal Code, deadly force is defined as “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 ANN. § 9.01(3)(West 2011). “[J]ustification, by definition, does not negate any element of the offense, including culpable intent; it only excuses what would otherwise constitute criminal conduct.” *Shaw v. State*, 243 S.W.3d 647, 659 (Tex.Crim.App. 2007).

To obtain a conviction in a case involving self-defense or defense-of-others, “the State must present evidence sufficient to support a finding beyond a reasonable doubt that the defendant committed each of the essential elements of the crime and did not act in self-defense.” *Rodriguez v. State*, 212 S.W.3d 819, 821 (Tex.App.--Austin 2006, no pet.). In assessing a defendant’s claim of self-defense or defense of others, the jury may consider the totality of the circumstances leading up to, during, and after the use of force. *Whipple v. State*, 281 S.W.3d 482, 496-98 (Tex.App.--El Paso 2008, pet. ref’d)(considering circumstances before shooting); *Valdez v. State*, 841 S.W.2d 41, 43 (Tex.App.--Houston [14th Dist.] 1992, pet. ref’d)(considering acts taken after shooting).

Ultimately, this case boils down to a contest of credibility. Traditionally, the courts of appeals defer to the jury’s determinations of credibility. “But notwithstanding a court’s deference to the jury’s credibility and weight determinations, the jury’s finding of guilt must be a rational one in light of *all* of the evidence presented at trial.” [Emphasis in original]. *Cary v. State*, 507

S.W.3d 750, 757 (Tex.Crim.App. 2016). What gives us pause here and turns this from a standard one-version-versus-another-version case is the medical evidence surrounding the laceration on Cedeno's arm. Its presence is significant in light of Santos-Garcia's defensive theory, and even when viewing the state of the evidence as a whole, we cannot simply discount the laceration. While it is unclear from the pictures how deep the wound is, a laceration could certainly lend credence to Santos-Garcia's claim that he believed Cedeno was being stabbed.

Still, we believe the jury could have rationally believed the laceration was not a stab wound, given that Garcia denied having or using a knife, given Hernandez's testimony that he saw no weapons used during the brief physical altercation, given testimony from police officers that the wound appeared superficial, and given that in his initial statement to police, Cedeno denied that the fight was serious and never mentioned that he had been stabbed. As for the inconsistencies between Cedeno's statement to police and his trial testimony, the jury was free to reject Cedeno's oral testimony at trial in favor of his original report to police of what happened during the fight, which was consistent with what other State witnesses recounted, including a witness who did not know anyone involved in the fight. *Morris v. State*, No. 07-13-00362-CR, 2014 WL 3867466, at *5 (Tex.App.--Amarillo Aug. 6, 2014, no pet.)(mem. op., not designated for publication)(jury could rationally reject witness' testimony that she provoked defendant into hitting her when she originally told police that defendant struck her first; "[s]uch conflicts will not call for reversal so long as there is enough credible testimony to support the conviction").

"As long as the verdict is supported by a reasonable inference, it is within the province of the factfinder to choose which inference is most reasonable." *Laster v. State*, 275 S.W.3d 512, 523 (Tex.Crim.App. 2009). Viewing the evidence in the light most favorable to the prosecution, we conclude a rational juror could find Santos-Garcia guilty of aggravated assault beyond a

reasonable doubt.

Issue Two is overruled.

II. Jury Charge Error

Finally, we turn to jury charge error. In Issue Three, Santos-Garcia asserts that the trial court incorrectly charged the jury on the law related to the defense-of-others defense.

We agree with Santos-Garcia that the trial court improperly inserted extraneous language into the charge; however, Santos-Garcia cannot establish that his charge warrants reversal of his conviction under the egregious harm standard.

A. Standard of Review

We review jury charge error claims under the framework established by *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1984). First, we look to see if a particular charge was actually given in error. *Id.* If so, we then determine whether the erroneous charge was so harmful that it warrants appellate reversal. *Id.* The level of harm needed to warrant reversal hinges on whether the defendant timely objected to the charge. If a timely objection was lodged, reversal is required upon a showing of “some harm;” if not, we may only reverse if the defendant establishes that he suffered “egregious harm.” *Ngo v. State*, 175 S.W.3d 738, 743-44 (Tex.Crim.App. 2005).

B. Error

Neither side disputes that the evidence was sufficient to submit the justification defense question to the jury. The only issue outstanding is whether the instruction given was erroneous.

