



## Fourth Court of Appeals San Antonio, Texas

### MEMORANDUM OPINION

No. 04-17-00826-CR

James **STRIBLIN**,  
Appellant

v.

The **STATE** of Texas,  
Appellee

From the 186th Judicial District Court, Bexar County, Texas  
Trial Court No. 2016CR08935  
Honorable Jefferson Moore, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Rebeca C. Martinez, Justice  
Patricia O. Alvarez, Justice  
Liza A. Rodriguez, Justice

Delivered and Filed: March 6, 2019

### AFFIRMED

James Striblin was convicted by a jury of murder. Striblin presents two issues on appeal contending: (1) the trial court abused its discretion in admitting prejudicial photographs into evidence; and (2) the trial court erred in refusing to submit the defense of necessity in the jury charge. We affirm the trial court's judgment.

### BACKGROUND

Striblin was charged with murdering Margarita Natividad by shooting her with a firearm. The evidence established Striblin shot Natividad outside her apartment around 3:00 a.m. The jury

charge included an instruction on defense of a third party. Striblin sought to convince the jury that he shot Natividad because while she had his common-law wife, Priscilla Cueva, pinned to the ground she racked a gun she was holding to Cueva's head. The jury found Striblin guilty of murder. Striblin elected for the trial court to assess sentence, and the trial court sentenced Striblin to life imprisonment. Striblin appeals.

### PHOTOGRAPHS

In his first issue, Striblin challenges several photographs that were introduced into evidence contending the photographs were prejudicial, including: (1) a photograph of Striblin without his shirt showing a tattoo of the word "OUTLAW" across his upper chest; (2) two photo arrays shown to two different witnesses in which they identified Striblin as the shooter; (3) a photograph of Natividad's body at the crime scene mostly covered by a yellow tarp; (4) three photographs of Natividad with her children.

#### A. Standard of Review

A trial court's ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *Johnson v. State*, 490 S.W.3d 895, 908 (Tex. Crim. App. 2016). "A trial judge abuses his discretion when his decision falls outside the zone of reasonable disagreement." *Id.*

Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. "Rule 403 favors the admission of relevant evidence" and "presumes relevant evidence is more probative than prejudicial." *Fisk v. State*, 510 S.W.3d 165, 173 (Tex. App.—San Antonio 2016, no pet.). When conducting a Rule 403 analysis, a trial court must balance the probative force of the proffered evidence along with the State's need for that evidence against: (1) any tendency of the evidence to suggest a decision on an improper basis, (2) any tendency of the

evidence to confuse or distract the jury from the main issues, (3) any tendency of the evidence to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (4) the likelihood that presentation of the evidence will consume an inordinate amount of time or merely repeat evidence already admitted. *Gigliobianco v. State*, 210 S.W.3d 637, 641-42 (Tex. Crim. App. 2006); *Fisk*, 510 S.W.3d at 173.

“[T]he plain language of Rule 403 does not allow a trial court to exclude otherwise relevant evidence when that evidence is merely prejudicial.” *Pawlak v. State*, 420 S.W.3d 807, 811 (Tex. Crim. App. 2013). “[A]ll evidence against a defendant is, by its very nature, designed to be prejudicial.” *Id.* “The fact that proffered evidence is prejudicial is insufficient to exclude it under Rule 403 because only ‘unfair’ prejudice provides the basis for exclusion of relevant evidence under the rule.” *Fisk*, 510 S.W.3d at 175 (citing *Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990) (op. on reh’g)).

#### B. Photograph with “Outlaw” Tattoo

When the State sought to introduce the photograph of Striblin showing the word “OUTLAW” tattooed across his chest, a hearing was conducted outside the presence of the jury. The photograph was offered for purposes of having Evadne Castaneda, a neighbor of Natividad who witnessed the shooting, identify Striblin as the shooter. During the hearing outside the presence of the jury, Castaneda testified she encountered Striblin and his common-law wife waiting outside Natividad’s apartment the afternoon before the shooting. Castaneda and her brother were waiting outside their apartment because they were locked out and waiting for their mother to arrive home. Castaneda testified Striblin showed them his tattoo while they talked.

Defense counsel argued identification was not an issue because Castaneda identified Striblin in court. Defense counsel also argued the tattoo could be considered gang-related. The State responded Castaneda’s identification of Striblin’s tattoo made her identification of Striblin

more certain than it would be without the photograph. The State also argued the tattoo had not been shown to be gang-related. The trial court overruled the objection concluding the photograph “firms up [Castaneda’s] identification.” Furthermore, although defense counsel asserted he had “pretty much stipulated in our opening statement that [Striblin] was the one who perpetrated the shooting,” the trial court responded that opening statement is not evidence. Finally, the trial court gave the jury the following limiting instruction:

State’s Exhibits 3, 4, 5 and 6 are admitted.

I’m going to give you an instruction regarding those exhibits. They’re photographs and they show some tattoos. Now, the tattoos are for identification purposes only. You are not to read into those tattoos anything beyond an identification issue.

