**Affirm and Opinion Filed August 10, 2020**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

**No. 05-18-01057-CR**

**ROY OLIVER, Appellant**
**V.**
**THE STATE OF TEXAS, Appellee**

**On Appeal from the 292nd Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. F17-18595-V**

# MEMORANDUM OPINION

Before Justices Pedersen, III, Reichek, and Carlyle
Opinion by Justice Pedersen, III

A jury found appellant Roy Oliver guilty of murder and assessed his punishment at fifteen years' confinement and a $10,000 fine. In fourteen issues, appellant challenges: the trial court's rulings on statements that he contends implicated *Garrity v. New Jersey*, 385 U.S. 493 (1967); the sufficiency of the evidence supporting the jury's rejection of his defense-of-third-person justification; the trial court's admission of evidence of extraneous conduct by appellant; the trial court's refusal to submit instructions on necessity and multiple assailants, and its submission of an instruction on reckless killing of a bystander and a definition of

reasonable doubt; and the trial court's admission of victim character evidence during the punishment phase of the trial. We resolve each of appellant's issues against him and affirm the trial court's judgment.

## BACKGROUND

Appellant, then a patrol officer in the Balch Springs Police Department, received a call at approximately eleven o'clock p.m. on April 29, 2017, informing him of intoxicated teenagers at a loud party at a residence on Baron Drive in Balch Springs. Officer Tyler Gross, who patrolled the district adjoining appellant's, was also dispatched to the Baron Drive address; the officers arrived in separate cars at the same time and parked in the street in front of the residence. Parked cars lined the street, and the officers soon learned that more than 100 young people were attending the party. Contrary to the report they had received, they saw no drinking or drug activity on the premises; the teenagers were visiting, listening to music, and dancing. Nevertheless, when they heard the sirens of approaching police cars, many of the young people fled the house and yard and ran to their cars. When the officers had been in the house a short time, they heard a number of gunshots in rapid succession. Appellant testified that the shots sounded like a semiautomatic weapon.

Among the teenagers attending the party were three brothers—Vidal Allen, Jordan Edwards, and Kevon Edwards—and two of the brothers' friends, Maximus and Maxwell Everette. Allen drove the five to the party in his father's black Chevrolet Impala. The teens met back at the car after they heard the police arrive;

Allen had parked on the side of Baron Drive. As the five were gathered around the car, they heard the same gunshots the officers heard, jumped into the Impala, and attempted to leave.

After hearing the gunshots, the officers immediately left the house. Officer Gross turned east and headed in the direction from which the sound had come. Appellant ran to his patrol car, retrieved his rifle, and followed Gross. As they moved eastward on Baron Drive, amid running and screaming young people, the officers headed toward the intersection with Shepherd Lane. On the opposite side of Shepherd was a nursing home; evidence would later establish that men unconnected with the party had fired the gunshots in the nursing home's parking lot and then driven away. The parked police cars had blocked Baron Road headed west, so the young people leaving the party had to proceed east on Baron. Appellant heard Gross tell one of those cars to stop, and he saw the driver comply. Then he heard Gross tell a second car that was slowly backing down Baron Drive to stop, but that car continued moving slowly toward Shepherd Lane. Appellant heard Gross again call out for the car to stop, this time more loudly, and heard him radio the license plate of the car to their dispatcher; the car did not stop.

Vidal Allen was driving the second car, backing down Baron Drive, and—he testified—thinking only of getting his brothers and friends home. He testified he did not know a police officer was telling him to stop. As he reached the intersection, he stopped briefly, and then proceeded forward, driving south on Shepherd. He was

blinded by a flashlight on the side of the road and maneuvered the car into the northbound lane to avoid whoever was holding it.

Officer Gross was holding the flashlight that was attached to his pistol, pointing it at the Impala. As the car passed Gross, he stepped toward it and hit the rear window with that pistol. When appellant saw the Impala stop and then accelerate forward, he shot five times into the passenger side of the car to try and stop it. As the car drove on, appellant asked Gross if he was alright and said, "He was trying to hit you."

Jordan Edwards was sitting in the front passenger seat in the Impala. One of appellant's shots hit him in the head. The wound was immediately fatal.

Appellant was indicted and charged with murder. A jury found him guilty and assessed his punishment at fifteen years' confinement and a fine of $10,000. This appeal followed.

## *GARRITY* IMMUNITY

In his first three issues, appellant contends that he made statements implicating the constitutional immunity protections afforded by *Garrity v. New Jersey*, 385 U.S. 493 (1967). He argues that the State's use of those immunized statements violated his due process rights and that, as a result, evidence derived from the statements should have been suppressed, his indictment should have been dismissed, and the district attorney's office should have been recused.

### *Garrity v. New Jersey*

In *Garrity*, police officers under investigation for misconduct were warned before being questioned that they had the right to refuse to answer questions, but they were also told that they would be subject to removal from office if they refused to answer. 385 U.S. at 494. The officers' choice, thus, was between self-incrimination and job forfeiture. *Id.* at 496. The Supreme Court concluded that police officers "are not relegated to a watered-down version of constitutional rights." *Id.* at 500. It held, therefore, that the 14th Amendment prohibits the use of statements obtained under threat of removal from office in subsequent criminal proceedings. *Id.*

*Garrity* protections, thus, allow two investigations of an officer's conduct to go forward—one internal and one criminal—while the officer's right against self-incrimination is preserved. If the government compels self-incriminating testimony in the internal investigation, it must offer immunity in the criminal proceeding that puts the officer in substantially the same position that he would have enjoyed had he claimed his privilege. *See United States v. Slough*, 641 F.3d 544, 549 (D.C. Cir. 2011) (citing *Kastigar v. United States*, 406 U.S. 441, 458 (1972)). Accordingly, if a statement is protected by *Garrity*,

> [i]n a later prosecution of the individual, the government cannot use his immunized testimony itself or any evidence that was tainted—substantively derived, shaped, altered, or affected—by exposure to the immunized testimony. Nor can the government use it to develop investigatory leads, to focus an investigation on a witness, or to motivate another witness to give incriminating testimony.

*Slough*, 641 F.3d at 549 (internal citations and quotations omitted). Stated simply, neither the *Garrity* statement nor evidence derived from the statement may be used against the officer in a criminal prosecution. *See id.*

Our inquiry in this appeal begins with the fundamental question of whether appellant's statements are in fact entitled to *Garrity* protection as "coerced statements . . . obtained under threat of removal from office." *Garrity*, 385 U.S. at 500. For any statement that is protected by *Garrity*, we ask next whether the defendant carried his burden below to lay a firm foundation—resting on more than mere suspicion—that proffered evidence was tainted by exposure to the immunized statement. *Slough*, 641 F.3d at 551 (citing *United States v. North*, 920 F.2d 940, 949 (D.C. Cir. 1990)). And if the defendant carried that burden, then we determine whether the State proved, by a preponderance of the evidence, that all of its evidence to be used against the defendant proceeded from legitimate independent sources. *Slough*, 641 F.3d at 550; *see also Kastigar*, 406 U.S. at 461–62.

**Appellant's Three Statements**

Appellant made three statements to law enforcement during the early stages of this case; he contends that all three merit *Garrity* protection.

