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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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IN THE

COURT OF CRIMINAL APPEALS

OF TEXAS

NICOLE PATRICE SELECTMAN
Appellant-Petitioner

v.

STATE OF TEXAS
Appellee-Respondent

Appealed from:

The 144th Judicial District Court, Bexar County, Texas &

Fourth Court of Appeals, San Antonio, Texas;

Cause No(s).: [2015CR9689] & [04-18-00553-CR], respectively.

APPELLANT'S AMENDED REPLY BRIEF

DEAN A. DIACHIN
Bexar County Asst. Public Defender
Paul Elizondo Tower
101 W. Nueva, Suite 310
San Antonio, Texas 78205
Ph: 210-335-0703
Fax: 210-335-0707

LEAD COUNSEL FOR APPELLANT.

ORAL ARGUMENT:
[REQUESTED].

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The legal theory the State now raises — for the first time ever — does not apply here because it has either been waived, superseded by rule, misapplied to the distinct facts of this case, or abrogated by other decisions this Court has delivered since 1982. 8

Ground for Review No. 1

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to support a rational jury finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 2, 2015. 17

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Ground for Review No. 2

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the confession and avoidance doctrine because: (1) appellant never "flatly denied" an essential element of the offense charged; and (2) the record contains more than ample evidence from which a jury could rationally find that appellant either did fire, or otherwise cause, the shot that injured this complainant. 20

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STATEMENT ON RECORD CITATIONS

The reporter's record will be cited as "RR" and the clerk's record will be cited as "CR." For example: (4 RR 135-137) is meant to reference "Reporter's Record, Volume 4, pages 135 through 137." The reporter's record consists of seven [7] volumes filed by a single court reporter (Ms. Maria E. Fattahi), and will be cited chronologically as follows:

(1 RR ___)	=	M. Fattahi, Vol. 1:	[Master Index];
(2 RR ___)	=	M. Fattahi, Vol. 2:	[Pretrial Motions & Voir Dire];
(3 RR ___)	=	M. Fattahi, Vol. 3:	[Trial Evidence];
(4 RR ___)	=	M. Fattahi, Vol. 4:	[Trial Evidence];
(5 RR ___)	=	M. Fattahi, Vol. 5:	[Charge, Closings, Verdict, & Punishment Evidence];
(6 RR ___)	=	M. Fattahi, Vol. 6:	[Punishment Charge, Verdict, & Sentencing];
(7 RR ___)	=	M. Fattahi, Vol. 7:	[Exhibits].

The clerk's record consists of a two [2] volumes filed by Bexar County District Clerk, Mary Angie Garcia, and will be cited as follows:

(1 CR ___)	=	M. Garcia, Vol. 1:	[Clerk's Record];
(2 CR ___)	=	M. Garcia, Vol. 1:	[Supp. Clerk's Record].

Trial exhibits will be cited: (7 RR ___ [SX-___]) & (7 RR ___ [DX-___]), respectively.

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Ms. Nicole Patrice Selectman, appellant, files this reply by and through her appellate counsel of record, Mr. Dean A. Diachin, Bexar County Assistant Public Defender, and in support would show this Honorable Court the following:

ISSUES PRESENTED FOR REPLY

Re: Appellant's Petition for Discretionary Review.

A. State's Response.

The State says a different legal theory now exits to uphold the judgments below. Namely, the evidence appellant relies on to support her requests for defensive instructions was admitted only for impeachment purposes and should not be considered as substantive evidence. State's Response, p. 11. As support, the State cites four [4] cases. *See Id.* at 11-12 (citing *Wilhoit v. State*, 638 S.W.2d 489 (Tex. Crim. App. 1982); *Key v. State*, 492 S.W.2d 514 (Tex. Crim. App. 1973); *Bocanegra v. State*, 519 S.W.3d 190 (Tex. App.—Fort Worth 2017, pet. ref'd); & *Adams v. State*, 862 S.W.2d 139 (Tex. App.—San Antonio 1993, pet. ref'd)).

