Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-14-00772-CR

Jonathan Jose **GUILLEN**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR2647
Honorable Maria Teresa Herr, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Jason Pulliam, Justice

Delivered and Filed: August 24, 2016

AFFIRMED

Jonathan Jose Guillen shot and killed Ernest Garcia after interrupting Garcia in the act of physically assaulting Guillen's mother, Lisa Martinez, who Garcia was dating. A jury convicted Guillen of murder and sentenced him to ninety-nine years' imprisonment. On appeal, Guillen contends the trial court abused its discretion by: (1) denying his motion for a mistrial based on an improper comment the prosecutor made during closing argument; (2) excluding evidence to support a finding that Garcia was the first aggressor; and (3) including an instruction on provoking the difficulty in the jury charge. We affirm the trial court's judgment.

CLOSING ARGUMENT

In his first two issues, Guillen complains of an improper comment made by the prosecutor. During the punishment phase of trial, Guillen presented evidence regarding his abusive childhood, including the testimony of an expert witness regarding the effect of that abuse on Guillen. During closing argument, defense counsel referred to this evidence. During the State's closing argument, the prosecutor referred to evidence of Guillen's juvenile conviction for aggravated robbery and the testimony of the victim of that robbery. Specifically, the prosecutor argued:

> Now, the other thing, what is this? Blame his background. Blame — well, when it happened, when he held that man up at gunpoint, the elderly man, the elderly man that came in and told you. Do you remember this, sir? That's something that stays with you the rest of your life. Right? He did that to him. That man is emotionally scarred forever. But did he feel any remorse? No. The professional told you he didn't.
>
> These are the people that are — cause problems in our society. The sociopaths who go out and shoot up kindergartens, fourth grades –

Defense counsel objected, and the following exchange occurred:

> [DEFENSE COUNSEL]: Objection, Your Honor. That's improper argument. There's been no evidence of having anything to do with shooting up fourth graders.
> THE COURT: All right. Sustained.
> [PROSECUTOR]: People —
> [DEFENSE COUNSEL]: Your Honor, I ask that he be instructed not to argue that.
> THE COURT: All right. Your objection is sustained. I'm sure he won't argue it again.
> [DEFENSE COUNSEL]: I move for a mistrial.
> THE COURT: Denied.

A. Preservation of Error and Scope of Review

"To preserve error in prosecutorial argument, a defendant must pursue to an adverse ruling his objections to jury argument." *Archie v. State*, 221 S.W.3d 695, 699 (Tex. Crim. App. 2007). The usual sequence to be followed in preserving error in this context is "objection, instruction to disregard, and motion for mistrial." *Id*. The Texas Court of Criminal Appeals, however, has stated:

> this sequence is not essential to preserve complaints for appellate review. The essential requirement is a timely, specific request that the trial court refuses.... Similarly, the request for an instruction that the jury disregard an objectionable occurrence is essential only when the such an [sic] instruction could have had the desired effect, which is to enable the continuation of the trial by a [sic] impartial jury. The party who fails to request an instruction to disregard will have forfeited appellate review of that class of events that could have been "cured" by such an instruction. But if an instruction could not have had such an effect, the only suitable remedy is a mistrial, and a motion for a mistrial is the only essential prerequisite to presenting the complaint on appeal.

Id. (quoting *Young v. State*, 137 S.W.3d 65, 69-70 (Tex. Crim. App. 2004)). When a party moves for a mistrial without requesting an instruction to disregard, "the scope of appellate review is limited to the question of whether the trial court erred in not taking the most serious action of ending the trial; in other words, an event that could have been … cured by instruction to the jury will not lead an appellate court to reverse a judgment on an appeal by the party who did not request [this] lesser remed[y] in the trial court." *Young*, 137 S.W.3d at 70.

B. Denial of Mistrial

We review the trial court's denial of a mistrial under an abuse of discretion standard. *Archie v. State*, 340 S.W.3d 734, 738-39 (Tex. Crim. App. 2011); *Hawkins v. State*, 135 S.W.3d 72, 77 (Tex. Crim. App. 2004). In response to a prosecutor's improper comment, a mistrial is appropriate only if the comment is "so prejudicial that expenditure of further time and expense would be wasteful and futile" because the prejudice is incurable. *Hawkins*, 135 S.W.3d at 77 (internal citations omitted). Stated differently, "[m]istrial is the appropriate remedy when [the improper comment is] so emotionally inflammatory that curative instructions are not likely to prevent the jury from being unfairly prejudiced against the defendant." *Archie*, 340 S.W.3d at 739 (internal citations omitted). In determining whether a trial court abuses its discretion in denying a motion for mistrial in this context, we balance the following three factors: "(1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of the punishment

assessed absent the misconduct (likelihood of the same punishment being assessed)." *Hawkins*, 135 S.W.3d at 77.