Under the Texas Penal Code, a person is justified in using force or deadly force against another to protect a third person if:

- (1) under the circumstances *as the actor reasonably believes them to be*, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and
- (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person. [Emphasis added].

TEX.PENAL CODE ANN. § 9.33.

Santos-Garcia’s complaint is highly technical, but we understand his argument this way: while Santos-Garcia agrees that the trial court correctly charged the jury that it should have assessed the reasonableness of the use of force “from his standpoint alone,” he maintains that the trial court erred by then grafting a separate requirement essentially saying that for Santos-Garcia to be justified in shooting Moreno, Amador Cedeno would *also* have had to have been justified if he had hypothetically shot Moreno instead. By adding this additional language to the charge, Santos-Garcia argues, the trial court impermissibly shifted the focus of the reasonableness inquiry from Santos-Garcia’s subjective belief about the necessity of force against Moreno—which is dispositive—to whether Cedeno had the objective legal ability to use force against Moreno—which is legally irrelevant to Santos-Garcia’s defense.

The State responds that when all provisions of the Texas Penal Code are read together, it becomes clear that the Legislature intended for jurors, in making their assessment of deciding whether defense of third parties is a justification for the defendant’s conduct, to place “the accused, who is the ‘actor’ under § 9.33 . . . in the shoes of the third person.” *Hughes v. State*, 719 S.W.2d 560, 564 (Tex.Crim.App. 1986), *superseded by statute on other grounds as stated in Morales v. State*, 357 S.W.3d 1, 4 (Tex.Crim.App. 2011). When viewed through this lens, the State contends, any language in the application section talking about Cedeno being justified in a hypothetical use of force against Moreno may have been superfluous, but it was also not technically incorrect;

assessing whether Santos-Garcia's belief that force was reasonable necessarily requires one to assume Santos-Garcia stepped into Cedeno's shoes and viewed events and potential threats from Cedeno's perspective.

Reading the language at issue in context is key. It is undisputed that the trial court correctly set out the Texas Penal Code's necessity standard, the law of self-defense, and the law of defense of third persons in the Definitions sections of the charge. In the Application section of the charge, the trial court set out the applicable law as follows. The phrase Santos-Garcia challenges on appeal is italicized:

If you find from the evidence beyond a reasonable doubt that on or about the 14th day of October 2009 in El Paso County, Texas the Defendant, CESAR SANTOS-GARCIA, did then and there intentionally or knowingly or recklessly cause bodily injury to ADRIAN MORENO, by shooting ADRIAN MORENO about the body with a firearm, and the said Defendant CESAR SANTOS-GARCIA did then and there use or exhibit a deadly weapon, to wit: a firearm, that in the manner of its use and intended use was capable of causing death and serious bodily injury during the commission of or immediate flight from said offense;

But you further find from the evidence that the Defendant CESAR SANTOS-GARCIA reasonably believed, or is presumed to have reasonably believed, as viewed from his standpoint alone under the circumstances as he reasonably believed them to be, that the deadly force, when and to the degree used, if it was, was justified to protect AMADOR CEDENO against the unlawful deadly force he reasonably believed to be threatening AMADOR CEDENO; that AMADOR CEDENO was justified in using deadly force, and that CESAR SANTOS-GARCIA reasonably believed that his intervention was immediately necessary to protect AMADOR CEDENO against the use or attempted use of unlawful deadly force by the said ADRIAN MORENO; or if you find that CESAR SANTOS-GARCIA's conduct is justified because he reasonably believed that his conduct was immediately necessary to avoid imminent harm, and the desirability and urgency of avoiding the harm clearly outweighed, according to the ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct, you will acquit the Defendant CESAR SANTOS-GARCIA and say by your verdict 'not guilty' (Verdict Form 'A').

You are further instructed, however, that if you believe from the evidence beyond a reasonable doubt, or if you believe beyond a reasonable doubt that the State has proven that the facts giving rise to the presumption of reasonable belief that deadly force was immediately necessary do not exist or that at the time and

place in question ADRIAN MORENO was not using or attempting to use unlawful deadly force on AMADOR CEDENO, *or that AMADOR CEDENO was not justified in using deadly force*, then you will find against the Defendant on his plea of defense of a third person or necessity, and say by your verdict ‘guilty’ (Verdict Form ‘B’). [Emphasis added].