*The Written Statement*
*April 30 at 3:00 a.m. to Lt. Maret of Balch Springs Police Department*

The shooting occurred shortly after eleven o'clock p.m. on April 29, 2017. After the shooting, appellant was taken to Balch Springs Police Department's

headquarters, where he met with an attorney provided by his police union. Shortly after three o'clock, on the morning of April 30, appellant and his attorney met with Lieutenant Mark Maret, who oversaw the patrol division of the Balch Springs Police Department and conducted internal affairs investigations within that department. It is undisputed that Maret gave appellant a packet containing three documents: (1) the Complaint, which listed allegations and possible violations of policy; (2) the Investigative Warning, which informed appellant that he was being investigated, directed him to make a written statement in response to the allegations, and stated that his "failure or refusal to do so may subject [him] to disciplinary action, including discharge from employment with the Balch Springs Police Department"; and (3) the Constitutional Protection Statement, which acknowledged that appellant's statement was a condition of employment and contained the *Garrity* warnings and protections.[1]

[1] We set forth the entire Constitutional Protection Statement because its specific language is important throughout this discussion. The statement identifies the date, time, and location and then states:

> I was ordered to submit this report/give this statement by Lt. Mark Maret #239.
>
> I submit this report or give this statement at his/her order as a condition of employment. In view of possible job forfeiture, I have no alternative but to abide by this order.
>
> "It is my belief and understanding that the department requires this report or statement solely and exclusively for internal purposes and will not release it to any other agency or use it for any other purposes. It is my further belief that this report or statement will not and cannot be used against me in any subsequent proceeding other than disciplinary proceedings within the confines of the department itself."
>
> "For any and all other purposes, I hereby reserve my Constitutional Rights to remain silent under the FIFTH and FOURTEENTH AMENDMENTS to the UNITED STATES CONSTITUTION and other rights prescribed by law. Further, I rely specifically upon the protection afforded me under the doctrines set forth in GARRITY VS. NEW JERSEY, 385

After appellant signed the Investigative Warning and the Constitutional Protection Statement, he gave Maret his typed statement of what happened during the shooting incident (the "Written Statement").

*The Walk-Through Statement*
*April 30 at 5:30 a.m. to Detectives from Dallas County Sheriff's Office*

Shortly after midnight on April 30, the Dallas County Sheriff's Office was contacted and agreed to take over the criminal investigation of the shooting from the Balch Springs Police Department. Detective Juan Carranza, who would serve as lead detective in the criminal investigation, oversaw collection of evidence from the scene through the early morning hours. At approximately 5:00 a.m., he contacted appellant's attorney and asked if appellant would be willing to participate in a walk-through of the scene. Appellant agreed and, with his attorney, met Detective Carranza and other investigators from the Sheriff's Department at the scene of the shooting. From approximately 5:15 until 5:30, appellant walked through the scene, telling the investigators "[his] side and what occurred." (the "Walk-Through Statement"). During the walk-through, appellant spoke only to Detective Carranza and his colleague, Detective Fetter. Lt. Maret was at the scene, but he did not ask any questions, and he was too far away to hear anything appellant told the detectives

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U.S. 493 (1967), and SPEVACK VS. KLEIN, 385 U.S. 511 (1967), should this report or statement be used for any other purposes of whatsoever kind or description."

The statement is signed by appellant.

from the Sheriff's Office. Detective Ferret produced a written report based on the walk-through; appellant did not.

*The Recorded Statement*
*May 2 to Lt. Maret of Balch Springs Police Department*

On May 2, Lt. Maret asked appellant to participate in a follow-up interview. Appellant signed a second *Garrity* warning, and the interview was video recorded (the "Recorded Statement").

## *Garrity* Analysis

The trial court held an evidentiary hearing and concluded that the Walk-Through Statement given the detectives from the Dallas County Sheriff's Office was not subject to *Garrity* protection and that appellant had not met his burden to show a firm foundation, as opposed to mere speculation, that the State's evidence had been tainted by exposure to the Written or Recorded Statements. We review the trial court's *Garrity* rulings, which are mixed questions of law and fact involving Fifth Amendment rights, employing a bifurcated review: we give almost total deference to the trial court's rulings on questions of historical fact and on application of law to fact questions that turn upon credibility and demeanor; we review de novo the trial court's rulings on application of law to fact questions that do not turn upon credibility and demeanor. *See Alford v. State*, 358 S.W.3d 647, 652 (Tex. Crim. App. 2012).

*Were appellant's statements within Garrity's protection?*

Appellant's statements merit protection in his criminal prosecution if they were compelled by a threat of removal from office. *See Garrity*, 385 U.S. at 500. The parties agree on appeal, as they did in the trial court, that the Written Statement and the Recorded Statement meet this requirement. In both instances, appellant was being interviewed by the representative of his employer, the Balch Springs Police Department; that representative, Lt. Maret, was charged with internal investigations. And in both instances, the department representative gave appellant a document that explained he was being required to give those statements "as a condition of employment" and "[i]n view of possible job forfeiture." Appellant signed this acknowledgment before giving both the Written and Recorded Statements. We conclude that those statements fall within *Garrity*'s purview. Appellant was entitled to believe that they would not be used in any way in his criminal prosecution. *See id.*

We do not believe the trial court abused its discretion in finding that the Walk-Through Statement was made under very different circumstances than the other two statements. Initially, it is undisputed that appellant's presence was requested by Detective Carranza through appellant's attorney; his walk-through participation was voluntary. In addition, the walk-through was conducted by detectives of the Dallas County Sheriff's Department, not by representatives of appellant's employer.

Appellant could not have reasonably believed that those detectives had the authority to terminate his employment.[2]

Appellant argues that the protections of his earlier *Garrity* warning—given before his Written Statement—carried over to the later walk-through. But the earlier warning stated clearly that a protected statement could only be used "in disciplinary proceedings within the confines of the department itself." Appellant could not have reasonably believed that representatives of a different law enforcement agency were involved in his department's disciplinary proceedings. We conclude that the Walk-Through Statement was not compelled by a threat to remove appellant from office. It was not, therefore, entitled to *Garrity* protection during appellant's criminal prosecution. *See id.*

Because the Walk-Through Statement was not a *Garrity* statement, it could not support appellant's motions to suppress, to quash, or to recuse. To the extent appellant's motions relied upon the Walk-Through Statement, we conclude the trial court did not abuse its discretion in denying them.

*Did appellant lay a firm foundation regarding tainted evidence?*

For the statements that were entitled to *Garrity* protection—the Written and Recorded Statements—we ask next whether appellant carried his burden below to lay a firm foundation that the State's evidence was tainted by exposure to those

[2] The record reflects that appellant's attorney was also at his side during the walk-through.

immunized statement. *See Slough*, 641 F.3d at 551. This foundation must be based on more than mere speculation. *Id.*; *see also Lawn v. United States*, 355 U.S. 339, 350 (1958) (petitioners not entitled to "preliminary hearing to enable them to satisfy their unsupported suspicions" that grand jury made "direct or derivative use" of materials previously produced to different grand jury).