C. Analysis

The four proper areas of jury argument are: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) answers to opposing counsel's argument; and (4) pleas for law enforcement. *Freeman v. State*, 340 S.W.3d 717, 727 (Tex. Crim. App. 2011). A prosecutor is allowed wide latitude in drawing inferences from the evidence as long as the inferences drawn are reasonable and offered in good faith. *Cantu v. State*, 939 S.W.2d 627, 633 (Tex. Crim. App. 1997).

In its brief, the State contends the prosecutor's argument was a reasonable inference that Guillen was an antisocial person who commits violent crimes without remorse. The State does not, however, explain how this description allows it to compare the crimes Guillen committed to a person shooting up kindergartens and fourth grades. We agree with Guillen that the prosecutor's comment was not within the four proper areas of jury argument.

We disagree, however, that the trial court abused its discretion in finding the prosecutor's comment was not sufficiently egregious to warrant a mistrial. In his brief, Guillen compares the comment in the instant case to cases in which a prosecutor made a specific comparison to a specific notorious criminal or incident. *See Gonzalez v. State*, 115 S.W.3d 278, 284-86 (Tex. App.—Corpus Christi 2003, pet. ref'd) (reversing punishment where prosecutor compared appellant to Osama bin Laden); *Massey v. State*, No. 04-99-00040-CR 1999 WL 792454, at *6 (Tex. App.—San Antonio Oct. 6, 1999, pet. ref'd) (reversing conviction where prosecutor compared appellant's conduct to the massacre at the Luby's Cafeteria in Killeen, Texas); *Brown v. State*, 978 S.W.2d 708, 714-16 (Tex. App.—Amarillo 1998, pet. ref'd) (reversing punishment where prosecutor compared appellant to notorious serial murderers Jeffrey Dahmer, John Wayne Gacy, and Ted Bundy). Guillen contends the prosecutor's comment in the instant case was a reference to Adam

Lanza's murder of twenty school children and six adults at Sandy Hook Elementary. Although we agree the prosecutor's comment in the instant case was a fair inference to the Sandy Hook Elementary shooting which occurred one day after the date of the offense for which Guillen was indicted, we do not believe the comment is "so emotionally inflammatory that curative instructions [were] not likely to prevent the jury from being unfairly prejudiced against [Guillen]." *Archie*, 340 S.W.3d at 739. Stated differently, we believe the trial court could have determined that any possible prejudice from the comment would have been cured by an instruction to disregard if one had been requested by Guillen. *See Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (noting appellate courts generally presume a jury will follow a judge's instructions); *De La Fuente v. State*, 432 S.W.3d 415, 424 (Tex. App.—San Antonio 2014, pet. ref'd) (same). Therefore, we hold the trial court did not abuse its discretion in denying the motion for mistrial. Guillen's first and second issues are overruled.

EVIDENCE GARCIA WAS FIRST AGGRESSOR

In his third issue, Guillen contends the trial court erred in excluding evidence of Garcia's prior specific acts of violence. Specifically, Guillen sought to introduce court documents to show Garcia had been charged with or convicted of six assault–family violence offenses. Guillen contends the evidence was admissible to show Garcia's character trait for violence in order to establish Garcia was the first aggressor.

A trial court's decision to exclude evidence is reviewed under an abuse of discretion standard. *Torres v. State*, 71 S.W.3d 758, 760 (Tex. Crim. App. 2002). "An appellate court will not reverse a trial court's ruling unless that ruling falls outside the zone of reasonable disagreement." *Id*.

