IN THE
TENTH COURT OF APPEALS

No. 10-15-00155-CR

ESTER PORRAS NATIVIDAD,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 12th District Court
Walker County, Texas
Trial Court No. 26,487

MEMORANDUM OPINION

In one issue, appellant, Ester Porras Natividad, contends that the trial court erred by refusing to give a jury instruction on voluntariness under section 6.01(a) of the Texas Penal Code. *See* TEX. PENAL CODE ANN. § 6.01(a) (West 2011). We affirm.

I. BACKGROUND

Here, appellant was charged by indictment with the felony offense of aggravated assault with a deadly weapon for allegedly striking apartment-complex manager Adia Jack with a motor vehicle. At the conclusion of the evidence, the jury found appellant

guilty of the charged offense and assessed punishment at seven years' confinement in the Institutional Division of the Texas Department of Criminal Justice with a recommendation for community supervision. The trial court accepted the jury's verdict, suspended the seven-year prison sentence, and placed appellant on community supervision for a period of seven years. The trial court certified appellant's right of appeal, and this appeal followed.

II. STANDARD OF REVIEW

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003).

The trial court must provide the jury with "'a written charge distinctly setting forth the law applicable to the case.'" *Walters v. State*, 247 S.W.3d 204, 208 (Tex. Crim. App. 2007) (quoting TEX. CODE CRIM. PROC. ANN. art. 36.14 (West 2007)). The trial court must instruct the jury on statutory defenses, affirmative defenses, and justifications whenever they are raised by the evidence in the case. *Id.* at 208-09. "A defendant is entitled to an instruction on every defensive issue raised by the evidence, regardless of whether the evidence is strong, feeble, unimpeached, or contradicted, and even when the trial court thinks that the testimony is not worthy of belief." *Id.* at 209. When reviewing a trial court's ruling denying a requested defensive instruction, we review the evidence in the light most favorable to the defendant's requested instruction. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006); *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001).

Moreover, we review the trial court's decision not to include a defensive issue in the jury charge for an abuse of discretion. *See Love v. State*, 199 S.W.3d 447, 455 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) (citing *Wesbrook v. State*, 29 S.W.3d 103, 122 (Tex. Crim. App. 2000)).

III. ANALYSIS

As noted earlier, appellant complains that the trial court erred by not providing a section 6.01(a) instruction on voluntariness in the charge. A person commits an offense only if he voluntarily engages in conduct, including an act, an omission, or possession. TEX. PENAL CODE ANN. § 6.01(a). "Voluntary conduct" and "accident" are two distinct defensive theories, and the current version of the Penal Code does not provide for a "defense of accident." *Rogers v. State*, 105 S.W.3d 630, 637-38 (Tex. Crim. App. 2003). Within the meaning of section 6.01(a), voluntariness refers only to one's own physical body movements. *Id.* at 638. More specifically, the Court of Criminal Appeals has stated:

> If those physical movements are the nonvolitional result of someone else's act, are set in motion by some independent non-human force, are caused by a physical reflex or convulsion, or are the product of the unconsciousness, hypnosis or other nonvolitional impetus, that movement is not voluntary. The word "accident," however, is a word of many meanings which covers a wide spectrum of possibilities. It generally means "a happening that is not expected, foreseen, or intended." Its synonyms include "chance, mishap, mischance, and misfortune." It includes, but certainly is not limited to, unintended bodily movements. But at least since this Court's decision in *Williams* [*v. State*, 630 S.W.2d 640 (Tex. Crim. App. 1982)], the word "accident" has *not* been used to refer to an "involuntary act" under Section 6.01(a). Thus, for purposes of section 6.01(a), an "accident" is not the same as, and should not be treated as the equivalent of, the absence of any voluntary act.

Id. at 638-39. (internal citations omitted) (emphasis in original).

A "voluntariness" instruction under section 6.01(a) is "necessary only if the accused admits committing the act or acts charged and seeks to absolve himself of criminal responsibility for engaging in the conduct." *Peavey v. State*, 248 S.W.3d 455, 465 (Tex. App.—Austin 2008, pet. ref'd); *see Rogers*, 105 S.W.3d at 639 n.30 ("When a person claims the involuntary-act defense he is conceding that his own body made the motion but denies responsibility for it."); *Gerber v. State*, 845 S.W.2d 460, 467 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) ("[N]o evidence showed that appellant acted involuntarily, i.e., under force externally applied.").

In the instant case, appellant did not testify, and the evidence does not indicate that appellant ever admitted to having struck Jack with a vehicle. In fact, John Scheiner, a patrol sergeant for the Walker County Sheriff's Office, testified that appellant told him, "fuck you, nothing happened" and "I ain't run no bitch over."