The trial court held an evidentiary hearing on appellant's motions; counsel questioned witnesses to determine the sources of their testimony before the grand jury and for the upcoming trial. The State's fact witnesses[3] each testified that his testimony was based upon his own personal experience the night of the shooting or at the walk-through, and each testified he had no knowledge of appellant's statements to Lt. Maret.

Appellant called a single witness at the hearing, Jason Hermus, the chief of the Dallas District Attorney's Public Integrity Unit. Hermus testified that his unit does an independent investigation of officer-involved shootings. To that end, his office obtained a copy of the Balch Springs file, which was reviewed by a single officer, Lieutenant Lupita Rendon. Rendon was charged by the unit's written policies with "scrubbing" the file of any *Garrity* material, and she was then walled off from the investigation. Hermus testified that even he did not know that *Garrity*

[3] The State called Officer Gross, Vidal Allen, Kevon Edwards, and Jeremy Seaton, all fact witnesses concerning the shooting. It called Detectives Fetter and Carranza, fact witnesses from the walk-through. The State also called Lt. Maret to address the Balch Springs Police Department's *Garrity* procedures and his presence at the walk-through.

material existed in this case until the issue was raised in court that week by appellant's counsel.[4]

At this point in the hearing, the trial court challenged appellant's counsel, saying:

> Mr. Gill, unless you have any witnesses that can provide affirmative proof that any of the statements that were given by your client to the Balch Springs Police Department at 3:20, so in other words, if you have any proof, if you can call any witnesses that would show that statements were used from Mr. Oliver at 3:20 that somehow might taint investigating, questioning, formulation of questions during Grand Jury proceedings or in this trial, I suppose, that can originate solely from Mr. Oliver in the Balch Springs Police Department, I don't see that anything that you could offer would be relevant.
>
> Do you have any witnesses like that?

Counsel responded, "Judge, I probably don't have any witnesses like that, but then that's not our burden."

The trial court proceeded to hear arguments, during which counsel for appellant argued, as he has in this Court, that appellant bore no burden in the *Garrity* analysis. We disagree. It was appellant's burden to bring to the trial court some showing that the State's evidence had been tainted by exposure to those immunized statements. *Slough*, 641 F.3d at 551. Each witness to the events surrounding the shooting and the walk-through testified that he had learned from his own observations at the time both the facts that he had testified to before the grand jury

[4] The State stipulated that Lt. Rendon reviewed the file and removed all *Garrity* material. She was not called to testify.

and the facts that he would testify to at trial. Similarly, each testified that he had not had contact with Lt. Maret or any of his colleagues at the Balch Springs Police Department. Nor had any employee of the Dallas District Attorney's office shared any facts of the case with the witnesses. To the extent that the facts developed at the *Garrity* hearing depend upon the credibility of the witnesses, we defer to the trial court's reliance on those facts. *See Alford*, 358 S.W.3d at 652.

We conclude that appellant made no showing that any witness was exposed to his Written or Recorded Statements, either directly or through any law enforcement official. Thus, no evidence offered at the grand jury proceedings or at trial can be traced directly or derivatively to those statements. We likewise conclude that nothing in the record supports a suggestion that any member of the Dallas District Attorney's office—other than Lt. Rendon—was aware of the *Garrity* statements' existence. Nor is there anything in the record indicating that Lt. Rendon participated in the investigation or presentation of appellant's case in any fashion. We find no authority concluding that the mere presence of a *Garrity* statement in a sealed file would support disqualifying a district attorney's office.

Appellant did not carry his burden to offer a foundation for his contention that his *Garrity* immunity was violated either by witness testimony at the grand jury or at trial or by the presence of his statements in the District Attorney's file. *See Slough*, 641 F.3d at 551. To the extent that appellant's motions to quash, to suppress, and to

recuse relied on his Written Statement or his Recorded Statement, the trial court did not err in denying them.

We overrule appellant's first three issues.

## SUFFICIENCY OF THE EVIDENCE

In his fourth and fifth issues, appellant challenges the legal and factual sufficiency of the evidence supporting his conviction. Specifically, he contends that given the evidence admitted at trial, no reasonable juror could have rejected his justification of defense of a third person.

When a defendant claims that the defense of a third person justified his use of force against another, the defendant bears the burden to produce some evidence supporting the defense. *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018). The State then bears the burden of persuasion to disprove the raised issues. *Id.* The burden of persuasion does not require the production of evidence; it requires only that the State prove its case beyond a reasonable doubt. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). To resolve appellant's legal sufficiency challenge, therefore, we do not ask whether the State presented evidence that refuted appellant's defense-of-third-person testimony. *See Braughton*, 569 S.W.3d at 609. Instead, we ask whether—after viewing all the evidence in the light most favorable to the prosecution—any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the defense-of-third-person issue beyond a reasonable doubt. *See id.*

In his opening statement, counsel for appellant told the jury that "Your decision is going to revolve around one point. And that is, Did the State of Texas prove beyond a reasonable doubt that Roy Oliver's actions were unreasonable." Appellant testified at trial and admitted that he intentionally fired his rifle into the car attempting to hit the driver. He has not challenged the sufficiency of the evidence that he committed murder. But he contends that his act was justified by his effort to defend Officer Gross from being hit by the Impala. That justification—as his counsel conceded—required appellant's actions, viewed from his own standpoint, to have been reasonable.

The Texas Penal Code provides:

> A person is justified in using . . . 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 . . . 9.32 in using . . . deadly force to protect himself against the . . . 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.

TEX. PENAL CODE ANN. § 9.33. In this case, then, appellant was justified in using deadly force against Allen if he reasonably believed that deadly force was immediately necessary to protect Gross from Allen's use or attempted use of unlawful deadly force. *Id.* §§ 9.32, 9.33.

Again, when considering the actions and circumstances surrounding the shooting, we look at the evidence in the light most favorable to the prosecution. *Braughton*, 569 S.W.3d at 609.

- Officer Gross testified that he tried to stop the Impala and struck its right rear window with his pistol, breaking it, to get the driver's attention. But though he was close to the vehicle, he was not in fear of it. He never believed the driver was trying to drive over or hit him, and he never felt the need to fire his weapon. During his testimony the State played his own and appellant's body camera videos. Gross testified that the video showed the car was trying to flee and to go around and away from him.
- Vidal Allen testified that he was in fear for his life after he heard the gunshots. Outside the car people were screaming and "going frantic." Inside the car, his brothers and friends were nervous and screaming. Although he heard someone say, "Stop the f---ing car," he didn't know it was a police officer.[5] When he started driving forward on Shepherd, he steered to the left on the street because "there was a flashlight and it was blinding my sight. It was a flash, a very, very bright flashlight, and you couldn't tell, like, who had the flashlight."
- Two witnesses, Jeremy Seaton and Chris Knight, were sitting in their car in the nursing home parking lot. They confirmed that when the Impala started

[5] On cross-examination, Allen admitted hearing that demand, but he testified: "We didn't know who it was to say stop the 'F'ing car, sir. Police don't talk like that, sir."

forward, the driver maneuvered the car into the left lane to avoid the officer standing near the intersection.