Guillen contends the trial court abused its discretion in this case because Garcia's prior specific acts of violence were admissible to show Garcia was the first aggressor. Although a

defendant in a homicide prosecution who raises the issue of self-defense may introduce evidence of the deceased's violent character to demonstrate the victim was the first aggressor, evidence of the victim's prior specific acts of violence are not admissible simply to prove the victim acted in conformity with a violent character trait. *Ex parte Miller*, 330 S.W.3d 610, 619 (Tex. Crim. App. 2009); *Torres*, 71 S.W.3d at 760. Although specific acts of violence may be relevant apart from character conformity to demonstrate the deceased's intent, motive, or state of mind, a specific violent act is not admissible absent "some evidence of a violent or aggressive act by the deceased that tends to raise the issue of self-defense and that the specific act may explain." *Torres*, 71 S.W.3d at 761. In addition, "a trial court is within its discretion to exclude prior violent acts if the victim's conduct was plainly aggressive." *Smith v. State*, 355 S.W.3d 138, 150-51 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd); *see also Perusquia v. State*, No. 04-12-00126-CR, 2013 WL 2645150, at *1 (Tex. App.—San Antonio June 12, 2013, pet. ref'd) (same) (not designated for publication). "Stated differently, when the victim's alleged conduct unambiguously shows that the victim was the first aggressor, evidence of prior violent acts may not be relevant apart from their tendency to show character conformity for which the prior violent acts would not be admissible." *Perusquia*, 2013 WL 2645150, at *1; *see also London v. State*, 325 S.W.3d 197, 206 (Tex. App.—Dallas 2008, pet. ref'd) (holding evidence of victim's violent past inadmissible where victim's shooting at appellant "was an unambiguous act of aggression and violence that needed no explanation"). Accordingly, "two conditions must exist before a complainant's extraneous act will be admissible to support a claim of self-defense: (1) some ambiguous or uncertain evidence of a violent or aggressive act by the victim must exist that tends to show the victim was the first aggressor; and (2) the proffered evidence must tend to dispel the ambiguity or explain the victim's conduct." *James v. State*, 335 S.W.3d 719, 728 (Tex. App.—Fort Worth 2011, no pet.); *see also Perusquia*, 2013 WL 2645150, at *1 (same).

During trial, the following argument was advanced by defense counsel in seeking to have the evidence admitted:

> The evidence I want to introduce to show the same thing as the Torres case is the fact that Ernest has several convictions for prior assaults on women, he has convictions for assaults on his former girlfriends and former wife. And that conduct is the same type of conduct and would go to explain his motive and intent in this particular case. That he intends to beat up women and those acts would show that which would be probative on the issue of who's the first aggressor.

To preserve error with regard to the exclusion of evidence, a party must explain to the trial court the reasons the evidence is admissible by clearly articulating the basis on which the trial court should admit the evidence. *Reyna v. State*, 168 S.W.3d 173, 177-79 (Tex. Crim. App. 2005). Although appellate courts may uphold a trial court's ruling on any legal theory or basis applicable to the case, we may not reverse a trial court's ruling on any theory or basis that might have been applicable to the case, but was not raised. *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002). A trial court "cannot be held to have abused its discretion merely by ruling on the only theories of law presented to it." *Id*. at 337.

As noted above, defense counsel argued at trial that Garcia's prior assaults were admissible to establish Garcia was the first aggressor with regard to his actions toward Martinez. The evidence in that regard, however, is not ambiguous or uncertain. Martinez testified at trial regarding Garcia's aggression and violence. Because Garcia's conduct with regard to Martinez was "plainly aggressive," the trial court was within its discretion to exclude the proffered evidence of the prior assaults. *Smith*, 355 S.W.3d at 150-51; *see also Perusquia*, 2013 WL 2645150, at *1.[1] Guillen's third issue is overruled.

[1] In his brief, Guillen makes no effort to explain how the record contains some ambiguous or uncertain evidence of a violent or aggressive act by Garcia or how the proffered evidence tended to dispel the ambiguity or explain Garcia's conduct. Instead, Guillen argues the excluded exhibits "clearly showed the violent character of the decedent towards men and women. … Had the jury known how violent Garcia truly was, Guillen['s] defenses of self-defense, defense of third person and necessity would have been bolstered by the knowledge that Guillen was dealing with a dangerously violent man." This argument, however, is one of character conformity, and, as previously noted, "specific acts are

JURY CHARGE

In his final issue, Guillen contends the trial court erred in including a provoking the difficulty instruction in the jury charge during guilt-innocence because such a charge was not supported by the evidence. The State responds the evidence was sufficient to create a fact issue for the jury as to whether Guillen may have provoked Garcia.

When analyzing a jury charge issue on appeal, this court first determines if there was error, and if so, whether the error caused sufficient harm to warrant a reversal. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm necessary to warrant a reversal depends on whether the appellant objected to the jury charge. *Id*.

