NUMBER 13-17-00266-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHNNY ANTHONY CASTRO, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 329th District Court of Wharton County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Hinojosa, and Perkes
Memorandum Opinion by Justice Perkes

Johnny Anthony Castro appeals his murder conviction, a first-degree felony. *See* TEX. PENAL CODE ANN. § 19.02. By one issue, Castro argues the trial court erred by issuing a conflicting jury charge that included instructions on both necessity and deadly force in self-defense. We affirm.

I. BACKGROUND

Castro was charged by indictment with the murder of Caleb Ormand on or about March 11, 2014. After the presentation of evidence, the trial court conducted an informal jury charge conference with the attorneys. The following day, the court went on the record to obtain objections from the parties. The State objected to the inclusion of instructions on both necessity and deadly force in self-defense,[1] arguing the necessity defense was inappropriate in a case involving deadly force. The trial court overruled the State's objection and inquired if Castro had any objections. Castro stated he needed a few minutes to review the final draft of the jury instructions. The court recessed for Castro to review the charge. After the court reconvened, Castro requested additional time, which the court allowed. The court came back on the record for the second time and asked Castro whether he had any objections to the proposed charge. Castro answered, "No. It appears that the objections which I had to the Charge have been taken care of by the new Charge."

The jury convicted Castro of murder and sentenced to him sixty-seven years' confinement in the Institutional Division of Texas Department of Criminal Justice. *See id.* § 12.32(a). This appeal ensued.

II. STANDARD OF REVIEW

When presented with an argument that a trial court committed jury-charge error, the reviewing court must conduct a two-step inquiry: (1) did an error occur; and (2) if so, did it cause harm that rises to the level of reversible error? *Ngo v. State*, 175 S.W.3d

[1] It is unclear from the record whether Castro requested both instructions or the trial court included them sua sponte.

738, 743 (Tex. Crim. App. 2005) (citing *Middleton v. State*, 125 S.W.3d 450, 453 (Tex. Crim. App. 2003)). "The degree of harm necessary for reversal depends on whether the appellant preserved the error by objection." *Id.* (citing *Middleton*, 125 S.W.3d at 453). If a defendant preserves error, then he only has to show "some harm" to his rights. *Id.* (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985)). If he fails to object, he must demonstrate "egregious harm." *Id.* (citing *Bluitt v. State,* 137 S.W.3d 51, 53 (Tex. Crim. App. 2004)).

III. ANALYSIS

The State argues "that if the inclusion of both instructions was error, then it is error that could only have harmed the [State], not [Castro]." In other words, the State contends that to the extent error occurred, it was harmless. We agree.

A. Error

We must first decide if the trial court erred by including jury instructions on both necessity and deadly force in self-defense. *See Mann*, 964 S.W.2d at 641. Consistent with its objection to the trial court, the State acknowledges a line of cases holding that the two defenses are incompatible as a matter of law because a defendant entitled to a deadly force instruction is necessarily precluded from a necessity instruction. On appeal, Castro adopts this argument as his own. Because this argument is contrary to our precedent, we conclude no error occurred. *See Fox v. State*, No. 13-03-230-CR, 2006 WL 2521622, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 31, 2006, pet ref'd) (mem. op., not designated for publication).

The defense of necessity is based on the reasonable belief that the charged conduct was "immediately necessary to avoid imminent harm." TEX. PENAL CODE ANN.

§ 9.22(1). The Texas Penal Code broadly defines "harm" 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(25). The defense of necessity is available unless "a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear." *Id.* § 9.22(3).

Deadly force in self-defense is limited to a reasonable belief that "deadly force is immediately necessary: (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." *Id.* § 9.32(a)(2). The former version of § 9.32 also imposed a duty to retreat unless "a reasonable person in the actor's situation would not have retreated." Act of May 16, 1995, 74th Leg., R.S., ch. 235, § 1, 1995 Tex. Gen. Laws 2141, 2141 (amended 2007) (current version at TEX. PENAL CODE ANN. § 9.32(c)).

Several of our sister courts concluded that the defense of necessity was foreclosed when a defendant used deadly force because the duty to retreat imposed a heightened standard (i.e., a "legislative purpose") not included in § 9.22. *Searcy v. State*, 231 S.W.3d 539, 542–43 (Tex. App.—Texarkana 2007, pet. ref'd); *Banks v. State*, 955 S.W.2d 116, 118–19 (Tex. App.—Fort Worth 1997, no pet.); *Butler v. State*, 663 S.W.2d 492, 496 (Tex. App.— Dallas 1983), *aff'd on other grounds*, 736 S.W.2d 668 (Tex. Crim. App. 1987); *see also Fitch v. State*, No. 14-06-00408-CR, 2007 WL 2447297, at *7 (Tex. App.—Houston [14th Dist.] 2008, pet. ref'd) (mem. op., not designated for publication). If a defendant was entitled to an instruction on deadly force in self-defense, he was necessarily precluded from an instruction on necessity. *Searcy*, 231 S.W.3d at 542–43.