Specifically, I think it’s State’s Exhibit 3, has a photo of a tattoo and the tattoo says the word “outlaw.” We all know what outlaw means. All right? But you cannot read into this case anything regarding that tattoo as it being an outlaw. That’s not the purpose of me allowing that particular photograph in.

I’m letting that photograph in only for the purpose of identification that the — that as the witness testified just a minute ago.

Furthermore, I think there’s some other tattoos. If for some reason you look at a tattoo on some of the other exhibits, the photographs, and those you believe represent something to you that you might have some sort of bias or prejudice towards, you are not to let any bias or prejudice influence you as far as your deliberations later in this case.

Again those photographs containing those tattoos are solely for identification purposes. Not for any other reason.

After the limiting instruction was given to the jury, Castaneda testified she saw the tattoo shown in State’s Exhibit 3 when Striblin showed the tattoo to her brother while they were standing outside the apartments the afternoon before the shooting.

Probative value measures of “how strongly [the evidence] serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent’s need for that item of evidence.”” *Fisk*, 510 S.W.3d at 173 (quoting *Gigliobianco*, 210 S.W.3d at 641). In this case, the State was required to prove Striblin was the shooter. Castaneda was the first witness to testify, and the unique nature of Striblin’s tattoo made her identification of him as

the shooter more probative. Although defense counsel maintained Striblin's identity was stipulated because Striblin was asserting self-defense and defense of a third party, the State was required to prove its case irrespective of Striblin's defenses. Given the limiting instruction provided by the trial court, the evidence did not suggest a decision on an improper basis or confuse or distract the jury, and the limiting instruction equipped the jury to evaluate the probative force of the evidence. *Gamboa v. State*, 296 S.W.3d 574, 580 (Tex. Crim. App. 2009) (noting appellate courts "presume that a jury will follow the judge's instructions"). Finally, the presentation of the photograph did not consume an inordinate amount of time, but only involved a few brief questions. After balancing the Rule 403 factors, we conclude the trial court did not abuse its discretion in admitting the photograph.<sup>1</sup>

### C. Photo Arrays

Striblin also challenges the admission of two photo arrays shown to two different witnesses from which the witnesses identified Striblin as the shooter. During trial and on appeal, Striblin contended the photo arrays were of mugshots which made them incredibly prejudicial. The photographs, however, show the heads and shoulders of six different individuals. Nothing in the photographs suggests they are mugshots. The photo arrays made the witnesses' identification of Striblin as the shooter more probative because it evidenced the witnesses' ability to identify Striblin immediately following the shooting and not just in the courtroom. The photo arrays did not suggest a decision on an improper basis or confuse or distract the jury, and the jury was equipped to evaluate the probative force of the evidence. Finally, the presentation of the photo arrays did not consume an inordinate amount of time. Instead, the testimony regarding the photo arrays is contained on a few pages of the two volumes of the reporter's record containing the trial

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<sup>1</sup> Striblin's brief also refers to Rule 404(b) of the Texas Rules of Evidence; however, Rule 404(b)(2) permits evidence to be admitted to prove identity. TEX. R. EVID. 404(b)(2).

testimony. After balancing the Rule 403 factors, we conclude the trial court did not abuse its discretion in admitting the photo arrays.

#### D. Crime Scene Photograph

Striblin next challenges the admission of a photograph from the crime scene showing Natividad's body on the sidewalk largely covered by a yellow tarp. The photograph also shows the pool of blood around her, and the location of the gun Striblin sought to prove Natividad was holding to Cueva's head when he shot Natividad. The photograph was highly probative of the location of Natividad's body in relation to the crime scene and to the gun. The photograph was also probative in showing the location of several evidence markers in relation to Natividad's body. Given that Natividad's body was largely covered with a yellow tarp, the trial court was within the zone of reasonable disagreement in concluding the photograph did not suggest a decision on an improper basis, confuse or distract the jury, and would not be given undue weight. Finally, the presentation of the photograph did not consume an inordinate amount of time. After balancing the Rule 403 factors, we conclude the trial court did not abuse its discretion in admitting the photograph. *See Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006) (holding trial court did not abuse its discretion in admitting crime scene photographs which were relevant to show the location of the body at the crime scene and were "no more gruesome than the crime scene itself as it was found by the police").

#### E. Photographs of Natividad with Her Children

Finally, Striblin contends the trial court erred in admitting three photographs showing Natividad with her children, arguing the photographs were victim impact evidence that was not admissible during the guilt-innocence phase of trial.<sup>2</sup> In *Matchett v. State*, however, the Texas

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<sup>2</sup> Although the State contends Striblin did not adequately brief this argument, the brief contains a citation to a case defining victim impact evidence in arguing the photographs of Natividad and her children were erroneously admitted.