"The portion of the self-defense statute regarding provocation is a limitation on a defendant's right to self-defense." *Elizondo v. State*, 487 S.W.3d 185, 186 (Tex. Crim. App. 2016). "The rule of law is that if the defendant provoked another to make an attack on him, so that the defendant would have a pretext for killing the other under the guise of self-defense, the defendant forfeits his right of self-defense." *Smith v. State*, 965 S.W.2d 509, 512 (Tex. Crim. App. 1998). "[A] charge on provocation is required when there is sufficient evidence (1) that the defendant did some act or used some words that provoked the attack on him, (2) that such act or words were reasonably calculated to provoke the attack, and (3) that the act was done or the words were used for the purpose and with the intent that the defendant would have a pretext for inflicting harm upon the other." *Elizondo*, 487 S.W.3d at 197. In deciding whether to give the instruction, the trial court must "decide whether evidence has been presented that *could* support a jury's finding on all three elements of provocation beyond a reasonable doubt." *Id*. (emphasis in original). In

admissible only to the extent that they are relevant for a purpose other than character conformity." *Torres*, 71 S.W.3d at 760. Furthermore, we note the argument on appeal must comport with the argument made at trial. *Bekendam v. State*, 441 S.W.3d 295, 300 (Tex. Crim. App. 2014).

reviewing the trial court's decision to include the instruction, the appellate court views "the evidence in the light most favorable to giving the instruction," resolving conflicts in the evidence and drawing reasonable inferences in favor of the instruction. *Smith*, 965 S.W.2d at 514.

In this case, Guillen did not testify at trial and the main eyewitness to Garcia's murder, Guillen's mother Lisa Martinez, gave contradictory accounts about the events surrounding the shooting. Martinez testified that she had been in a relationship with Garcia for a few months, even though she was still married. On the day of the shooting, Martinez had "gotten friendly" with her husband, who was recently paroled, resulting in several hickeys on her neck. She then used cocaine at a friend's house before returning home to her apartment where she lived with her son Guillen, his baby, and his girlfriend. When Garcia arrived after 9:00 p.m., he was drunk and Martinez took him into her bedroom because she knew they would argue and she did not want her son to see the argument or "say stuff" to Garcia. Martinez testified that both she and Guillen knew that Garcia was violent when he was intoxicated. After a short time in her bedroom, Garcia became angry about the hickeys and the fact that Martinez did not want to do cocaine with him. Martinez testified that the argument escalated, and Garcia punched her in the face three times, causing her mouth to bleed. Martinez stated she "cried quietly" in an attempt to "avoid problems."

Martinez told conflicting stories about the events that followed. At one point, Martinez testified that Guillen knocked on the bedroom door and Garcia went to open the door. At another point, Martinez testified that Guillen opened the door and saw Garcia "choking" her; she later testified that Garcia's hands were on the back of her neck pushing her head down toward the floor. Martinez also made a statement that Garcia was standing by the bed when Guillen opened the door. Once the door was opened, Guillen asked Martinez whether Garcia had hit her. Martinez did not respond, and Guillen told Garcia to leave several times. Garcia approached the door and attempted to push it closed while Guillen pushed back and placed his foot in the doorway to prevent the door

from being closed. Garcia told Guillen, "[l]et me deal with your mom and I'll f**king deal with you later, boy." Martinez stated Garcia was mad because "he did not like anyone in their business."

When Guillen opened the door a second time, he was holding a gun. Garcia was standing by the bed's footboard and Guillen was standing outside the doorway. Guillen cursed at Garcia, and told him to "get the f**k out." Martinez testified that Garcia became angry and began walking toward Guillen "with his hands up" and "it looked like Garcia was going to hit" Guillen. Martinez stated that Guillen began stepping back into the hallway and continued telling Garcia to leave, but Garcia kept advancing toward Guillen "with his hands up" and Guillen shot him multiple times. Martinez testified at one point that she could only see the gun barrel extending into the bedroom, but later testified she could see that Guillen's eyes were closed while he was firing the gun. Martinez also testified that she turned away after the first shot, but later testified she saw Garcia fall after a "few shots." She also testified that, at first, she was unsure if Garcia was shot because he did not fall down after the first shot and kept moving toward Guillen. Martinez testified she did not think it was necessary for Guillen to shoot Garcia. After the shooting, Guillen told Martinez to go next door and call 911, which she did. When she returned, Guillen left with his baby and girlfriend before the police arrived.