- The State offered testimony from Grant Fredericks, a certified forensic video analyst. Fredericks used the two officers' body camera videos, along with measurements and scanning equipment at the scene of the shooting, to create an exhibit that showed the officers' positions and viewpoints from the time they left the residence through the shooting. Fredericks testified, and the video exhibit supported, a number of conclusions including: the Impala stopped backing up in the middle of Shepherd Lane, and then the driver steered the car to the left, into the northbound lane, as it passed Officer Gross; Gross was not in a position to be impacted by the Impala; the Impala was past Gross before the first shot was fired; appellant fired the five shots in less than one second; the Impala had passed appellant before he fired the final three shots.
- The State's use-of-force expert, Dr. Philip Hayden, testified—based primarily upon his review of grand jury testimony and the Fredericks video analysis—that appellant used excessive force when he fired into the Impala and that the shooting was "[a]bsolutely unreasonable" given what he saw or should have seen at that time. Hayden pointed out that appellant had nine seconds from the time he retrieved his rifle and began following Officer Gross until the moment he fired the first shot. He opined that nine seconds was plenty of time to focus on Officer Gross and to evaluate his situation. Had appellant done so, he

would have known that Gross was not in danger from the Impala. When Hayden was asked if he believed appellant had to fire to protect his partner, he replied, "No, there's no time that Officer Gross was in danger, so there's no reason for him to fire at all."

Appellant testified at length that he believed the Impala was going to strike Officer Gross and that he believed he had no choice but to use lethal force to stop the car. And appellant's use-of-force expert, Dr. Jay Coons, opined that appellant's actions during the shooting incident were reasonable. Dr. Coons's opinion emphasized his estimate of the time it would have taken appellant to make the decision to shoot, i.e., between one and one-and-one-half seconds. He testified that when viewing the Fredericks video, one must "back it up" between one and one-and-one-half seconds to determine what appellant was seeing—not when he fired the first shot, but at the time he decided to fire. At that time, according to Coons, the Impala was not yet past Gross, and the car was "still in a position to where it could strike him." But the jury could choose to believe or to disbelieve appellant and could choose to accept or to reject his expert's opinions. *See Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991) (credibility determination of defensive evidence is solely within jury's province and jury is free to accept or reject defensive evidence). "A jury is permitted to reject even uncontradicted defensive testimony, so long as its rejection of that evidence was rational in light of the remaining evidence in the record and is not contradicted by indisputable objective facts." *Braughton*, 569

S.W.3d at 612. Given the ample evidence in the record indicating that the Impala was not headed toward Officer Gross, the jury's rejection of appellant's testimony was not irrational; nor was the jury's rejection of appellant's evidence contradicted by any indisputable, objective fact. *See id.*

A rational jury could have determined that the Impala's path down Shepherd Lane could not give rise to a reasonable belief that Allen was threatening Officer Gross with unlawful deadly force. And a rational jury could, therefore, have concluded that it was not immediately necessary for appellant to employ deadly force against Allen in an effort to stop the Impala. We conclude that the evidence is legally sufficient to support the jury's rejection of appellant's justification of defense of third person.

In his fifth issue, appellant challenges the factual sufficiency of the evidence supporting the jury's rejection of his justification. He relies on *Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015), which asserts: "Affirmative defenses may be evaluated for legal and factual sufficiency, even after this Court handed down its opinion in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010), which abolished factual-sufficiency review as it applies to criminal convictions." When a defendant pleads an affirmative defense, the defendant must prove the affirmative defense by a preponderance of the evidence. PENAL § 2.04(d). But defense of a third person is classified as a justification, rather than an affirmative defense. *Id.* § 9.33. The State had the ultimate burden of persuasion to disprove the justification as it proved its

case beyond a reasonable doubt. *Zuliani*, 97 S.W.3d at 594. When the State bears the ultimate burden of proof on an issue, we may review the evidence only for legal sufficiency. *Davis v. State*, No. 05-10-00732-CR, 2011 WL 3528256, at *1 (Tex. App.—Dallas Aug. 12, 2011, pet. ref'd) (not designated for publication). Under that standard, we have concluded the evidence is sufficient.

We overrule appellant's fourth and fifth issues.

**EXTRANEOUS CONDUCT**

Appellant challenges three instances in which the trial court admitted evidence of negative conduct not directly related to his indictment for murder. Evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's character and show that he acted in conformity with that character at the time of the crime at issue. TEX. R. EVID. 404(b)(1). However, that evidence may be admissible for another purpose, such as proving motive, intent, knowledge, or state of mind. TEX. R. EVID. 404(b)(2); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.36(a) (in murder prosecution State may offer "all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense"). Evidence may also be admitted under Rule 404(b) to rebut a defensive theory. *Moses v. State*, 105 S.W.3d 622, 626 (Tex. Crim. App. 2003). Admissibility of this evidence is within the discretion of the trial court, and we will not overturn the trial court's ruling absent an abuse of that discretion. *Id.* at 627.

## Post-Collision Altercation

In his seventh issue, appellant argues the trial court erroneously admitted evidence of his conduct following an off-duty traffic accident that occurred two weeks before the shooting of Jordan Edwards. Appellant's vehicle was stopped at a red light; he was driving, and his wife and son were passengers. His vehicle was hit from behind when a car driven by Monique Arredondo slid on the wet road. Although the parties relate the facts of their interaction very differently, the evidence is undisputed that appellant left his vehicle, approached Arredondo's car, pulled a gun from his belt, gave Arredondo orders concerning showing her hands, and demanded information from her. When addressing the incident the next day, as he was required to do, appellant reported that he pulled his gun because he "fear[ed] the driver was going to maneuver the vehicle in a way that would strike [him]." We recount the procedural attention given to this issue in some detail because it forms the basis for our resolution of the issue.

Initially, the State filed a pretrial motion asking to offer evidence of the accident and appellant's conduct in its case-in-chief under Rule 404(b). The trial court heard evidence from the Dallas police officer who came upon the accident, Arredondo, and her passenger, Ashley Cuevas. The State argued the evidence helped rebut appellant's theory of defense of a third person, which had been raised in voir dire, and was relevant to appellant's motive, intent, knowledge, and state of mind.

Without requiring a response from the defense, the trial judge denied the motion. He told the parties he would hold the motion for trial, treating it as a motion in limine.

On the second day of trial, after a number of the State's fact witnesses had testified, the State re-urged its motion to admit evidence of the traffic accident. It argued that the defense-of-third-person theory had then been raised through cross-examination of the preceding witnesses, and it contended that the defense had opened the door to the evidence. Counsel for appellant argued the evidence was "nothing but character conformity evidence" and contended it was improper to attempt to impeach appellant with evidence the State itself offered. Again, the trial court denied the State's request to introduce evidence of the extraneous conduct.

Finally, when the State had finished calling witnesses in its case-in-chief, it re-urged its motion to allow evidence of the incident under Rule 404(b). Appellant argued again that he had not yet advanced a defensive theory and that the State was attempting to offer evidence to rebut its own evidence. This time, appellant objected to the evidence under Rule 403 as well, contending the evidence would be unfairly prejudicial, cumulative, and burdensome, misleading and confusing to the jury. The trial judge concluded—after researching the issue extensively himself—that the evidence was not admissible. He said he would continue to treat the motion as one in limine, and told the attorney for the State to approach the bench "at any time from this point forward until the end of the case if you feel like the door's been otherwise opened."

