Opinion issued November 20, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00069-CR

ASHTON JOEL CARMEN, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 51,101

DISSENTING OPINION

Is a request for a jury instruction on self-defense sufficient to put the trial court on notice that the party wants an instruction on deadly force in defense of person?

The issue in this case is very close to the one recently decided by the Court of Criminal Appeals in *Bennett v. State*, 235 S.W.3d 241 (Tex. Crim. App. 2007). In *Bennett*, appellant requested a general instruction on self-defense at trial and later complained on appeal that the trial court erred in not submitting an instruction on defense of a third person. *Id.* at 242. The court of appeals had held that appellant's request to include an instruction on self-defense "as it relates to [the] case" was sufficient to place the trial court on notice of her complaint with respect to defense of a third person. *Id.* The Court of Criminal Appeals reversed the court of appeals's judgment, agreeing with the State's position that, because appellant's request for an instruction on self-defense failed to preserve error with respect to an instruction on defense of a third person, the trial court did not err in refusing to submit the latter instruction to the jury. *Id.* at 243.

In *Bennett*, the Court of Criminal Appeals reasoned that self-defense and defense of a third person are separate defenses enumerated in separate sections of the Texas Penal Code[1] and that a request for the former does not by itself alert the trial court with respect to the latter. *Id.* The court rejected appellant's contention that the

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[1] *Compare* TEX. PENAL CODE ANN. § 9.31 (Vernon Supp. 2008) ("Self-Defense") *with id.* § 9.33 (Vernon 2003) ("Defense of Third Person"). Note that in between these two defenses lies "Deadly Force in Defense of Person." *See id.* § 9.32 (Vernon Supp. 2008).

trial court should have been aware of her complaint because defense counsel used the words "in this case" and because evidence at trial existed that would have supported the submission of an instruction on defense of a third person.[2] *Id.* The court reasoned that the law does not require a trial court to mull over all of the evidence introduced at trial in order to determine whether a defendant's request for a jury instruction means more than it says. *Id.* The court did not require "magic words," but it did require that the substance of the complaint be conveyed to the trial court. *Id.* In *Bennett*, because appellant's challenge did nothing more than convey that she wanted an instruction on self-defense, the substance of the complaint on appeal—that an instruction on defense of a third person was required—was not preserved.[3] *Id.*

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[2] In fact, the only relevant evidence of a defense at trial was evidence that appellant was acting in defense of a third person. *See generally Bennett v. State*, No. 05-05-01420-CR, 2006 WL 1828107 (Tex. App.—Dallas Dec. 20, 2006, pet. granted) (not designated for publication). Note that here appellant did not even use any descriptive words, such as "in this case."

[3] The Court of Criminal Appeals stated that it would have been a different case had the record indicated that the trial court actually understood appellant's request to encompass the matters about which the appellant complained on appeal, citing Texas Rule of Appellate Procedure 33.1(a)(1)(A) ("unless the specific grounds were apparent from the context"). *Bennett v. State*, 235 S.W.3d 241, 243 n.9 (Tex. Crim. App. 2007). However, the court determined that there was no indication in the record that the trial court actually understood the appellant's request to extend to any instruction other than one for self-defense. I interpret the court's reference to "context" in rule 33.1(a)(1)(A) as referring to the charge conference, as opposed to evidence at trial, because the Court of Criminal Appeals expressly rejected the argument

All of the reasoning found in *Bennett* applies directly to the facts of this case. First, self-defense and deadly force in defense of person are separate defenses enumerated in separate sections of the Texas Penal Code. *Compare* TEX. PENAL CODE ANN. § 9.31 (Vernon Supp. 2008) (entitled "Self-Defense") *with id.* § 9.32 (Vernon Supp. 2008) (entitled "Deadly Force in Defense of Person"); *see Bennett*, 235 S.W.3d at 243. Further, we should conclude, as did the court in *Bennett*, that a

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that appellant's request encompassed the evidence at trial that supported defense of a third person and because the court reasoned that a trial court is not required to mull over all of the evidence introduced at trial. I further note that the language in rule 33.1 requires that, in order to preserve an issue for appellate review, an objection must be sufficiently specific to advise the trial court of the legal basis for the objection. TEX. R. APP. P. 33.1(a)(1)(A); *Starks v. State*, 127 S.W.3d 127, 133 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) ("To properly preserve an issue for appellate review, there must be a timely objection that specifically states the legal basis for the objection.") (citing *Rezac v. State*, 782 S.W.2d 869, 870 (Tex. Crim. App. 1990)). As stated above, appellant made only a general request for an instruction on self-defense and did not specifically state the grounds for his request and, thus, appellant's request would not have conformed to the requirements of rule 33.1(a)(1)(A). *See Pennington v. State*, 697 S.W.2d 387, 390 (Tex. Crim. App. 1985) ("It is clear then that a general objection which does not distinctly specify the claimed error in the charge is not sufficient to preserve error."). Likewise, it would have been a different case here if appellant had requested an instruction on "self-defense using deadly force," or had said anything that would have placed the trial court on notice that appellant was requesting something more than mere "self-defense." In all of the authorities on which the majority relies for the proposition that "self-defense" and "deadly force in defense of one's person" are interchangeable, there is always something more than mere "self-defense" within the immediate context of the use of the term self-defense to make it clear that deadly force in defense of person is actually intended.

request for the former does not by itself alert the trial court that the latter is being requested. *See Bennett*, 241 S.W.3d at 243. Although the record may contain sufficient evidence to support a request for an instruction on deadly force in defense of person, the law does not require the trial court to review all of the evidence in order to determine if appellant's request meant more than what he stated. *See id.* In fact, the Court of Criminal Appeals has placed the burden on the defendant to request a defensive instruction in order to ensure preservation. *See id.*; *see also Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998). Appellant's request in this case did nothing more than convey to the trial court that he wanted an instruction on self-defense and, thus, did not preserve the substance of the complaint on appeal, which is that the trial court erred in not instructing on deadly force in defense of person. *See Bennett*, 235 S.W.3d at 243. I would not place the duty on the trial court to determine whether a request for self-defense actually means a request for deadly force in defense of person.

Because I believe that the rationale of *Bennett* squarely controls the disposition of this case, I respectfully dissent.

Tim Taft
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

Justice Taft, dissenting.

Publish. *See* TEX. R. APP. P. 47.2(b).