Jack testified that she heard a car horn repeatedly blowing on the night in question. She also received a call about a disturbance outside an apartment in the complex. When she arrived, Jack heard appellant yelling, "I know he's in the house with that bitch, and I need him to come out of the house right now." Jack implored appellant to call her ex-boyfriend on the phone and to stop blowing the horn because the horn was disturbing others in the apartment complex. Appellant responded, "Fuck the kids and the adults." As appellant continued to yell curse words and blow the car horn, Jack stated that she intended to call the police. Appellant responded, "fuck you and the police." After saying this, appellant "put the car in reverse and smashed on the gas." In doing so, appellant dragged Jack in her door, causing several painful injuries. Jack alleged that appellant ran

over her leg with the vehicle. Appellant stopped the vehicle when some residents threw soda cans at the windshield of the car.

In any event, years after the offense and a week prior to trial, appellant approached Gene Bartee, Precinct 4 Constable for Walker County, at the grocery store and told him that she had no memory of what she did or what happened on the date in question because she was taking Ambien. Once again, appellant did not admit that she engaged in the act of striking Jack with her car but was not responsible for it. *See Peavey*, 248 S.W.3d at 465. Furthermore, neither Constable Bartee's testimony about appellant's recollection of the date in question nor the testimony about soda cans being thrown at appellant's vehicle while she was dragging Jack demonstrate that appellant's acts of pressing the brake on the vehicle, putting the vehicle's transmission in reverse, pressing the accelerator, and striking Jack were "the nonvolitional result of someone else's act, [were] set in motion by some independent non-human force, [were] caused by a physical reflex or convulsion, or [were] the product of unconsciousness, hypnosis or other nonvolitional impetus." *Rogers*, 105 S.W.3d at 638; *see Gerber*, 845 S.W.2d at 467; *see also Farmer v. State*, 411 S.W.3d 901, 907 (Tex. Crim. App. 2013) ("All that is necessary to satisfy Section 6.01(a) of the Texas Penal Code is that the commission of the offense *included* a voluntary act." (emphasis in original)); *Gokey v. State*, 314 S.W.3d 63, 69 (Tex. App.—San Antonio 2010, pet. ref'd, untimely filed) ("'Accident,' in the sense of an unintended or unexpected result of conduct, no longer supports the defense of involuntariness. Rather, the evidence must show 'one's own physical body movements' were not voluntary.").

Additionally, a review of the record shows that appellant really sought to include the section 6.01(a) instruction in the charge to assert the non-existent defense of accident.[1] The Court of Criminal Appeals has noted that: "There is no law and defense of accident in the present penal code, and the bench and bar would be well advised to avoid the term 'accident' in connection with offenses defined by the present penal code." *Rogers*, 105 S.W.3d at 637 (citing *Williams v. State*, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982) (op. on reh'g)). In other words, "accidental" conduct is not the same as "involuntary" conduct under section 6.01(a). *See* TEX. PENAL CODE ANN. § 6.01(a); *see also Rogers*, 105 S.W.3d at 639 ("Thus, for purposes of section 6.01(a), an 'accident' is not the same as, and should not be treated as the equivalent of, the absence of any voluntary act.").

Based on the foregoing, we cannot say that the trial court abused its discretion in refusing to submit appellant's requested section 6.01(a) instruction on voluntary conduct. *See Rogers*, 105 S.W.3d at 638-39 (describing when a voluntary-conduct jury instruction is

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[1] At the charge conference, appellant argued the following:

> And then, Judge for five and six we are requesting instructions under 6.01 and 6.02 of the Code, with respect to the voluntary act requirement, and the requirement of culpability, and Judge, we cite the case too—and if the Court will remember, and [the prosecutor] tried to correct this, but when Ms. Young [a witness] said when the *accident* happened, and the court—the case law says, Judge—hang on just one second—this is *Watley* (phonetic) *versus State*. That's out of Texarkana, 2013. It says the burden is on the State to prove that Defendant's actions were voluntary. *Alfred* (phonetic) *v. State*, Texas Court of Criminal Appeals in 1993. The State need not prove voluntariness unless the evidence is raising the issue of *accident*, in which case the State must disprove the theory of *accident* beyond a reasonable doubt . . . . [W]e're entitled to a 6.01 voluntary act instruction, coupled with the 6.02 culpable mental state instruction, because we believe it was raised by the evidence.

(Emphasis added).

warranted); *Love*, 199 S.W.3d at 455; *see also Wesbrook*, 29 S.W.3d at 122. We overrule appellant's sole issue on appeal.

IV. CONCLUSION

We affirm the judgment of the trial court.

AL SCOGGINS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Scoggins
Affirmed
Opinion delivered and filed January 7, 2016
Do not publish
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