The State rested, and trial continued. Appellant was the defense's first witness. After he testified to events on the night of the shooting, his attorney advised the trial judge that he had "an entirely different area to go into," and the proceedings were recessed for lunch. When trial resumed, that attorney began asking appellant about his accident with Arredondo, and appellant proceeded to describe the incident in detail. The questioning was not inadvertent or incidental: the testimony fills eighteen pages of the reporter's record and lasted approximately twenty minutes. Appellant set forth his version of the facts surrounding the incident, including his assertions that he saw furtive movements in the car as he approached, that he identified himself as a police officer by showing his badge, and that when he drew his gun he kept it in a ready position at his chest but never pointed it at Arredondo. When appellant finished testifying, the defense called its expert, Dr. Jay Oliver Coons, and then rested.

In rebuttal, the State called Arredondo and Cuevas. Both testified, *inter alia*, that appellant never identified himself as a police officer and that from the time he approached the vehicle he had his gun drawn and pointed at Arredondo's face. Arredondo testified that the car remained in park from the time of the accident until Dallas police arrived on the scene and had both drivers move their vehicles to a parking area. Appellant's counsel did not object to the State's calling these witnesses or to any questions asked of them. The defense cross-examined both witnesses.

It is this rebuttal testimony to which appellant assigns error in this Court. His brief does not mention his own testimony concerning the accident during the defense's case. He argues again the objections that were made—and sustained—during the State's case-in-chief concerning efforts by the State to rebut his defense-of-third-person justification with its own evidence and Rule 403. However, those objections were not re-urged before or during the rebuttal testimony.

The only inference we can draw from this record is that appellant made a strategic decision to open the door to testimony concerning the incident in order to be the first to tell the story. And he made that decision despite the fact that the trial court had three times ruled that the evidence was inadmissible against him. "[A] party who 'opens the door' to otherwise inadmissible evidence risks the adverse effect of having that evidence admitted." *Bowley v. State*, 310 S.W.3d 431, 435 (Tex. Crim. App. 2010); *see also* TEX. R. EVID. 107 (if party introduces part of act or conversation, then adverse party may introduce any other act or conversation necessary to allow trier of fact to understand part offered by opponent).

The trial court did not abuse its discretion in admitting the rebuttal testimony of Arredondo and Cuevas. We overrule appellant's seventh issue.

**Facebook Repost**

Appellant's eighth issue contends that the trial court erred by allowing the State to question him on cross examination concerning a statement he had reposted on Facebook. The entirety of the State's questioning was the following:

> Q. (By the prosecutor): Do you remember that on July the 12th, 2013, you made a Facebook post that was read by Greg Petty that said, "I will never in my life be as good at anything else as I am at killing people"?
>
> A. (By appellant): That was a repost. That's correct.
>
> Q. You made the post?
>
> A. I reposted, correct.

Appellant's counsel objected to this evidence on a number of grounds, including Rule 403, before the evidence was offered. The trial court overruled the objection, stating that the post was a prior statement by appellant on which he could be cross examined.[6] As he began the questioning on this topic, the prosecutor properly identified the contents of the statement, its date, its location (i.e., on Facebook), and one person (identified as a co-worker of appellant) who had read it. *See* TEX. R. EVID. 613(1). Appellant unequivocally admitted making the statement, so extrinsic evidence of the post was not admissible. *See* TEX. R. EVID. 613(4). Accordingly, when the State offered its printout of the post, the trial court allowed it to be admitted for record purposes only.

Nevertheless, appellant contends that the probative value of the post was substantially outweighed by the risk of unfair prejudice. He argues that the State never demonstrated a need for the evidence and that it was raised solely to inflame the jury. Specifically, he contends that:

[6] The State contends on appeal that because appellant did not object again when the State asked the question about the post, the objection was waived. However, the trial court gave appellant a running objection to this subject matter, preserving the issue for our review.

> Indeed, devoid of context – such as, the original source of the post (Appellant testified it was a "repost") and how Appellant intended it to be taken – the admission of such a statement could only serve to impress the jury in an "irrational and indelible way" and lure them "into declaring guilt on a ground different from proof specific to the offense charged."

Appellant's Brief at 42 (citing *Old Chief v. United States*, 519 U.S. 172, 180 (1997)).

We agree with appellant that, although the State's questioning was brief and followed the requisites of Rule 613, the statement could have inflamed the jury in the absence of context. However, appellant provided that context on redirect:

> Q. (By defense counsel): I don't know what a repost is. What is a repost?
>
> A. (By appellant): Someone posts something on a wall or board – big under the veterans community, veterans awareness. Due to a high suicide rate of veterans, it's important that we look out for each other and communicate with each other. That was something that one of those veterans had posted and I was reposting it just to get it out there for conversation.
>
> Q. Well, you understand that it's talking about -- whoever sent it, created it. You didn't create that document.
>
> A. No. I'm not a creative man, just, no.

Appellant had discussed his own military record earlier in his testimony. On redirect he gave the statement at issue context: he attributed its message to a post by a troubled veteran and explained that he had reposted it to advance the conversation among those in the veteran community concerning the high suicide rate of veterans. We conclude that any potential risk of inflaming the jury was minimized by appellant's own testimony.

In addition, immediately before the cross-examination on this issue began, the trial court gave the jury a limiting instruction as appellant requested. The instruction, which was essentially repeated in the jury charge, stated in relevant part:

> You are instructed that certain evidence is about to be admitted before you in these cases in regard to the defendant having committed other acts, if any were committed, other than one for which he is now on trial . . . . Such evidence . . . cannot be used against the defendant as any evidence of guilt in this case. Said evidence will be admitted before you for the sole purpose of aiding you, if it does aid you, in testing and determining the credibility of the defendant regarding the defendant's character, the defendant's state of mind, or to rebut a defensive theory.

Jurors were instructed, thus, not to consider the testimony about the repost as evidence of appellant's guilt. And they were specifically instructed as to how they could use the evidence: to test appellant's credibility, to determine his state of mind, or to rebut his theory of defense of Officer Gross. We presume the jury follows the trial court's instructions as they are presented. *Thrift v. State*, 176 S.W.3d 221, 224 (Tex. Crim. App. 2005). This presumption can be refuted, but only if the appellant points to evidence that the jury failed to follow the instruction. *Id.* Appellant has not identified any such evidence in this case.

We discern no harmful error in allowing the State to cross examine appellant concerning the statement he reposted on Facebook. We overrule appellant's eighth issue.

