COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00222-CR
NO. 02-16-00223-CR

BILLY MACK SPENCE A.K.A. BILLY SPENCE — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 372ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NOS. 1413452D, 1413454D

MEMORANDUM OPINION[1]

In separate causes, Appellant Billy Mack Spence was charged with two counts of assault of a public servant. *See* Tex. Penal Code Ann. § 22.01(a)(1), (b)(1) (West Supp. 2016). A jury found him guilty of both counts, and the trial court assessed his punishment for each offense at eight years' confinement and ordered those sentences to run concurrently. Spence appeals, arguing the trial

[1]*See* Tex. R. App. P. 47.4.

court erred by refusing to charge the jury on the affirmative defense of necessity and by denying him a mistrial after the State misstated the law during its closing argument. We find no reversible error and, therefore, we affirm.

I. BACKGROUND

Spence dialed 911 and reported that a prowler was attempting to break into his house. When Fort Worth Police Department (FWPD) Officer Robert San Filippo, Sergeant William Paine, and Officer Olimpo Hernandez arrived, however, they did not find a prowler. Instead, they found Spence's wife, Ladonna, seated in the driver's seat of a car parked in the driveway.[2] She got out of the car and approached the officers, who described her demeanor as scared and a little timid. The officers saw blood dripping from her hand, and when they asked what had happened, Ladonna said she had been inside the house when Spence head-butted her and pushed her out the front door, causing her hand to crash through one of the door's glass panes in the process. The officers concluded that Spence had committed family violence, an offense that required his arrest.[3]

The officers asked Ladonna for permission to enter the house, which she gave to them. With her keys in hand, she walked the officers to the front door, leaned in toward the broken pane of glass, and told Spence that the officers were

[2]Video recordings of the events from two of the responding officers' body cameras were published to the jury.

[3]Officer San Filippo and Officer Hernandez testified that FWPD policy requires officers to arrest any person who has committed family violence if he is still on scene.

coming inside. Spence, who stood approximately six feet, five inches tall and weighed approximately 300 pounds, emerged holding a cell phone and a glass bottle of Jim Beam whiskey that was more than half empty. He walked to the front door before Ladonna could unlock it, and when she turned her key to unlock the door, Spence responded by relocking it and holding the lock in place with his hand, frustrating any further attempts to unlock the door from the outside. Spence began conversing with the officers, but his speech was incoherent, and he was very upset and irate, yelling and cursing at the officers. The officers concluded Spence was intoxicated, and he became increasingly aggressive throughout the conversation. One of the officers attempted to de-escalate the situation by telling Spence that they just needed to talk to him to get his side of the story, but Spence did not calm down.

As the situation developed, the officers concluded they would need to make a forced entry into the house in order to arrest Spence, but because Spence's size, intoxicated state, and aggressive behavior posed a threat to their safety, they intended to wait for backup before doing that. Before backup arrived, however, Spence announced to the officers that he had a gun and was going to get it, and he immediately walked away from the front door and toward what the officers believed was a bedroom.[4] The officers believed that allowing

[4]Spence remained on the phone with the 911 dispatcher throughout much of the interaction with the responding officers, and a recording of that call was introduced into evidence and played for the jury. From that recording, Spence can be heard saying, "If you come into my house, I've got a gun, and I'm going to cap your ass, you hear me?"

Spence to retrieve a firearm would pose a risk not only to their safety but the public's as well. Thus, having concluded they could not risk allowing Spence to retrieve a firearm, the officers decided they could no longer wait for backup before confronting Spence; they kicked in the front door and entered the house.

Officer San Filippo entered first, with his Taser drawn. Sergeant Paine entered next, and then Officer Hernandez, who had also drawn his Taser. The officers moved toward the hallway that Spence had retreated to, and they repeatedly told him to get on the ground. Spence, who was still holding his cell phone and bottle of Jim Beam whiskey, initially raised his hands but quickly lowered them, and he did not comply with the officers' commands to surrender. As a result, Officer San Filippo fired his Taser, hitting Spence and causing him to fall face down on the ground with his arms underneath him. The officers told Spence to put his arms out to the side so they could place him in handcuffs. When he failed to do so, Officer San Filippo and Officer Hernandez attempted to pry Spence's hands out from underneath him. However, Spence rolled over and kicked both officers square in the chest. The force of the kick knocked Officer Hernandez off his knees into a wall behind him and sent Officer San Filippo backwards into a closet, where he landed flat on his back on something sharp.