B. Appellant's Reply.

The State does not deny the record includes sufficient *facts* to support a rational finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against an actual, or apparent,

threat of imminent serious bodily injury or death at the time she acted here. Instead, they claim the record is legally insufficient because some of the evidence that supports such a reasonable belief was admitted "only for impeachment purposes". State's Response, p. 11. Specifically, the State complains the confession that Erica Rollins gave to Tracy Thomas in 2017 is not "substantive evidence". *Id*.

That said, this new legal theory does not apply here. That theory applies, primarily, when a party calls a witness solely to admit that witness' *own* prior inconsistent statements — statements that would be inadmissible otherwise — under a pretext of impeachment. *See Adams v. State*, 862 S.W.2d 139, 148 (Tex. App.—San Antonio 1993, pet. ref'd) (agreeing, "[w]hen counsel knows that a witness has nothing favorable to say, counsel should not be permitted to parade inconsistent statements before the jury in the hope that they will be treated as substantive evidence"). Indeed, it is the "otherwise inadmissible" aspect of this practice that justifies giving the party's opponent — upon request — an instruction that the witness' prior inconsistent statements are not, themselves, evidence of anything, but rather may be considered for impeachment purposes only. That said, such instructions are not justified when, as here, a party: (1) does not seek to impeach its own witness; (2) calls a witness who does have information favorable to that party; and (3) elicits testimony that is admissible for reasons apart from mere impeachment.

The caselaw the State cites bears this argument out. In *Key v. State*, for instance, Russell Key was tried for burglary. At trial, the State called Key's co-defendant, James LaBone, who swore that LaBone committed the burglary by himself while Key was asleep in the back of LaBone's car. The State then sought to impeach LaBone — its own witness — with a prior inconsistent written confession LaBone gave police, in which he implicated both himself and Key. This Court reversed and remanded, holding:

> The [prior inconsistent] written statement of LaBone … was admitted only for impeachment purposes … and cannot be considered in determining the sufficiency of the evidence to support the conviction.

Key v. State, 492 S.W.2d 514, 516 (Tex. Crim. App. 1973). In *Key*, the guise of "impeachment" was the only legal means by which the State could admit LaBone's prior inconsistent statement. Had it been sponsored by anyone else, LaBone's written confession would have violated the accomplice witness rule, testimonial hearsay rule, and included no "statement against penal interest" made by Key, himself. Further, given the only other evidence admitted against Key was some jewelry and coins found in LaBone's car — but which were never linked to the burglary in question — the record was indeed legally insufficient. *See Key*, 492 S.W.2d at 516 (explaining, "[t]he written statement of LaBone … was admitted *only* for impeachment purposes … and cannot be considered in determining the sufficiency of the evidence

to support the conviction"). If LaBone's written statement had been admissible for another purpose apart from impeachment — as Tracy Thomas' testimony was here — then a different result would have been warranted.

The same problem infected *Adams v. State*, where Ray Adams was also tried for burglary. At trial, the defense introduced otherwise inadmissible evidence under the guise of impeachment and did so by impeaching its own witness, Maria P. Hernandez. Specifically, the defense asked Hernandez about an interview she had given defense counsel the day before trial. No impeachment ever occurred later at trial, however, because Hernandez never testified, during examination by either party, that she ever gave an inconsistent statement during that interview. Rather, Hernandez explained that, during the same interview, her neighbor, "Sharon," volunteered that *Sharon* saw a man she knew as "Paun" taking stolen items from the victim's home on the offense date, even if Hernandez, herself, did not. Thus, by all accounts, Hernandez testified she saw absolutely nothing that day, and none of *her* prior statements were in any way inconsistent with that testimony. Still, the State asked for, and received, an instruction that Hernandez' testimony be used "only for the purpose of impeaching … Maria P. Hernandez, and you (the jury) cannot consider said impeachment testimony as any evidence whatever of the guilt or innocence of the defendant." *Adams*, 862 S.W.2d at 147. That said, given

Hernandez never made any prior inconsistent statements that *could work* to impeach *Hernandez*, this instruction was quite peculiar.

For its part, the court of appeals, unlike the trial court, did not hold that Sharon's observations, as related by Hernandez, could not be used by the jury to exculpate Adams; rather, the court held that Adams simply failed to make the same complaint at both trial *and* on appeal. The court of appeals observed:

> The thrust of appellant's objection [at trial] was that his interrogation of Hernandez could be used as substantive evidence … [whereas on] appeal appellant complains of the [the trial court's] limiting instruction because it charged the jury to disregard evidence of Hernandez' [own] prior inconsistent statements.