Section 9.32 has since been amended to severely limit the duty to retreat. *See* Act of March 20, 2007, 80th Leg., R.S., ch. 1, § 3, 2007 Tex. Gen. Laws 1, 2 (codified at TEX. PENAL CODE ANN. § 9.32(c)) ("A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.").

At least two of our sister courts have revisited their prior holdings in light of this amendment and have concluded that § 9.32 continues to embody a "legislative purpose" separate and apart from the former duty to retreat. *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 *5–6 (Tex. App.—Texarkana Nov. 7, 2014, pet ref'd) (mem. op., not designated for publication); *see also Darkins v. State*, 430 S.W.3d 559, 571–72 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd) (continuing to hold the two defenses are incompatible without analyzing amendment to § 9.32). As the *Wilson* Court explained, "From a plain reading of the statute, it is clear that the Legislature intended to justify the use of deadly force only when one's life is immediately threatened by another's use of unlawful deadly force or to prevent the commission of specific violent crimes." *Wilson*, 2014 WL 8332264, at *6. This "legislative purpose" would be undermined because "necessity has a much lower threshold." *Id.*; *Kelley*, 2016 WL 1446147, at *7. Necessity only requires that the conduct be "immediately necessary to avoid imminent harm," TEX. PENAL CODE ANN. § 9.22(1), and "harm" is broadly defined under the Penal Code. *See id.* § 1.07(25); *Wilson*, 2014

WL 8332264, at *6; *Kelley*, 2016 WL 1446147, at *7. Two of our other sister courts have joined these opinions in concluding the two defenses are incompatible when deadly force is the conduct alleged to be "immediately necessary." *Striblin v. State*, No. 04-17-00826-CR, 2019 WL 1049233, at *4 (Tex. App.—San Antonio Mar. 6, 2019, pet. struck) (mem. op., not designated for publication); *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).

This Court, however, previously held that § 9.32 does not contain a "legislative purpose" that precludes a defendant from an instruction on each defense. *Fox*, 2006 WL 2521622, at *3. Relying on the well-settled principle that "a defendant is entitled to the submission of every defense raised by the evidence, even if the defense is inconsistent with other submitted defenses," we noted that the court of criminal appeals had recently held "that submitting a self-defense instruction [under § 9.31] does not foreclose the availability of a necessity instruction." *Id.* (citing *Bowen v. State*, 162 S.W.3d 226, 229–30 (Tex. Crim. App. 2005)). Therefore, "we reject[ed] the State's argument." *Id.*

In *Bowen* the defendant was charged with resisting arrest by force. *Bowen*, 162 S.W.3d at 227. The trial court granted the defendant's request for a self-defense instruction but refused her request for a necessity instruction. *Id.* Under § 9.31(c), a person is justified in using force to resist arrest only to the extent necessary to prevent an officer's abuse of force. TEX. PENAL CODE ANN. § 9.31(c). The State argued that these statutory restrictions constituted a "legislative purpose" under § 9.22(3) that precluded necessity as a defense to resisting arrest. *Bowen*, 162 S.W.3d at 228. The *Bowen* Court disagreed:

> The State's argument that the necessity defense's availability must be viewed in light of section 9.31 must also fail because it ignores that necessity and self-defense are separate defenses. The State attempts to link the two defense statutes together by Bowen's use of force. However, Bowen's conduct does not merge the two defense provisions into a single, unified defense. While Bowen's use of force may limit her ability to invoke self-defense, it does not exclude a necessity defense to a resisting arrest offense as a matter of law. We have recognized the independence of separate defenses by holding that a defendant is entitled to the submission of every defensive issue raised by the evidence, even if the defense may be inconsistent with other defenses. We reaffirm the principle by holding self-defense's statutorily imposed restrictions do not foreclose necessity's availability.

Id. at 229–30 (internal citations omitted).

We recognize that § 9.32's "statutorily imposed restrictions" on the use of deadly force were not at issue in *Bowen*; whether they constitute a "legislative purpose" under § 9.22(3) is a question the court of criminal appeals will have to resolve. *See id.* Under our previous decision, Castro's use of deadly force did not preclude an instruction on necessity as a matter of law. *See Fox*, 2006 WL 2521622, at *3; *see also In re Estrada*, 492 S.W.3d 42, 48 (Tex. App.—Corpus Christi—Edinburg 2016, no pet.) ("Generally, we are bound by our prior holding absent an intervening change in the law from a higher court, the legislature, or this Court sitting en banc."). We conclude no error occurred. *See Ngo*, 175 S.W.3d at 743.

B. Harm

Even if including both instructions constituted error, we hold such error was harmless. As a preliminary matter, we conclude that Castro is required to demonstrate egregious harm because he failed to preserve the error. *See Ngo*, 175 S.W.3d at 743.