**Use of Vulgar Language in the Courtroom**

In his ninth issue, appellant argues that the trial court erroneously permitted the State to cross-examine him concerning an incident in which he was testifying as

a police officer, and he became confrontational with prosecutors and used vulgar language in front of the jury. Appellant admitted that, while testifying in that case, he had responded to the prosecutor by stating, "I don't remember the f---ing question." Appellant also admitted that he had gotten confrontational with two prosecutors afterward "over the comments they made." Appellant acknowledged that, as a result of the incident, the Balch Springs Police Department disciplined him by suspending him for three days. In rebuttal, the State called one of the prosecutors involved in the incident, Michael Leighton D'Antoni, and he confirmed appellant's hostile attitude toward the prosecutors and his vulgar language in front of the jury.[7]

Before the cross-examination, the State asserted that it was offering the evidence to respond to appellant's testimony concerning his "character trait of following rules, abiding by rules, orders, general orders, and policies." Appellant responded that he had not made a blanket statement that he was always a rule follower in a way that put that trait at issue. Instead, counsel said, "He's only responded to a discrete number of specific instances where he said he has followed a particular rule as told to him at that time."

The rules of evidence contemplate that if a criminal defendant offers evidence of his good character, the prosecution can introduce its own character evidence to rebut the implications of that evidence. *Harrison v. State*, 241 S.W.3d 23, 27 (Tex.

[7] The record indicates there was an off-the-record conference at the bench when D'Antoni was called, but there is no objection to the substance of his testimony on the record.

Crim. App. 2007). Specifically, Rule 404 provides an exception to the general exclusion of character evidence, stating that "In a criminal case, a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." TEX. R. EVID. 404(a)(2)(A).

Our review of the record identified a number of instances in which appellant held himself out as abiding by rules and policies he was trained to follow. He agreed, at the outset of his discussion of police work, that he tried to stay abreast of training that was available to him, asserting that "[t]raining and education is very paramount in law enforcement." As the questions turned to the circumstances surrounding the shooting, he was asked what his orders were about carrying weapons; he described where the rifle was to be stowed and added: "There's a specific way that they are loaded for safety reasons. Make sure we follow those policies." And as he testified about retrieving his rifle, he said he chambered a round, because "[t]hat is what we were trained to do." When he finished describing the process of readying and carrying his weapon, his counsel asked whether "this all [was] pursuant to the training that [he] had"; appellant answered that it was. And when—after testifying he was in shock after the shooting—he was asked why he went to the spot where the Impala had been stopped, he said: "You get your butt down there. You've been given an order by the sergeant, so I'm going down there to assist."

Appellant also responded to questions by identifying actions that were contrary to policy and training. When asked if he was shooting warning shots that

night, he responded: "No. That's prohibited and it's not safe." Similarly, when asked if he was trying to shoot the tires or the engine to disable the vehicle, he responded that he was not, and he agreed that was because he was "not allowed to do that either."

The trial judge could have concluded appellant's testimony was intended to impress upon the jury that he made his decisions based on the policies and rules of his department. The conduct at issue here was in violation of those policies or rules. Accordingly, it was appropriate material for cross-examination and rebuttal under Rule 404(a)(2)(A). We discern no abuse of discretion in allowing the testimony.

We overrule appellant's ninth issue.

**CHARGE ERROR**

Appellant contends that the trial court made four erroneous rulings involving the jury charge in this case. We review a jury charge issue first to determine whether error exists; then we analyze any error for harm. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). Because appellant objected to all four of these alleged errors, we will reverse if we find an error that caused "some harm" to his rights. *See id.*

## Necessity Instruction

In his tenth issue, appellant complains of the trial court's rejection of his proffered instruction on necessity.[8] The Penal Code provides that:

> Conduct is justified if:
>
> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

PENAL § 9.22. Appellant relies upon the same evidence that supported his defense of Officer Gross and argues that he reasonably believed it was immediately necessary to shoot into the Impala to avoid imminent harm to his partner.

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[8] Appellant submitted and requested the following instruction:

> You are instructed that conduct of a person is justified if that person reasonably believes the conduct is immediately necessary to avoid imminent harm, and the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct. The term "conduct" means an act or omission and its accompanying mental state. A "reasonable belief means a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. Now, if you find from the evidence beyond a reasonable doubt that on the occasion in question the defendant did intentionally or knowingly cause the death of Jordan Edwards by shooting him with a deadly weapon, to wit: a firearm or did then and there commit an act clearly dangerous to human life, to wit: shooting Jordan Edwards with a firearm, a deadly weapon, but you further find from the evidence, or you have a reasonable doubt thereof, that at the time of such conduct by the defendant, if any, the defendant reasonably believed that such conduct on his part was immediately necessary to avoid imminent harm, to wit, to prevent Vidal Allen from driving an automobile into Tyler Gross and possible resultant injury to Tyler Gross, and that the desirability and urgency of avoiding the harm of having an automobile strike Tyler Gross clearly outweighed, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing shooting of Jordan Edwards by the defendant, then you will acquit the defendant and say by your verdict "not guilty."

We need not reassess appellant's evidence on this subject, however, because the defense of necessity is not available to justify the use of deadly force. *Kelley v. State*, No. 05-15-00545-CR, 2016 WL 1446147, at *7 (Tex. App.—Dallas Apr. 12, 2016, pet. ref'd) (mem. op., not designated for publication). Appellant acknowledged at trial that he used deadly force in his attempt to stop the Impala. He sought and obtained an instruction on defense of a third person. The Penal Code authorizes the use of deadly force in defense of a third person only if, "under the circumstances as the actor reasonably believes them to be, the actor would be justified . . . in using . . . deadly force to protect himself against the . . . *unlawful deadly force* he reasonably believes to be threatening the third person he seeks to protect." PENAL § 9.33(1) (emphasis added). Necessity, however, justifies conduct if "the actor reasonably believes the conduct is immediately necessary to avoid *imminent harm*." *Id*. § 9.22(1) (emphasis added). And, pursuant to the Penal Code's definition, that "harm" could include "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested." *Id.* § 1.07(a)(25). Thus, the defense of necessity could justify conduct that is significantly less threatening than the conduct that would justify deadly force in defense of a third person.

In the context of self-defense, we have concluded that a plain reading of section 9.32 indicated the legislature intended to allow deadly force only to prevent an immediate threat to one's life or to prevent a commission of specific violent

crimes. *Kelley*, 2016 WL 1446147, at *7. In the related—but even more limited—context of defense of a third person, we perceive a legislative purpose to limit justification of deadly force to "unlawful deadly force [the actor] reasonably believes to be threatening the third person he seeks to protect." PENAL § 9.33(1). That legislative purpose plainly excludes the justification of necessity, which would afford such a justification in circumstances involving the mere threat of imminent harm. PENAL § 9.22(3) (conduct is justified by necessity when "a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear").

The trial court did not err in refusing appellant's instruction on necessity. We overrule appellant's tenth issue.

**Reckless Killing of a Bystander**

In his eleventh issue, appellant argues that the trial court erred in instructing the jury that even if appellant was justified in using deadly force, the justification would be "unavailable" to him if—in exercising that deadly force—he recklessly killed an innocent third person. Appellant contends there is no evidence that he recklessly killed Jordan Edwards. He concedes that he testified at trial that firing a rifle into a moving car runs the risk of killing an innocent bystander. But he argues that in this case there was no evidence that the risk he took was unjustified.

The trial court's instruction was based upon section 9.05 of the Penal Code:

> Even though an actor is justified under this chapter in threatening or using force or deadly force against another, if in doing so he also recklessly injures or kills an innocent third person, the justification afforded by this chapter is unavailable in a prosecution for the reckless injury or killing of the innocent third person.