Court of Criminal Appeals held testimony by the victim's widow that she was married to the victim for twenty-five years, that they had five children, and identifying a photograph of him with friends did not constitute victim impact evidence. 941 S.W.2d 922, 931 (Tex. Crim. App. 1996); *see also DeLarue v. State*, 102 S.W.3d 388, 404 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (holding photograph of victim with her son was not victim impact evidence). Accordingly, the trial court did not abuse its discretion in admitting the photographs.<sup>3</sup>

#### **NECESSITY DEFENSE**

In his second issue, Striblin contends the trial court erred in refusing to include an instruction on the defense of necessity in the jury charge.

“Our first duty in analyzing a jury-charge issue is to decide whether error exists.” *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). “Then, if we find error, we analyze that error for harm.” *Id.*

Under section 9.22 of the Texas Penal Code, conduct is justified by necessity, 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.

TEX. PENAL CODE ANN. § 9.22. Thus, if there is a plain legislative purpose to exclude the defense of necessity, then subsection (3) precludes it from being included in the charge.

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<sup>3</sup> Even if we assumed the trial court erred in admitting the photographs, Striblin would not be able to show he was harmed by their admission. One of Natividad's neighbors previously testified Natividad had children, and Natividad's children were about the same age as the neighbor's five children. *Eggert v. State*, 395 S.W.3d 240, 244 (Tex. App.—San Antonio 2012, no pet.) (holding erroneous admission of evidence is harmless if cumulative of other evidence proving the same fact).

As previously noted, the jury charge in the instant case contained an instruction on defense of a third person. Several of our sister courts have held when deadly force is the conduct that is allegedly “immediately necessary” under the first element of a necessity defense, the defense of necessity does not apply. *See Sneed v. State*, No. 11-15-00320-CR, 2017 WL 2588164, at \*3 (Tex. App.—Eastland Apr. 28, 2017, pet. ref’d) (mem. op., not designated for publication); *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); *Wilson v. State*, No. 06-14-00021-CR, 2014 WL 8332264, at \*4-6 (Tex. App.—Texarkana Nov. 7, 2014, pet. ref’d) (mem. op., not designated for publication). As those courts have explained, section 9.32 of the Texas Penal Code provides that a person is justified in using deadly force against another if (1) he would be justified in using force against another under section 9.31; and (2) when and to the degree he reasonably believes the deadly force is immediately necessary to protect him against the other’s use or attempted use of unlawful deadly force or to prevent the other’s imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery. TEX. PENAL CODE ANN. § 9.32. Similarly, section 9.33 of the Texas Penal Code provides that a person is justified in using deadly force against another to protect a third person if such use of deadly force would be justified under section 9.32, and the person reasonably believes his intervention is immediately necessary to protect the third person. *Id.* § 9.33. Thus, a plain reading of sections 9.32 and 9.33 of the Texas Penal Code reveals the Texas Legislature intended to justify the use of deadly force only when one’s life or the life of a third person is immediately threatened by another’s use of unlawful deadly force or to prevent the commission of specific violent crimes. *See Sneed*, 2017 WL 2588164, at \*3; *Kelley*, 2016 WL 1446147, at \*7; *Wilson*, 2014 WL 8332264, at \*4-6. By contrast, the defense of necessity has a much lower threshold, requiring only that the conduct be necessary to “avoid imminent harm.” TEX. PENAL CODE ANN. § 9.22(1). “Harm” is

defined as “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). Consequently, allowing an instruction on necessity when the appellant used deadly force and obtained a jury instruction on self-defense or defense of a third person would undermine the legislative purpose of only allowing deadly force to be used to prevent the immediate threat to one’s life or the life of a third person or to prevent the commission of specific violent crimes. *See Sneed*, 2017 WL 2588164, at \*3; *Kelley*, 2016 WL 1446147, at \*7; *Wilson*, 2014 WL 8332264, at \*4-6. Therefore, because a legislative purpose for excluding the defense of necessity under the facts in this case plainly appears in sections 9.32 and 9.33 of the Texas Penal Code, the trial court did not err in refusing to include an instruction on necessity in the charge. TEX. PENAL CODE ANN. § 9.22(3)

Even if we were to assume the trial court erred in excluding an instruction on necessity, Striblin would not be able to establish any harm. Any instruction on necessity would have overlapped the instruction on defense of a third person because Striblin’s conduct (shooting Natividad) and the harm sought to be avoided (Cueva being shot by Natividad) were the same. Therefore, because the jury rejected Striblin’s defensive theory, it would also have rejected the necessity defense. *See Rodriguez v. State*, 524 S.W.3d 389, 393-95 (Tex. App.—Houston [14th Dist.] 2017, pet. ref’d); *see also Raza v. State*, No. 05-17-00066-CR, 2018 WL 1062451, at \*6 (Tex. App.—Dallas Feb. 27, 2018, no pet.) (mem. op., not designated for publication).

## CONCLUSION

The trial court’s judgment is affirmed.

Liza A. Rodriguez, Justice

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