Castro contends that the State's objection to the jury charge was sufficient to preserve error for both parties, but he provides the Court with no authority or analysis to

support his position. *See* TEX. R. APP. P. 38.1(i) ("The [appellant's] brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record."). We find the answer in the plain language of Article 36.14 of Texas Code of Criminal Procedure, which states in relevant part:

> Before said charge is read to the jury, the defendant or his counsel shall have a reasonable time to examine the same and *he shall present his objections* thereto in writing, distinctly specifying each ground of the objection. . . . Compliance with the provisions of this Article is all that is necessary to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof.

TEX. CRIM. PROC. CODE ANN. art. 36.14 (emphasis added).

When asked by the trial court if he had any objections, Castro's counsel responded, "No. It appears that the objections which I had to the Charge have been taken care of by the new Charge." By not raising "his objections" to the jury charge, Castro failed to comply with Article 36.14's requirements for preserving error. *See id.* Accordingly, Castro must demonstrate the error caused him egregious harm. *See Ngo*, 175 S.W.3d at 743.

"Jury charge error is egregiously harmful if it affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory." *Stuhler v. State*, 218 S.W.3d 706, 719 (Tex. Crim. App. 2007) (citing *Hutch v. State*, 922 S.W.2d 166, 171 (Tex. Crim. App. 1996) (plurality op.)). "This is a difficult standard to meet and requires a showing that the defendant was deprived of a fair and impartial trial." *Nava v. State*, 415 S.W.3d 289, 298 (Tex. Crim. App. 2013) (citing *Taylor v. State*, 332 S.W.3d 483, 489 (Tex. Crim. App. 2011)). The analysis is fact specific and done on a case-by-

case basis. *Arrington v. State*, 451 S.W.3d 834, 840 (Tex. Crim. App. 2015) (citing *Gelinas v. State*, 398 S.W.3d 703, 710 (Tex. Crim. App. 2013)).

Castro argues that the error vitally affected his self-defense theory because, according to Castro, the necessity instruction did not affirmatively permit the use of deadly force, creating an irreconcilable conflict between the two instructions. Conceptually, this argument fails because Castro's use of deadly force was not at issue; before a defendant is entitled to any justification defense, he must confess to the offense. *See, e.g., Juarez v. State*, 308 S.W.3d 398, 399 (Tex. Crim. App. 2010) ("The confession and avoidance doctrine applies to the necessity defense. Therefore, a defendant must admit to the conduct—the act and the culpable mental state—of the charged offense to be entitled to a necessity instruction." (footnotes omitted)).

Accordingly, Castro's closing argument began by acknowledging his use of deadly force:

> Good afternoon. The State is correct, there is no dispute that John Castro shot Caleb Ormand in the head. Where we do disagree is whether or not that was justified and that's what you have to decide, and I think the evidence in this case leads you to the conclusion that it was justified, that John Castro believed that in order to protect his friends and his family, who he loved, he had to shoot Caleb Ormand in the head.

Regardless, the necessity instruction tracked the statutory language, requiring the jury to acquit Castro if they determined beyond a reasonable doubt that he "did intentionally of knowingly cause the death of Caleb Ormand by shooting him in the head"—i.e., the deadly force he confessed to—but also found that "[Castro] reasonably believed such act was immediately necessary to avoid imminent harm., . . . [and] that 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 denouncing the conduct of the said Johnny Anthony Castro." *See* TEX. PENAL CODE ANN. § 9.22(1), (2). We fail to see how this instruction was inconsistent with Castro's self-defense theory, but even if it was, "a defendant is entitled to the submission of every defense raised by the evidence, even if the defense is inconsistent with other submitted defenses." *Bowen*, 162 S.W.3d at 229 (citing *Hamel v. State*, 916 S.W.2d 491, 493 (Tex. Crim. App. 1996)).

We also agree with the State that Castro received a benefit from the inclusion of both instructions, and therefore any error was harmless. This issue typically arises when a defendant complains on appeal that he was entitled to both instructions and the trial court erred by only providing an instruction on self-defense. *See, e.g., Fox*, 2006 WL 2521622, at *3; *Wilson*, 2014 WL 8332264, at *4.

For good reason; by its plain language, necessity is a more permissive justification because it only requires a showing of "imminent harm," TEX. PENAL CODE ANN. § 9.22(1), and "harm" is broadly defined under the Penal Code, *see id.* § 9.22(1), while deadly force is justified in only a narrow set of circumstances. *See id.* § 9.32(a); *see also Bowen*, 162 S.W.3d at 234 (Cochran, J., dissenting) ("[T]he statutory defense of self-defense is a codification of a *subset* of the necessity defense . . . .") (emphasis added). In this case, the necessity instruction included a definition of "harm" that tracked the Penal Code's definition. Theoretically, the jury could have acquitted Castro based on necessity without ever reaching the narrower self-defense justification. Instead, the jury rejected both defenses and convicted Castro of murder. Having failed to demonstrate any harm, let alone egregious harm, we overrule Castro's sole issue. See *Ngo*, 175 S.W.3d at 743.

III. CONCLUSION

The trial court's judgment is affirmed.

GREGORY T. PERKES
Justice

Do not publish.
TEX. R. APP. P. 47.2(b).

Delivered and filed the
1st day of August, 2019.