Having freed himself of the officers attempting to restrain him, Spence got up and began moving toward the kitchen when Officer San Filippo, who was still on the ground, fired another cartridge from his Taser, hitting Spence and causing him to fall to the ground again. Despite the officers' continued commands for him

to stop fighting them, Spence continued to resist. He rolled onto his back and began wildly flailing his legs at the officers, and Officer Hernandez struck Spence a few times on the legs with a baton. The officers' efforts had little effect on Spence, who managed to make his way into the kitchen. Officer Hernandez then sprayed a can of pepper spray at Spence. This, too, had little effect in obtaining Spence's compliance, so Officer Hernandez shot his Taser at Spence, causing him to again fall to the floor. Spence began to roll around on the ground, however, and would not surrender to the officers, so Officer San Filippo hit Spence in the legs with a baton. Spence still did not comply with the officers' commands, and he flailed his legs at the officers and began reaching for things in the kitchen.

Overcome by the lingering effects of the pepper spray, Officer San Filippo found it difficult to breathe and made his way out of the kitchen and outside of the house as backup officers entered. The backup officers made their way into the kitchen to assist Officer Hernandez. The officers attempted to turn Spence over onto his stomach, but he was still resisting, so one of the backup officers used the drive-stun mode of his Taser on Spence's side, another officer maneuvered toward the front of Spence's head and applied pressure, and Officer Hernandez hit Spence in the side of the neck with four closed-hand strikes. Spence finally relented, and the officers arrested him.

After things had calmed down, Officer San Filippo began to experience persistent pain and a sore back as a result of his encounter with Spence. Officer

Hernandez was also injured: he experienced a dull pain in his upper back that gradually worsened. He experienced constant pain for several months, during which time he visited a doctor on several occasions. Officer Hernandez filed a worker's compensation claim as a result, and his pain did not ultimately resolve until a few months after his encounter with Spence.

II. CHARGE ERROR

In his first issue, Spence contends the trial court erred by denying his request to instruct the jury on the defense of necessity because that defense was raised by the evidence.

A. STANDARD OF REVIEW

We apply a two-step analysis in reviewing a claim of charge error: we first determine whether error occurred, and if it did, then we determine whether the error was harmful. *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

B. LAW

A defendant is entitled to a jury instruction on a defensive issue if it is raised by the evidence, regardless of the strength or credibility of that evidence. *Farmer v. State*, 411 S.W.3d 901, 906 (Tex. Crim. App. 2013). In determining whether the evidence raised a defensive issue, we view the evidence in the light most favorable to the defendant's requested submission. *See Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006).

Necessity is a justification defense that excuses a defendant's otherwise unlawful conduct if (1) the defendant reasonably believed the conduct was immediately necessary to avoid imminent harm, (2) the desirability and urgency of avoiding the harm clearly outweighed, 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. *See* Tex. Penal Code Ann. §§ 9.02, 9.22 (West 2011); *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999). It is a confession-and-avoidance defense, meaning a defendant is not entitled to a necessity instruction unless he admits to the conduct—the act and the culpable mental state—of the charged offense and then offers necessity as a justification. *See Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010); *Pennington v. State*, 54 S.W.3d 852, 856 (Tex. App.—Fort Worth 2001, pet. ref'd). Nor is a defendant entitled to a necessity instruction if he was responsible for having placed himself in the position from which he attempted to extricate himself by committing a criminal offense. *See Shafer v. State*, 919 S.W.2d 885, 887 (Tex. App.—Fort Worth 1996, pet ref'd); *see also Morrow v. State*, No. 11-13-00326-CR, 2015 WL 5192291, at *2 (Tex. App.—Eastland Aug. 21, 2015, no pet.) (mem. op., not designated for publication); *Ford v. State*, 112 S.W.3d 788, 794 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Rangel v. State*, Nos. 04-01-00451-CR, 04-01-00452-CR, 04-01-00453-CR, 2002 WL 1625576, at *3–4 (Tex. App.—San Antonio July 24, 2002, no pet.) (not designated for publication).