PENAL § 9.05.[9] Appellant does not quarrel with the applicability of the principle of transferred intent in this case: he has acknowledged that he shot intending to hit Vidal Allen, and it is undisputed that his shot killed Jordan Edwards. Section 9.05 makes clear that "there is no justification corollary to the doctrine of transferred intent." *Dailey v. State*, No. No. 05-17-00016-CR, 2018 WL 3424361, at *7 (Tex. App.—Dallas July 16, 2018, pet. ref'd) (mem. op., not designated for publication). Thus, if sufficient evidence supported the trial court's section 9.05 instruction, it gave the jury another basis for finding appellant guilty.

The innocence of the victim and the recklessness of the actor are both fact issues for the jury when they are raised by the evidence. *Dugar v. State*, 464 S.W.3d 811, 819 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Appellant challenges only the element of recklessness, contending that he did not disregard an unjustified risk, i.e., a risk "of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." PENAL § 6.03(c).

[9] Appellant also argued that section 9.05 is unconstitutional as applied to him in this case. He does not raise that argument on appeal.

Appellant relies on *Brunson v. State*, 764 S.W.2d 888 (Tex. App.—Austin 1989, pet. ref'd). In that case, Brunson was convicted of (1) murder after shooting an acquaintance, Bill Hicks, and (2) intentional or knowing injury to a child when one of the bullets he intended for Hicks hit the thirteen-year-old girl living in the same house. *Id.* at 890. On appeal, Brunson argued that the trial court should have charged the jury on the lesser included offense of reckless injury to a child. *Id.* at 891.[10] But the court relied on Brunson's own testimony, including "that he emptied his gun at Hicks, that he never intended to injure [the child], and that he did not even see her at all before the shooting" to conclude that Brunson was never aware of, and therefore did not disregard, a risk. *Id.* at 892. Appellant cites his own testimony that:

> We were responding to gunshots, to an active shooter. The car's being told to stop, being detained, the passenger was moving. Making furtive movements. I do not know what the, what that passenger was trying to do or get.

But this testimony does not negate recklessness as appellant suggests. In *Brunson*, the shooter testified that he never saw the secondary victim. Appellant's quoted testimony establishes that when he intentionally shot into the car at Allen, he knew there was a passenger in the car. Under a *Brunson* standard, appellant was aware of and did disregard a risk by shooting into the car.

[10] Brunson apparently relied on section 9.05 in his argument for the submission on recklessness. The Austin court explained that Brunson's request misunderstood the statute, which was intended "to narrow the scope of certain justification defenses." *Id.* at 891–92. However, the court went on to address whether there was evidence that Brunson was guilty only of recklessness, and that discussion is useful here.

Moreover, our review of the record persuades us that the risk was unjustifiable, i.e., that its disregard constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from appellant's standpoint. PENAL § 6.03(c). Appellant fired five shots into a moving vehicle that was driving away from him, on a crowded dark street; he was unsure of the number of passengers in the car, although he knew at least one person accompanied the driver. Appellant's Texas Commission on Law Enforcement training directed that an officer should not use deadly force if there is a risk that an innocent person could be killed or injured. His own police department's General Orders Manual states under the heading Deadly Force Restrictions: "Firearms shall not be discharged at a moving vehicle in an attempt to disable the vehicle." And the State's expert witness, Dr. Hayden, explained why that policy was appropriate. He testified first that a moving target is difficult to hit, and when trying to hit an individual in a moving vehicle—here, the driver—"you have a small target and it's very difficult for somebody to do that unless they're a very good shot." Moreover, Hayden testified, if you are successful in shooting the driver, the result is an out-of-control vehicle that could be even more dangerous.

We conclude that the record contains some evidence that appellant acted recklessly when he shot into the Impala. Accordingly, the trial court's submission of the section 9.05 instruction was not error. We overrule appellant's eleventh issue.

**Definition of Reasonable Belief**

In his twelfth issue, appellant contends that the trial court should not have defined "reasonable belief" for the jury in the charge. The charge tracked the Penal Code's definition of the term: "'Reasonable belief' means a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." PENAL § 1.07(a)(42).

Appellant argues that this definition is "at odds with caselaw mandating that justification should be judged from the defendant's perspective alone." He concedes that the justification for defense of a third person addresses "the circumstances as the actor reasonably believes them to be." *Id.* § 9.33(1). But he contends that there is a "subtle distinction" operating between the related grammatical phrases—"reasonably believes" and "reasonable belief"—because courts have asserted that the reasonableness of a defendant's actions under justification theories must be viewed "solely" from the defendant's standpoint. *See, e.g., Bennett v. State*, 726 S.W.2d 32, 38 (Tex. Crim. App. 1986) (instruction was proper when jury "was not allowed to assess the reasonableness of appellant's belief from any standpoint but his own").

We disagree that any distinction exists between section 9.33(1)'s standard of "reasonably believes" and section 1.07(a)(42)'s definition of "reasonable belief." A jury's mandate to view "the circumstances as the actor reasonably believes them to be," PENAL § 9.33(1), and to view "the reasonableness of the defendant's actions

solely from the defendant's standpoint," *Ex parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991) (citing *Bennett*, 726 S.W.2d at 37–38), both retain the essential requirement of reasonableness. Neither formulation of that requirement transforms a justification's objective standard into a subjective one. Instead, although the test specifies that a defendant may act on circumstances as viewed from his own standpoint, it also incorporates the "ordinary prudent man test" from tort law. *Werner v. State*, 711 S.W.2d 639, 645 (Tex. Crim. App. 1986); *Martinez v. State*, No. 05-95-00829-CR, 1997 WL 602844, at *7 (Tex. App.—Dallas Oct. 1, 1997, pet. ref'd) (not designated for publication).

Rather than conflicting with the statutory language of sections 9.31 or 9.33, the definition of reasonable belief explains the meaning of a critical portion of those statutes. To that end, the Court of Criminal Appeals has recently addressed section 9.31 and stated:

> Penal Code Section 9.31 provides that, subject to certain exceptions, 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." *Id.* § 9.31(a). . . . A *"reasonable belief" in this context* is defined as "one that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id.* § 1.07(a)(42).

*Braughton*, 569 S.W.3d at 606 (emphasis added). Thus, our Court of Criminal Appeals has recently employed the definition of reasonable belief to give meaning to section 9.31's use of the term "reasonably believes." We cannot conclude that the terms are in conflict.

The trial court's submission of the definition of reasonable belief in the jury charge was not error. We overrule appellant's twelfth issue.

**Multiple Assailants Instruction**

In his thirteenth issue, appellant contends the trial court erroneously rejected his request to include in the jury charge an instruction on multiple assailants.[11] A defendant is entitled to such an instruction if there is evidence—viewed from his standpoint—that he was in danger of an unlawful attack or a threatened attack by more than one assailant. *Frank v. State*, 688 S.W.2d 863, 868 (Tex. Crim. App.

