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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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No. PD-1130-19

IN THE COURT OF CRIMINAL
APPEALS OF TEXAS

RECEIVED
COURT OF CRIMINAL APPEALS
2/24/2021
DEANA WILLIAMSON, CLERK

MARVIN RODRIGUEZ, Appellant

v.

STATE OF TEXAS, Appellee

On the granting of Appellant's Petition for Discretionary Review in cause number PD-1130-19, from the Fort Worth Court of Appeals for the Second Court of Appeals District, cause number 02-17-00371-CR.

APPELLANT'S REPLY TO THE STATE'S BRIEF

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STATEMENT OF THE CASE

This Court granted Appellant's petition for review from a decision by the Fort Worth Court of Appeals on November 4, 2020. *See Rodriguez v. State*, No. 02-17-00371-CR, 2019 WL 3491647 (Tex. App.—Fort Worth Aug. 19, 2019). Appellant filed his brief on the merits on December 28, 2020. The State filed its brief on January 27, 2021. Appellant filed an extension on February 16, 2021 and now files this reply.

APPELLANT'S REPLY TO THE STATE'S BRIEF

I. The State's preservation argument

The State argues that Appellant's self-defense claim is unpreserved because it "relies on a different ground than that argued at trial." State's brief at 21.

The issue for trial counsel was how the "confession-and-avoidance" rule would implicate Appellant's requested defense instructions. The context of counsel's argument to the trial court was that if the court were to bar a self-defense instruction on the basis that Appellant denied an intent to cause serious bodily injury, that would be okay – the inference from other witnesses' testimony would be that this was an intentional act. RR 10 – 105-06; *see also* RR 10 – 111 ("So our position is <u>even if he didn't admit to intentionally or knowingly causing the death or intending to cause serious bodily injury and doing an act clearly dangerous to human life</u>, and that's the ultimate ruling you make even though we continue to object to it, you still have the issues of how the defense, the justifications play into manslaughter and criminally negligent homicide.") (emphasis added). This is no bait and switch – the factual basis is the same. That is, Appellant and the other witnesses testified that there was a giant fight, that Appellant felt that he and his brothers' lives were in danger, and that he got a gun to protect himself and them. Trial counsel asked for defensive instructions on this basis. The fact that he sought to navigate the waters of

the "confession and avoidance" rule in the trial court should not be a reason to hold that his requested relief fails to comport with what Appellant has raised in the court of appeals. It does.

For this reason, the State's more specific cases it cites in support of its view are not even close. They concern either a different requested instruction at trial and appeal[1] or an entirely different defense.[2]

The State's two-seconds-before-midnight preservation argument dodges the very issue at the heart of the court of appeals' opinion. The dispute between Appellant and the State was never about what magic words the Appellant testified to or didn't – that's obvious from the record. In that sense, Appellant's briefing has never clashed with his charge conference argument: that he did not clearly admit an intent to cause serious bodily injury to Mr. Sells. The issue was whether what he did say from the stand would constitute *enough* to enjoy the benefits of the confession-and-avoidance doctrine. Appellant thinks it was enough; the State (and the court of appeals) disagree.

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[1] *Settles v. State*, No. 05-14-00382-CR, 2015 WL 3522838 at *5 (Tex. App.—Dallas June 3, 2015, pet ref'd) (unpublished)

[2] *Walker v. State*, No. 04-13-00837-CR, 2014 WL 5463948 at *4 (Tex. App.—San Antonio Oct. 29, 2014, no pet.) (unpublished).

II. The State misunderstands a defendant's evidentiary burden to show an entitlement to a defensive instruction.

As it did in the Fort Worth Court of Appeals, the State cherry picks evidence that it likes and ignores evidence supportive of Appellant's self-defense and defense-of-a-third person claims in order to reach its conclusion that "there is no evidence that would support a reasonable belief that Sells used or attempted to use deadly force." State's brief at 23.