C. APPLICATION

As noted above, because necessity is a confession-and-avoidance defense, Spence was not entitled to a necessity instruction unless he admitted to every element—including the culpable mental state—of the charged offenses (here, the assaults of Officer San Filippo and Officer Hernandez). *See Juarez*, 308 S.W.3d at 399; *Pennington*, 54 S.W.3d at 856. The record does not show that Spence admitted to those offenses. The court of criminal appeals has explained the requirement that a defendant must admit to the charged offense to be entitled to a necessity instruction as follows:

> [W]e have rendered two different interpretations of the confession and avoidance doctrine's requirements. Historically in necessity defense cases, we have said that a defendant must admit to the conduct. We made this assertion in cases in which the defendant testified and explicitly denied the conduct, either by denying the act or the culpable mental state or both. But in our most recent discussion of the doctrine in *Shaw v. State*, we expanded the admission requirement and said that a defendant's defensive evidence must admit to the conduct. Whether the confession and avoidance doctrine requires the former or the latter is not necessary to our resolution of this case because [Appellant] testified and a factfinder could reasonably infer from his testimony that he [admitted to every element of the charged offense]. We will leave it for a future necessity defense case to decide whether the confession and avoidance doctrine requires a defendant's own admission.

Juarez, 308 S.W.3d at 405–06 (footnotes omitted). Spence neither testified nor presented any defensive evidence, and thus he did not admit to the assaults of Officer San Filippo and Officer Hernandez.[5] *See id.*; *see also Jenkins v. State*,

[5]We need not and do not decide whether Spence himself was required to admit to the charged offenses in order to raise necessity as a defense. *See* Tex. R. App. P. 47.1; *Juarez*, 308 S.W.3d at 405–06.

468 S.W.3d 656, 673–74 (Tex. App.—Houston [14th Dist.] 2015, pet. dism'd) (explaining that an instruction on a confession-and-avoidance defense such as necessity "is only appropriate when the defendant's defensive evidence essentially admits to every element of the offense including the culpable mental state" (quoting *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) (emphasis omitted))); *Harrison v. State*, 421 S.W.3d 39, 41–42 (Tex. App.—Waco 2013, pet. ref'd) (holding that "[r]egardless of whether defensive evidence is sufficient to admit to the conduct, [appellant's] defensive evidence did not essentially admit to every element of the offense charged," and thus he was not entitled to a necessity instruction).

Additionally, the reason why FWPD officers came to Spence's house at all was because he had called 911 to report that a prowler was trying to break into his house. It was his commission of family violence that required the responding officers to arrest him. When the officers attempted to peacefully enter the house by having Spence's wife unlock the door with her keys, Spence frustrated their attempts by holding the lock from the inside. He was intoxicated, very upset, and irate, yelling and cursing at the officers, and although the officers attempted to calm him down, Spence became increasingly aggressive. It was Spence's statement to the officers that he was going to retrieve a gun that caused them to make an immediate forced entry inside the house. It was his refusal to follow their repeated commands to get on the ground after they made entry that led to his being Tased. And after falling to the ground, Spence failed to comply with the

officers' directions to put his hands out to his side so they could place handcuffs on him, leading Officer San Filippo and Officer Hernandez to attempt to physically pry his hands out from underneath him. That is the position from which Spence attempted to extricate himself by assaulting Officer San Filippo and Officer Hernandez, and it is a position that he was in by his own voluntary conduct. *See Shafer*, 919 S.W.2d at 887 (holding appellant was not entitled to necessity instruction in a driving while intoxicated case where her own voluntary conduct of drinking seven or eight alcoholic drinks before starting her trip caused her to become intoxicated during the drive); *see also Morrow*, 2015 WL 5192291, at *2 (stating appellant was not entitled to necessity instruction in burglary case where appellant's voluntarily ingestion of intoxicating substances with friends resulted in friends attacking him, leading him to break into a house for refuge); *Ford*, 112 S.W.3d at 794 (holding that appellant not entitled to necessity instruction in evading arrest case where appellant disobeyed officer's request to sit in his patrol car, jumped instead into his own car, locked the door, and reached under the seat, causing the officer to draw his weapon, after which appellant fled, because appellant provoked the difficulty, or was responsible for having placed himself in the position from which he attempted to extricate himself by fleeing); *Rangel*, 2002 WL 1625576, at *3–4 (holding appellant not entitled to necessity instruction in assault on public servant case where appellant's intoxication led to officer's attempt to arrest him, which appellant resisted by force).

We conclude that Spence was not entitled to a necessity instruction, and thus, the trial court did not err by refusing his request for one. We overrule Spence's first issue.