[11] Appellant proffered the following instruction, which modified his defense-of-a-third-person instruction with the concept of multiple assailants:

> When a person or a third person is attacked with unlawful deadly force, or a person reasonably believes he or a third person is under attack or attempted attack with unlawful deadly force, and there is created in the mind of such person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies such person in resorting to deadly force to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself or a third person from such attack or attempted attack.
>
> When there is evidence, viewed from the defendant's standpoint, that he or a third person was in danger of unlawful deadly force at the hands of more than one assailant, he has a right to use deadly force to defend himself or the third person against either or all of them. Now bearing in mind the foregoing instructions, if you unanimously find from the evidence beyond a reasonable doubt that on or about April 29, 2017, in Dallas County, Texas, the defendant committed the offense of murder, but you further find from the evidence, or have a reasonable doubt thereof, that the defendant reasonably believed that deadly force when and to the degree used was immediately necessary to protect Tyler Gross against the use or attempted use of unlawful deadly force by Vidal Allen or that the defendant reasonably believed that deadly force when and to the degree used was immediately necessary to protect Tyler Gross against the use or attempted use of unlawful deadly force by Vidal Allen and another or others and that he reasonably believed that such deadly force was immediately necessary to protect Tyler Gross against the use or attempted use of unlawful deadly force by Vidal Allen or by Vidal Allen and another or others, then you will acquit the defendant and say by your verdict "not guilty."
>
> If you do not so find, and you do not have a reasonable doubt thereof, you will reject the justification of deadly force in defense of a third person.

1985). A trial judge must instruct the jury on every defensive issue raised by the evidence regardless of its source or strength. *Juarez v. State*, 308 S.W.3d 398, 404–05 (Tex. Crim. App. 2010). "[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." *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007). The evidence may be weak or contradicted, however, "there must be at least some evidence to support the defense as a rational alternative to the defendant's criminal liability." *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013). The defense cannot be submitted unless it is raised by affirmative evidence; it "cannot be based on speculation or hypothetical 'what if' scenarios." *Id.* at 287.

Appellant contends that the record is "replete" with references to multiple assailants and he had the right to protect Officer Gross against all of them. He refers first to the active shooter or shooters who fired what sounded like semiautomatic weapons while the officers were inside the house. No witness, including appellant, ever testified to hearing another of those gunshot sounds after the initial firing. There was no affirmative evidence at the time appellant shot into the Impala that the earlier shooters remained in the vicinity and were threatening appellant or Gross.

But appellant also contends that when he saw Officer Gross trying to stop the Impala, he thought Gross had located the shooters in that car. He argues that the passenger, Jordan Edwards, "was moving, making furtive movements," which

caused appellant to believe he was a threat. Gross, who was closer to the Impala than appellant, testified he saw no furtive movements inside the car. And although appellant later used the words "furtive movements," he testified to what he actually saw, saying:

> On the other side of the car on the passenger seat, I'm seeing the silhouette over there moving. I can see the silhouette, it's wider, it's narrower, it's higher, it's lower. To me that tells me they're, the silhouette is moving. It tells me it's, it's wider, it's narrower, it's higher, it's lower. There's movement, but that's all I can see.

This is not evidence that reasonably suggests that Edwards was about to attack appellant or Gross with deadly force. There was no evidence linking Edwards (or anyone else in the Impala) to a use or threat to use a firearm.

We conclude that appellant's argument concerning multiple assailants is supported only by his own speculation or hypothetical "what if" scenarios. *See Krajcovic*, 393 S.W.3d at 287. The threshold for evidence raising a defense is low, but there must be some evidence. The record in this case does not contain evidence of the use or attempted use of unlawful deadly force by any passenger in the Impala.

The trial court correctly rejected appellant's proposed instruction on multiple assailants. We overrule appellant's thirteenth issue.

## VICTIM CHARACTER EVIDENCE

In his fourteenth issue, appellant contends that the trial court erred by admitting evidence of Jordan Edwards's character during the punishment phase of trial. The State presented a series of witnesses, including Edwards's teachers and his

football coach, all of whom offered glowing testimony of the caliber of student and young man Edwards was.[12] We review the trial court's ruling admitting evidence during the punishment phase of trial for an abuse of discretion. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018).

The specific evidence at issue here is victim character evidence, which is "generally recognized as evidence concerning good qualities possessed by the victim." *Mosley v. State*, 983 S.W.2d 249, 261 (Tex. Crim. App. 1998). Appellant objected below, contending that the victim character evidence was inadmissible because appellant did not know Edwards at the time of the crime.[13] It is undisputed that appellant did not know Edwards, and appellant contends that fact makes the State's evidence irrelevant. However, "Every homicide victim is an individual, whose uniqueness the defendant did or should have considered, regardless of whether the murderer actually knew any specific details of the victim's life or characteristics." *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002). Victim character evidence gives the jury "a quick glimpse of the life that the petitioner chose to extinguish," and it reminds the jury that the victim was a unique human being. *Id.*

[12] The State also called Edwards's parents, but appellant makes no specific reference to or complaint about their testimony.

[13] Appellant argued, "The victim character evidence is not admissible unless the State of Texas can prove that the person on trial knew the decedent prior to the events in question, which they're not going to be able to prove here."

The scope of evidence during the punishment phase is broad: "evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing." CRIM. PROC. art. 37.07, § 3(a)(1). And evidence is relevant to sentencing if it helps the jury decide the appropriate sentence for a particular defendant given the facts of the particular case. *Hayden v. State*, 296 S.W.3d 549, 552 (Tex. Crim. App. 2009). Victim character evidence is admissible during the punishment phase if the jury "may rationally attribute the evidence to the accused's 'personal responsibility and moral culpability.'" *Id.* (quoting *Salazar v. State*, 90 S.W.3d at 335). In that way, admitting evidence concerning the victim can provide "a way to inform 'the sentencing authority about the specific harm caused by the crime in question.'" *Salazar*, 90 S.W.3d at 335 (quoting *Payne v. Tennessee*, 501 U.S. 808, 825(1991)). We conclude that the State's evidence concerning Edwards's exemplary character appropriately illustrated some of the harm caused by his murder. "[T]here is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." *Payne*, 501 U.S. at 826.

Appellant contends that the trial court erred by allowing too much victim character evidence, and he argues further that the testimony tended to compare Edwards with his peers in an inappropriate fashion. Our Court of Criminal Appeals has suggested that "even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice under Rule 403." *Mosley*, 983 S.W.2d at

263. In addition, "Rule 403 limits the admissibility of such evidence when the evidence predominantly encourages comparisons based upon the greater or lesser worth or morality of the victim." *Id.* But appellant did not object to the evidence at issue on Rule 403 grounds. Therefore, he has not preserved these complaints for our review.

The trial court did not abuse its discretion in admitting the victim character evidence. We overrule appellant's fourteenth issue.

## CONCLUSION

We have resolved each of appellant's issues against him. We affirm the trial court's judgment.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

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TEX. R. APP. P. 47

# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

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|---|---|
| ROY OLIVER, Appellant | On Appeal from the 292nd Judicial District Court, Dallas County, Texas |
| No. 05-18-01057-CR V. | Trial Court Cause No. F-1718595-V. |
| THE STATE OF TEXAS, Appellee | Opinion delivered by Justice Pedersen, III. Justices Reichek and Carlyle participating. |

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered this 10th day of August, 2020.