We are inclined to agree with Santos-Garcia on this point. While the charge could be read as acknowledging that the jury could find the defendant not guilty if there was a unity of reasonable perspectives as between the shooter (Santos-Garcia) and the person the shooter believes he is protecting (Cedeno), the jury charge can be also read as imposing a superfluous second decisional component (i.e. that Amador Cedeno would have *in fact* been entitled to claim self-defense against Moreno as a legal matter) onto the operative decisional component (i.e. that from Santos-Garcia’s perspective, it was reasonably necessary to use deadly force because he believed Cedeno was in danger of being stabbed to death).

The application paragraph can be read as authorizing conviction when Santos-Garcia reasonably believed that Cedeno’s life was in apparent danger, but Cedeno would not have been entitled to claim self-defense himself. That contravenes the apparent danger doctrine, which allows a defendant using deadly force in defense of a third party “to defend against *apparent danger* to the same extent as *actual danger*, provided that he acts upon a reasonable apprehension of danger as it appears to him at that time.” [Emphasis added]. *Brock v. State*, No. 05-02-01273-CR, 2003 WL 21983212, at *4 (Tex.App.--Dallas Aug. 21, 2003, pet. ref’d)(not designated for publication). Whether Amador Cedeno would have, as a technical matter, been allowed to claim self-defense at a hypothetical trial in which he was the shooter has no bearing on whether Santos-Garcia, at the moment of the shooting, reasonably believed the deadly force he employed was necessary to counter force against Cedeno that he reasonably perceived to be deadly.

Santos-Garcia is correct that the complained of language should have been omitted from

the charge. The trial court erred by crafting a charge that allowed to jury to find that Santos-Garcia could have reasonably believed that deadly force was necessary to defend Cedeno, but then still convict Santos-Garcia if the jury separately believed Cedeno himself could not have claimed self-defense as a technical matter (for example, if Santos-Garcia reasonably believed Cedeno was in danger, but the jury believed Cedeno could not invoke self-defense because he provoked the fight with Moreno).

C. Harm

Jury charge error alone, however, does not entitle Santos-Garcia to reversal of his conviction. We must still determine whether the inclusion of that superfluous language resulted in an improper verdict.

Again, the level of scrutiny we use in our harm analysis hinges on whether the defendant objected to the error in the trial court. Because the ground of objection at trial does not comport with the ground raised on appeal, the error was not preserved; as such, under *Almanza*, we will reverse only upon a showing of egregious harm. *Bolen v. State*, 478 S.W.3d 865, 868 (Tex.App.-Amarillo 2015, pet. ref'd)(use of egregious harm standard required when trial objection and appellate objection are not the same). “[J]ury-charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory.” *Sanchez v. State*, 209 S.W.3d 117, 121 (Tex.Crim.App. 2006). “An egregious harm determination must be based on a finding of actual rather than theoretical harm.” *Cosio v. State*, 353 S.W.3d 766, 777 (Tex.Crim.App. 2011). The egregious harm analysis is a fact-specific, case-by-case inquiry. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex.Crim.App. 2015). “Under *Almanza*, courts evaluate [egregious] harm by taking into account (1) the entire jury charge; (2) the state of the evidence, including contested issues; (3) arguments of counsel; and (4) any other

relevant information contained in the record as a whole.” *Gelinas v. State*, 398 S.W.3d 703, 705-06 (Tex.Crim.App. 2013)(plurality op.).

This is a fairly close-call case from an egregious harm perspective. Santos-Garcia advances non-trivial potential bases for harm. However, on balance, we believe the harm factors here are not sufficient to warrant reversal.

The Remainder of the Charge (Factor One) and Arguments of Counsel (Factor Three)

In reviewing the entire jury charge (Factor One) and the arguments of counsel (Factor Three), we find that the charge on balance focuses the jury’s attention around the operative question of Santos-Garcia’s state of mind. While the jury charge creates the potential for conviction in the event of a divergence between Santos-Garcia’s subjective understanding of the danger and Cedeno’s legal entitlement to use deadly force in personally defending himself from Moreno, the likelihood that the jury found such a divergence and convicted on that basis is low. We are troubled that the prosecutor seemed to emphasize this exact divergence briefly as he explained the charge to the jury during closing arguments:

Moving on to page 5, defense of a third person. I think we all understand that, but realize that it only applies if Mr. Cedeno couldn’t claim the defense. Mr. Cedeno can’t claim the defense. We submit that he started the fight. You have testimony that says he started the fight. Of course, you have opposing testimony that says somebody else did, but they had four years to make that up.