III. JURY ARGUMENT

In his second issue, Spence contends the trial court reversibly erred by denying two motions for mistrial he made in response to misstatements of law the prosecutors made during the State's closing argument. The jury charges included the following self-defense instruction:

> Upon the law of self defense, the use of force to resist an arrest or search is justified:
>
> 1) If, before the actor offers any resistance, the peace officer uses or attempts to use greater force than necessary to make the arrest or search; AND
>
> 2) When and to the degree the actor reasonably believes the force is immediately necessary to protect himself against the peace officer's use or attempted use of greater force than necessary.
>
> By the term "reasonable belief" as used herein is meant a belief that would be held by an ordinary and prudent person in the same circumstances as the defendant.
>
> In considering the application of the self defense law, you should consider all the facts and circumstances in evidence before you, together with all relevant facts and circumstances going to show the condition of the mind of the Defendant at the time of the offense, if any, and in considering such circumstances, you should place yourselves in the Defendant's position at that time and view them from his standpoint alone.

Toward the beginning of the State's initial closing argument, the following exchange transpired:

[PROSECUTOR]: Now, I want to go over the Court's Charge and the self-defense issue. This is not self-defense. Why? Because if you argue self-defense, you have to be in the right. You have to be innocent. You have to be protecting yourself --

[DEFENSE COUNSEL]: Your Honor, I object. That's a misstatement of the law.

THE COURT: Yeah, I'm not sure what you mean by "have to be innocent[."] I'll sustain the objection as a precaution.

[DEFENSE COUNSEL]: Ask the jury to disregard that statement.

THE COURT: Disregard the statement that you have to be innocent -- if you meant innocent of anything -- and that's just not the law.

[DEFENSE COUNSEL]: And move for mistrial.

THE COURT: Every[one] understand that instruction?

SEVERAL JURY MEMBERS: Yes.

THE COURT: Can everyone follow it all right?

SEVERAL JURY MEMBERS: Yes.

THE COURT: That will be denied.

After Spence's counsel delivered his closing argument, the State returned for its final closing argument, during which time it made an argument concerning self-defense that was similar to the one it had made during its initial closing argument:

[PROSECUTOR]: He was that off. He was not right. And he was not in the right when he tries to use self-defense to stop the law enforcement officers from doing their job. And you have to be in the right to claim self-defense. That's a sacred justification --

[DEFENSE COUNSEL]: Objection, Your Honor. That's another misstatement of the law.

THE COURT: I'll sustain the objection based on the State's burden to disprove self-defense. I'll sustain your objection.

[DEFENSE COUNSEL]: I'll ask the jury be instructed to disregard that statement of the law.

THE COURT: You'll disregard the last statement that you have to be, quote, in the right. If that can be interpreted in numerous ways, you just don't consider it at all.

[DEFENSE COUNSEL]: Move for mistrial.

THE COURT: Can y'all still follow instructions?

SEVERAL JURY MEMBERS: Yes.

THE COURT: That will be denied.

Spence contends the trial court abused its discretion by denying these motions for mistrial.

A. STANDARD OF REVIEW

When a trial court sustains an objection to an improper jury argument and instructs the jury to disregard but denies a defendant's motion for a mistrial, the issue is whether the trial court abused its discretion by denying the mistrial. *Hawkins v. State*, 135 S.W.3d 72, 76–77 (Tex. Crim. App. 2004). Only in extreme circumstances, when the prejudice caused by the improper argument is incurable, i.e., "so prejudicial that expenditure of further time and expense would be wasteful and futile," will a mistrial be required. *Id.*; *see also Simpson v. State*, 119 S.W.3d 262, 272 (Tex. Crim. App. 2003). In determining whether a trial court abused its discretion by denying a mistrial, we balance three

factors: (1) the severity of the misconduct (prejudicial effect); (2) curative measures; and (3) the certainty of conviction absent the misconduct. *Hawkins*, 135 S.W.3d at 77; *Mosley v. State*, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g). An instruction to disregard an improper jury argument is generally sufficient to cure harm. *Wesbrook v. State*, 29 S.W.3d 103, 115 (Tex. Crim. App. 2000); *Whitney v. State*, 396 S.W.3d 696, 704 (Tex. App.—Fort Worth 2013, pet. ref'd).

B. APPLICATION

We turn first to the severity-of-misconduct factor. Assuming without deciding that the two statements Spence objected to as set forth above misstated the law of self-defense, "[p]rejudice is clearly the touchstone" of the severity-of-misconduct factor. *Hawkins*, 135 S.W.3d at 77. Spence contends that these statements were prejudicial because they conveyed to the jury that he had to be innocent in order to be justified in using self-defense and because they shifted the burden of proof on his claim of self-defense. He also emphasizes that the statements were made twice.