Adams, 862 S.W.2d at 147. If Adams had only objected on the same basis in both venues, he might well have won on appeal. *See Id.* (observing, "[appellant] does not demonstrate how such testimony [about Sharon's observations] could have been used as substantive evidence and has [simply] not briefed the issue"). Thus, the problem in *Adams* was inadequate briefing, and not — as the State now claims — any type of bar that operates as a matter of law.

Wilhoit v. State is likewise distinct. There, William Wilhoit was tried for aggravated rape. At trial, the State's investigating officer admitted the complainant had told him that Willhoit subdued her with "thumb cuffs" and "most likely … a toy type gun". On cross-examination, the complainant confirmed

"[i]t was definitely some kind of gun." No evidence was ever admitted to suggest that whatever gun Willhoit used was somehow incapable of causing death or serious bodily injury. Still, Wilhoit claimed he was entitled to an instruction on the lesser-included offense of simple rape. This Court disagreed, holding, "what [the complainant] … said to the officer is not evidence that serves to negate the aggravating element alleged". *Wilhoit v. State*, 638 S.W.2d 489, 499 (Tex. Crim. App. 1982). Thus, the distinction between impeachment and substantive evidence was not really the deciding factor in that case. *Wilhoit* is thus largely inapposite.

In *Bocanegra v. State*, the State likewise sought to gain advantage by impeaching its own witness. There, Calub Bocanegra was convicted of sexual assault of a young child. The court of appeals reversed and discretionary review was refused. *Bocanegra v. State*, 2017 WL 2257310, (Tex. App.— Fort Worth, 2017, pet. ref'd) (mem. op.; not designated for publication).[1]

At trial, the State subpoenaed the complainant's mother, Mandy, to testify. During her testimony, Mandy made clear that her child, Amy, had told Mandy things that convinced Mandy that Bocanegra was not guilty. The State then sought,

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1. The only opinion published in that case is a dissent. *See Bocanegra v. State*, 519 S.W.3d 190 (Tex. App.—Fort Worth 2017, pet. ref'd) (Walker, J. dissenting). The majority opinion is attached as an appendix. *See Id.* at 194. The State only cites content from the unpublished majority opinion, which has no precedential value. TEX. R. APP. P. 47.7(a) (West 2019); *see also* State's Brief, p. 11 (citing "[p.] 234," which appears in the appendix).

relentlessly, to impeach Mandy on grounds that she was "biased," even though she was no longer with Bocanegra and had actually remarried. The court of appeals discounted the State's impeachment efforts, explaining:

> Mandy was aggressively pressed by the prosecution to choose who was lying — Amy or Bocanegra — … Mandy eventually answered "Amy".
> …
> Throughout trial, the State criticized Mandy because she admitted that she did not think Bocanegra was guilty.
> …
> [But, bias] is a form of impeachment evidence whose only aim is to attack the credibility of a witness but otherwise has no probative value. It is not substantive evidence sufficient to prove a material fact in a case.

Bocanegra, 2017 WL 2257310, at *10-11, *35, *36.

This case differs from those cited by the State for at least two [2] reasons. First, appellant did not call Tracy Thomas only to attack her credibility, with either: (1) questions designed to reveal her bias;[2] or (2) her *own* prior inconsistent statements. Rather, appellant called Thomas to rebut certain claims made by the State's witness, Erica Rollins.[3]

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2. In fact, Tracy Thomas made clear she has no bias in favor of either eyewitness in this case. *See, e.g.,* (4 RR 138) (confirming Thomas has never dated either Rollins or appellant); (4 RR 120) (admitting, "I was [actually] closer to [Rollins]"); (4 RR 159-160) (stating, "I just know that … [Rollins confessed to me] and I … immediately started feeling remorseful for both of them").

3. Both at the E.R. and at trial, Rollins confirmed she initially reported that an intruder caused the danger that led to her injury, and only later blamed appellant. To the extent Rollins' second story "impeaches" her first, should her second version also now be labeled "non-substantive evidence"? Appellant submits it was for a well-instructed jury to weigh all versions and to resolve any conflicts.