The State's argument boil down to the fact that Sells was unarmed and that, "Even in Appellant's version of the facts, Sells simply had the upper hand in a fist fight." State's brief at 24. The State's refusal to acknowledge the trial record is puzzling: Appellant did not simply say that he was losing a "fist fight"; it may have begun as a mere fight, but quickly progressed to something potentially deadly. Appellant testified that, after the second time Candido was knocked down, he saw a man kneeling "with all his weight" on Candido. RR 9 – 45. Candido was face down and screaming in pain. RR 9 - 45. Candido himself testified that he couldn't breathe. RR 9 – 57. It turns out that the man kneeling on Candido and preventing him from breathing was Mr. Sells. RR 9 – 46. Fearing for his brother's life and that of his own, Appellant grabbed Sells and put the gun to his neck. RR 9 – 45.

Other evidence contradicts the State's claim that this was just a fistfight. *See* RR 8 – 56 (Candido awakened from being knocked unconscious by being choked

by someone else); 8 – 143 (Appellant's sister-in-law's testimony that five or six men were beating on her husband Javier); 8 – 147 (this same woman, to avoid injury, had to scramble up a retaining wall, all the while screaming at the piles of fighting men to stop); 8 – 149-50 (she also feared that all three brothers would be killed).

The State may not like Appellant's testimony – but that doesn't mean it can just ignore it. *See Smith v. State*, 676 S.W.2d 584, 587 (Tex. Crim. App. 1984) ("In the instant case we are unable to say there is no evidence as to the issue of self-defense. Surely, the testimony of Barbara Bolden and Ella Mae Smith, although not strong and convincing, raises the issue of self-defense. The issue before this Court is not the truth of this testimony; that is up to the trier of fact.").

III. Despite this Court's opinions to the contrary, the State continues to insist that a defendant must unequivocally admit to both the act and its mental state in order to gain a justification instruction.

The State continues to insist that, under a strict application of the confession-and-avoidance rule, the defendant must admit to both the actus reus and the mens rea of the offense. State's brief at 26-28. Of course, Appellant disputes that the rule is that clear cut – nor should it be.

First, Appellant dealt with this in its opening brief: this Court has many times said that a defendant need not necessarily admit to every element of the offense.

Indeed, this Court has recently reiterated that in *Ebikam v. State*, No. PD-1199-18, 2020 WL 3067581 at *3 (Tex. Crim. App. June 10, 2020) (unpublished) (A defendant "may equivocate on whether he committed the conduct in question and still get a justification instruction.").

The State relies in large part on *Ex parte Nailor*, 149 S.W.3d 125 (Tex. Crim. App. 2004). Appellant's case could hardly be more different. Nailor testified at his domestic violence trial that the victim raised large brass eagle over her head. He responded by putting up his hands to protect himself. In the process, the eagle was knocked out of the victim's hand and into her face. *Id*. at 128. In effect, according to Nailor, he took no aggressive action at all. His lawyer did not even ask for a self-defense instruction, thus becoming the basis for this ineffective assistance of counsel writ. *Id*. at 132.

This Court denied relief, suggesting that Nailor "did not rely upon the law of self-defense at trial." *Nailor*, 149 S.W.3d at 134. This was less of a "confession and avoidance" case and more of a denial-that-anything-happened-at-all case. At Appellant's trial, by contrast, *the entire focus of Appellant's case* was on self-defense:

- Appellant testified he was in fear of life and the life of his brother.
- Appellant testified that his brother was being kneeled on by Sells and screaming.

- Candido, Appellant's brother, testified that he couldn't breathe and feared for his own life while being attacked by Sells and others.
- Appellant presented the testimony of an emergency room physician (excluded by the trial court) in order to explain the life-threatening dangers involved in a large brawl between drunken men and why an actor in Appellant's position might respond with the use of deadly force.
- Appellant's counsel, unlike the lawyer in *Nailor*, specifically requested charges on self-defense, defense of a third person, and necessity.

Therefore, Appellant's case is nothing like *Nailor*. But it is like *Martinez v. State*, 775 S.W.2d 645 (Tex. Crim. App. 1989).