Martinez admitted at trial that she gave a different story to the police on the night of the shooting. She told the officers that Garcia did not assault her, and that the bedroom door was locked and when Guillen knocked, Garcia went to open the door. She also told the officers that, right before the shots, Garcia walked toward Guillen just to talk, not as if he was going to hit him. Martinez further stated to the police that after the shooting Guillen said, "that's what he f**king got." Finally, Martinez did not tell the officers that Guillen's girlfriend, Gloria Segura, was present during the shooting and that the gun was in Segura's name because she did not want any trouble

from Segura's father, an ex-police officer. Martinez explained at trial that she lied to the police officers who interviewed her that night because she was mad at Guillen for shooting Garcia.

Parts of Martinez's trial testimony were controverted by other evidence. She testified that she has lupus and bruises easily. However, all of the several witnesses who saw Martinez immediately after the shooting stated they did not see any bruises, scrapes, or blood on Martinez's face or mouth, despite her testimony that Garcia hit her in the face three times causing her mouth to bleed. The detective who interviewed Martinez the night of the shooting recalled seeing hickeys on Martinez's neck, but not any other bruises, scrapes, or blood. The medical examiner, Dr. Jennifer Rulon, testified that Garcia was shot ten times, with two gunshot wounds to his right front chest, one wound on the top of his left shoulder, six wounds to his back right hip and buttocks area, and one wound to the back of his left hand; he also had a graze wound on his right hand. Dr. Rulon could not determine the chronological sequence of the gunshot wounds, but stated several wounds were serious and potentially lethal. Dr. Rulon testified that the six wounds on the back right hip/buttocks area were not possible if Garcia continued moving forward after he was hit. There was no evidence of close-range firing on Garcia's hands, which meant the gun barrel was more than two to three feet away from Garcia's hands when fired. Crystina Vachon, the forensic scientist who tested Garcia's clothes for gunshot residue, testified that the front-entrance shots to Garcia's chest and shoulder were fired from about two to five feet away, and the amount of residue showed Garcia's right front chest was closer to the gun than his left shoulder. The shots to Garcia's back right hip/buttocks were fired from more than five feet away and were consistent with Garcia lying on the ground when the shots were fired. Detective Brian Peters, a crime scene investigator, testified that only one of the ten spent shell casings was found in the hallway, which contradicts Martinez's testimony that Guillen kept stepping back into the hallway while he was firing the gun. Nine spent shell casings were found inside the bedroom, with four on the bed. Tammi Sligh, the

forensic scientist who examined the recovered shell casing and bullets, testified she conclusively determined that five of the gunshots were fired from the same Smith and Wesson Sigma Series gun; the characteristics of the other bullets were destroyed. Sligh stated that the particular gun is a semi-automatic, so there is "an intentional pull of the trigger every time." Based on the type of gun used and the recovery of spent casings on the bed, Sligh testified the gun would have had to be fired from further inside the bedroom than the hallway. Sligh stated the placement of casings on the bed were consistent with the shots fired down into Garcia's hip/buttocks area. There was no evidence that Garcia had a weapon. Finally, testimony was admitted about a jail cell phone call in which Guillen stated that he knew what had gotten him into trouble — "packing the damn pistol, dog, and letting my pride get in the way."

The other eyewitness present at the time of the shooting was Segura, Guillen's girlfriend. Segura stated she never felt safe or comfortable around Garcia and did not like the way he treated Martinez. Segura testified that Martinez and Garcia argued "all the time" and always in the bedroom, not in front of her and Guillen. Segura stated that the bedroom she shared with Guillen and the baby was across the hall, and she had a limited view into Martinez's bedroom when the door was open. Segura testified that she recently bought a Smith and Wesson SD Sigma handgun for protection. She admitted that Guillen helped her decide the type of gun to buy. She testified that she kept the gun hidden under a pile of blankets in the hall closet.

According to Segura, there was nothing unusual about the argument between Martinez and Garcia on the night of the shooting. Segura testified that she was putting the baby to sleep in the bedroom she shared with Guillen and she had laid down with the door open. She heard Garcia arrive, go into Martinez's bedroom, and start arguing with her. Segura stated that Martinez opened her bedroom door and told Garcia to leave three times, but he refused. Segura fell asleep and woke up when she heard Guillen say, "Open the door." Segura saw Guillen standing in Martinez's