As we explained previously, that is an incorrect statement of law. The fact that the prosecutor called attention to it weighs in favor of a harm finding.

However, the remainder of the charge’s application section frames the question in terms of Santos-Garcia’s belief “from his standpoint alone.” We believe that phrase serves to clarify the ambiguity and mitigate harm.

The harm from the improperly included language was also mitigated by defense counsel,

who refocused the jury on the proper legal standard during closing arguments:

Let's talk about defense of others, okay? Defense of others says -- and I'm over on page 5 -- a person is justified in using force or deadly force against another to protect a third person, if under the circumstances the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32, in using force or deadly force to protect himself.

Now, so what we're saying is, 'I can use the same amount of force to protect myself from deadly force or force to help somebody else as if I was using it for myself.' So what happens at that point? Well, what happens at that point, he sees the danger. He knows that the gun is in the car, and he knows that he had a gun legally. We all can agree on that; because if you put a gun in the car and you have it in the car, then obviously you're legally -- you're permitted to take the gun out, okay?

So the question in your mind is why he's shooting. Why did he shoot him? Well, he shot him, as the Court instructed, because he was justified by necessity. He had a gun; it was self-defense. By necessity, he had the right to shoot him because Amador Cedenó was being murdered.

[Intervening objection by the State overruled]

How serious did those wounds have to be to be a murder? Not too serious. We all know that we have arterial veins in this section of our arm. We all know. That's common sense. So people bleed to death with less injuries than that.

What were these two guys doing? Well, they were stabbing him.

They want to minimize their conduct, okay? That's what they want to do. They want to minimize their conduct, but their conduct was obvious: They were inflicting serious bodily injury on Amador Cedenó. So my client, from his perspective, a reasonable man's perspective, assessed the situation. He had already tried to intervene to defuse the situation, and so as he explained it, he engaged. He engaged.

On the one hand, the application section of the charge incorrectly sets out the law, and the State appeared to rely on that incorrect law briefly in closing argument. On the other hand, the remainder of the charge emphasizes that the jury should consider the third-party defense issue from the perspective of Santos-García alone. And defense counsel also articulated the correct standard during closing arguments. On balance, we find some harm,

but not enough to rise to the level of egregious harm.

The State of the Evidence as a Whole (Factor Two)

Finally, given that there are no other unusual factors to consider in our analysis (Factor Four), we view the error in light of the evidence as a whole (Factor Two). The error would only “vitally affect a defensive theory” if the primary issue presented at trial was whether Cedeno, independent of Santos-Garcia’s perceptions, would have actually been able to claim self-defense had he been prosecuted instead of Santos-Garcia. But the evidence at trial never created the potential for a situation in which Santos-Garcia would have thought there was apparent danger, but Cedeno was not in actual danger. Instead, two starkly different narratives emerged from the evidence. The prosecution’s case centered on discrediting Santos-Garcia’s belief that the use of deadly force was necessary because the fight was not serious, did not involve weapons, was limited to Cedeno and Moreno, and was already over by the time Santos-Garcia shot Moreno. The defense argued that Santos-Garcia’s use of deadly force was necessary because the fight involved four people or five who jumped Cedeno, and Santos-Garcia, Cedeno, and Zamora all believed Cedeno was being stabbed.

In short, the jury was presented with two zero-sum options: either a reasonable person would have believed Cedeno was in danger of death or serious bodily injury sufficient to trigger the right to use deadly force in response—or not. Either Cedeno was attacked by multiple men, or Cedeno was in a minor one-on-one scuffle with one other man. Either Moreno had a knife and was stabbing Cedeno, or he did not. In light of the state of the evidence and the competing theories presented, the charge error did not vitally affect Santos-Garcia’s defensive theory.

While Santos-Garcia established error, we are not persuaded, based on the state of the evidence, that Santos-Garcia’s defense-of-third-parties argument was vitally affected by the error

in the jury charge as required by the *Almanza* egregious harm standard.

Issue Three is overruled.

CONCLUSION

Santos-Garcia's conviction rests upon legally sufficient evidence, and no reversible jury charge error appears before us.

The judgment of conviction is affirmed.

November 30, 2017

YVONNE T. RODRIGUEZ, Justice

Before McClure, C.J., Rodriguez, and Hughes, JJ.
Hughes, J., Not Participating

(Do Not Publish)