Before the State began its initial closing argument, the trial court read its charges—which included a correct instruction on self-defense—to the jury. When Spence objected to the prosecutor's statement during the State's initial closing argument, the trial court sustained the objection and instructed the jury to disregard it. When Spence thereafter moved for a mistrial, the trial court asked the jury members if they understood its instruction and whether they could follow

it, and the jury members confirmed they could. The trial court denied the motion, and then the prosecutor continued, focusing on the precise wording of the court's self-defense charge.[6] After the trial court sustained Spence's objection during the State's final closing argument, it instructed the jury to "disregard the last statement that you have to be, quote, in the right. If that can be interpreted in numerous ways, you just don't consider it at all." When Spence again moved for a mistrial, the trial court asked the jury members if they could still follow instructions, and they stated that they could. The trial court denied the motion, and the prosecutor then argued, consistent with the court's charges, that Spence's claim of self-defense failed if he offered resistance before the officers attempted to use force to arrest him.[7]

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[6]Indeed, immediately after the trial court denied Spence's first motion for mistrial, the prosecutor continued her opening argument as follows:

> [The court's charge] states, "If, before the actor offers any resistance, the peace officer uses or attempts to use a greater force than necessary . . ." That's not what we have here. We have a six-foot-four, 300-pound man drunk, under the influence of something, threatening to go get a gun and cap their asses. That's not self-defense.

[7]Following the trial court's cautionary instruction, the prosecutor's argument continued as follows:

> The provocation was absolutely there by the time those officers went through the door. And from the time they went through the door to the time they saw Billy Spence, they were yelling the entire time, "Get down, get down."
>
> And you know what? He had three seconds or more to respond, three seconds. One, two, three. That is plenty of time to get down on the ground like they said. He did not do that. And that

Given the above context, assuming the prosecutors' statements misstated the law of self-defense, we would conclude that any error was not so highly prejudicial as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors.

As to the second factor, the trial court took curative measures to ensure both that the jury understood the law of self-defense as applied to the facts of these cases and that the jury would follow that law in rendering its verdict. When Spence asked the trial court to instruct the jury after his first objection, the trial court did so, stating, "Disregard the statement that you have to be innocent -- if you meant innocent of anything -- and that's just not the law." And when Spence moved for a mistrial following that instruction, the trial court denied that motion only after ensuring the jury members understood and would follow its instruction. When Spence again asked the trial court to instruct the jury after he objected to the State's final closing argument, the trial court obliged, stating, "You'll disregard the last statement that you have to be, quote, in the right. If that can be interpreted in numerous ways, you just don't consider it at all." And when Spence moved for a mistrial, the trial court asked the jury members if they could

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> man was never going to comply, and he never did from that point on. Even before then, he was in no mind to comply with officers. He told them, "If you come in here, you're going to have to shoot me." He said that on the 9-1-1 call. You can listen to it yourself if you missed it the first time.
>
> He also told them he was going to get a gun and he was going to shoot them. That's what they heard. That's what he did. He walked away.

still follow instructions, and they responded, "Yes." The law generally presumes that instructions to disregard and other cautionary instructions will be duly obeyed by the jury. *Whitney*, 396 S.W.3d at 706. And generally, a trial court cures any error from an improper jury argument when it instructs the jury to disregard the comment. *Id.* We find nothing in the record to suggest that the jury did not heed the trial court's instructions.

Finally, the third factor: the certainty of a conviction absent the statements Spence complains of here. Officers San Filippo and Hernandez were wearing body cameras throughout the encounter with Spence, both cameras were activated during the encounter, and both cameras captured the events that transpired from their perspective. These videos were introduced into evidence and played for the jury. Additionally, the State introduced into evidence and played for the jury a recording of Spence's call to 911, which captured audio of a large portion of the events that transpired. And, of course, the State offered the testimony of Officers San Filippo and Hernandez, as well as the testimony of Sergeant Paine. The overwhelming weight of all of this evidence showed not only that Spence injured Officers San Filippo and Hernandez by kicking them as they were attempting to arrest him but also that Spence offered resistance before the officers employed force in their efforts to arrest him, and based upon the strength of the State's case, we find that the prosecutors' comments were unlikely to influence the jury even if they were considered.

Balancing the above, we conclude that the magnitude of the prejudice caused by the jury arguments Spence complains of here was not so great that the trial court's instructions were unable to cure it. Thus, assuming without deciding that the prosecutors' arguments were improper, we hold that the trial court did not abuse its discretion by denying Spence's requests for a mistrial. We overrule Spence's second issue.

IV. CONCLUSION

Having overruled both of Spence's issues, we affirm the trial court's judgments. *See* Tex. R. App. P. 43.2(a).

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: August 17, 2017