The State doesn't like to discuss *Martinez*, but it is pivotal to this case.[3] The issue is not merely about the legal concepts raised by *Martinez* but one of factual

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[3] The State Prosecuting Attorney, on the other hand, has been more vocal about *Martinez* in the confession and avoidance cases she has argued before this Court. She has even gone so far as to refer to the confession and avoidance section of *Martinez* as mere dicta. *See* SPA's Post submission letter brief in *Jordan v. State*, No. PD-0899-18. That cannot be correct. Deciding whether the C&A rule applied in the first place was necessary to determine whether the lower court's decision was even correct. THEN the Court (not without a dissent from Judge Clinton) went on to determine that Martinez's requested self-defense instruction could have been rejected because the facts of the case did not entitle him to a self-defense instruction *Martinez* at 647. That's not dicta – that's simply a holding on the merits that follows a rejection of what is, essentially, a preservation argument by the State. This is like claiming that a court's decision that a stop-and-frisk implicates the Fourth Amendment is dicta because that court next says that the stop-and-frisk was justified in the defendant's case. *See Terry v. Ohio*, 392 U.S. 1 (1968).

congruence with what happened in Appellant's case. As Appellant argued in his original brief to this Court, Martinez denied intending to fire his pistol at the victim and even denied firing the pistol himself. *See* App. brief at 6-7. This would be denying both the act and the mental state, in the State's formulation. But this Court reasoned that Martinez's admissions (to having the gun and having his finger on the trigger when it fired) were sufficient to garner him a self-defense instruction. *Martinez*, 775 S.W.2d at 647. As argued before, Appellant's situation is the same and he should be treated the same.

IV. Appellant's response to the State's argument in favor of retaining "The Rule."

The State also argues that Appellant has failed to put forward any compelling reason to get rid of the rule of confession and avoidance. The State's logic behind the rule amounts to the following: an instruction that an act is excusable should require the defendant to admit having committed it in the first place, otherwise, "there is nothing to justify." State's brief at 38. Well, of course there is something to justify – proof showing beyond a reasonable doubt that the defendant committed an offense. Whether that proof comes from a defendant's admission or a victim's

testimony really has no relevance. And this is not to say that a defendant's denial has should not be considered. As in *Nailor*, where there is simply no evidence to support a self-defense claim and a defendant's testimony can in no way be read to similarly support such a claim, no instruction should be necessary.

Accordingly, Appellant's argument is not that an appellate court may never consider what a defendant says (or doesn't say) but that there should be no mechanistic rule slavishly checked off by the courts of appeals. This is, perhaps, the root of the State's confusion about some of the out-of-state cases cited by Appellant. The State regards *State v. Gogolin*, 727 P.2d 683 (Wash. Ct. App. 1986), as supporting the Fort Worth Court's opinion because it appears to deny a self-defense instruction on the basis that the defendant claimed at trial the assault was an accident. *See id*. at 684; State's brief at 39 n.11. But this really supports Appellant's view – there is no real "rule" at play here, simply a failure of the evidence to justify a self-defense instruction: "The trial court properly refused to instruct the jury on self-defense in the absence of any evidence to support it." *Gogolin*, 727 P.2d at 684. Further, there are probably so few state cases on this issue simply because it never comes up in most places – there is no rule, just an ordinary examination of evidence to see if an instruction is justified.

A "rule," such as it is, is unnecessary. But there is nothing wrong with reviewing a defendant's testimony at trial in the context of the other evidence. Doing

so in Appellant's case reveals that there was sufficient evidence to warrant the inclusion of Appellant's requested defenses at trial.

PRAYER

Appellant prays that this Court reverse the Fort Worth Court and remand his case to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 2,056 words.

/s/ Jim Gibson
Jim Gibson

CERTIFICATE OF SERVICE

A copy of this petition has been e-served to the Post-Conviction Section of the Tarrant County Criminal District Attorney's Office, 401 W. Belknap, Fort Worth, Texas 76196 and to the State Prosecuting Attorney, Stacey M. Soule at information@spa.texas.gov on February 18, 2021.

/s/ Jim Gibson
Jim Gibson

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