doorway and stated that Martinez told Guillen that Garcia hit her. Segura testified that she could see that Garcia and Martinez were on opposite sides of the bedroom. She denied that Garcia and Guillen struggled over the bedroom door. Segura twice asked Guillen to come into their bedroom, but he refused and remained in the hallway. She heard Guillen repeatedly ask Garcia if he had hit Martinez and heard Garcia laugh. Segura testified that Garcia "went at" Guillen quickly, lunging at him with open hands. Because Garcia's actions seemed aggressive and threatening, Segura got up and closed her bedroom door; she was afraid for herself and the baby. After she shut the door, she heard noises followed by gunshots. Segura made conflicting statements about the period of time that elapsed between her shutting the door and hearing the gunshots, telling the detective who took her statement that "five to ten minutes" elapsed but testifying at trial that she meant to say "five to seven seconds" elapsed. Segura stated that, after the gunshots, Guillen opened their bedroom door and told her they needed to leave. Segura assumed someone had been shot, but did not ask any questions. She stated she was scared because she had purchased the gun used. Segura and Guillen left with the baby and stayed at his aunt's house and then moved around to several motels.

Based on this evidence, we conclude there was sufficient evidence upon which the jury could find all three elements of provocation. *See Elizondo*, 487 S.W.3d at 197. The evidence that Guillen returned and pointed a gun at Garcia and cursed at Garcia to "get the f**k out" supports a finding that Guillen "did some act" and "used some words" that provoked Garcia's threatening and aggressive move toward him, i.e., Garcia's attack. *See id.* Guillen's exhibition of a deadly weapon and his intensified demand that Garcia "get out" occurred after Guillen had repeatedly asked Garcia to leave and Garcia had refused. Thus, Guillen knew that Garcia was resisting leaving. Instead of calling the police, Guillen chose to return to the bedroom door with a gun and demand that Garcia leave, even though he knew Garcia was drunk and tended to be violent when

drunk. Under these circumstances, the jury could have found that Guillen's act of pointing a gun at Garcia was an act of provocation by Guillen.

As to whether Guillen's demand that Garcia leave and his pointing the gun at Garcia was "reasonably calculated" to provoke Garcia's attack in response, and was done for the "purpose and with the intent" of having a pretext for shooting Garcia, there is sufficient evidence to support reasonable inferences of these two elements. *See id.* When Guillen arrived at the door with the gun, he knew Garcia and Martinez had been arguing, he knew Garcia was violent when drunk and was drunk that night, and he suspected that Garcia had assaulted Martinez. In addition, Garcia had threatened to "deal with him (Guillen) later" after he finished "dealing with" Guillen's mother. Garcia addressed Guillen in a condescending way as "boy." This evidence supports a reasonable inference that Guillen was angry at Garcia that night and "reasonably calculated" that pointing the gun and demanding he leave would provoke Garcia into attacking him. As to Guillen creating a pretext to shoot Garcia, Segura testified the arguments between Garcia and Martinez were common and there was nothing unusual that night, suggesting there was no need for Guillen to intervene that night. Martinez's testimony that she took Garcia into her bedroom to "avoid problems," and did not tell Guillen that Garcia had hit her because she did not want Guillen to "say stuff" to Garcia, tends to support an inference of prior verbal confrontations between Guillen and Garcia. In addition, there was evidence that Segura recently purchased the gun that Guillen picked out. The need to intentionally pull the trigger for each shot, the number of gunshot wounds that Garcia sustained, and the placement of six of the gunshot wounds on his backside also tend to support a finding that Guillen's intent in exhibiting the gun was to create a pretext to shoot Garcia. The testimony about the distance from which the gun was fired and the recovery of four spent casings on the bed and two in the corner of the room also goes to show that Guillen was further inside the bedroom when he fired the gun, and was not backing up in the hallway while firing as Martinez

stated. Finally, the fact that Guillen fled after the shooting and stated that he "let his pride get in the way" supports a finding that he intended to shoot Garcia all along.

Viewing the evidence in the light most favorable to the trial court's inclusion of the instruction, we conclude the record contains sufficient evidence "that *could* support a jury's finding on all three elements of provocation beyond a reasonable doubt." *Elizondo*, 487 S.W.3d at 197. As the court stated in *Smith*, "[i]t is neither our responsibility nor our role to decide if the evidence actually established that the appellant provoked the difficulty with the intent to harm the deceased. That question is properly within the province of the jury as judge of credibility and finder of fact." *Smith*, 965 S.W.2d at 519-20. Thus, we hold "merely that the evidence was sufficient to allow the jury to pass on" the issue of provocation. *See id.* at 520. Guillen's fourth issue is overruled.

CONCLUSION

Based on the foregoing reasons, the trial court's judgment is affirmed.

Rebeca C. Martinez, Justice

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