Second, Thomas also delivered information favorable to appellant that was not admissible for impeachment purposes *only*, as it both corroborated Rollins' *initial* reports at the E.R. *and* tended to invalidate her subsequent claims made against appellant.[4] *See* TEX. R. EVID. 803(24) (West 2017) (allowing hearsay statements that have "so great a tendency to invalidate the declarant's claim against someone else" or would "expose the declarant to civil or criminal liability"). In allowing Thomas' testimony, the trial court seems to have agreed that filing a false police report and committing aggravated perjury satisfy the test set out in 803(24). (4 RR 126-127); *see also Bingham v. State*, 987 S.W.2d 54, 57 (Tex. Crim. App. 1999) (holding exception for hearsay "statements made against penal interest" is not limited only to hearsay statements made by defendants because "such statements are considered reliable, regardless of whether or not the criminal defendant is the declarant").

Further, even if the State's new legal theory could have applied at trial, that theory was waived when the State failed to object on that ground below. *Cf., Terry v. State*, 2000 WL 1644600, at *3 (Tex. App.—Dallas 2000, pet. ref'd) (stating,

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4. Contrary to the State's assertion, [State Brief, p.20], no witness ever testified "Rollins claimed to hospital officials that an intruder in the home … shot [Rollins]." E.R. doctor Nicole Malouf testified Rollins only told her "an intruder had broken into the house and she … was startled by that person at the top of the stairs and turned to run and that's when she got shot." (4 RR 104). And Rollins only testified that, "I just said [at the E.R.] that an intruder came in my home *and* I got shot [and that Nicole saved me]". (3 RR 59, 125) (emphasis added).

"appellant did not object to Harris's statement or request a limiting instruction. Therefore … the [prior inconsistent] statement [introduced by the State] was admitted for all purposes"); *see also* (4 RR 125) (noting only objection State levied below was: "Objection. Hearsay"). As noted, that objection was correctly overruled.

Additionally, cases decided by this Court since *Wilhoit*, in 1982, have also abrogated the State's new theory. The State effectively complains that Rollins' confession is not "substantive evidence" simply because it is contradicted by other of Rollins' statements, which happened to be introduced first at trial. However, it's well settled that a defensive issue may be raised by any source and it doesn't matter if that source is impeached, contradicted, or disbelieved by the trial court. *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016); *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017). At bottom, the State makes the same error now that the court of appeals did below: it simply refuses to view the record in the light most favorable to the instructions requested. *But see Brooks v. State*, 323 S.W.3d 893, 894-95 (Tex. Crim. App. 2010) (noting legal sufficiency review requires *all* evidence admitted at trial, whether properly or not, be considered on appeal). The State's new legal theory thus has no merit.

Ground for Review No. 1

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to support a rational jury finding that appellant reasonably believed deadly force was immediately necessary to protect herself or Erica Rollins against a violent home intruder on April 2, 2015.

A. State's Response.

The State claims no evidence shows appellant reasonably believed deadly force was immediately necessary "because there is no evidence she believed an intruder was in her home". State's Brief, p. 16. According to the state, in order to suffice, the record must establish "Selectman's subjective belief [that] deadly force was necessary to protect [herself or Rollins]". *Id*. at p. 19.; *see also Id*. at p. 20 (claiming, "[t]he standard is not if the evidence could have given the defendant a reasonable belief; but rather, is there some evidence the defendant [actually] held a reasonable belief [that] deadly force was necessary").

B. Appellant's Reply.

The applicable legal standard — which again applies here *de novo* — is whether there is some evidence from which a jury could rationally find each of the elements needed to raise the defensive instructions requested. *Shaw v. State*, 243 S.W.3d 647, 658 (Tex. Crim. App. 2007). In conducting this review, the record will be viewed in the light most favorable to the submissions requested. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006). This standard is an objective standard,

not a subjective one. *E.g.*, TEX. PENAL CODE § 1.07(a)(42) (West 2015) (defining "reasonable belief" as one "that would be held by an ordinary and prudent [person] under the same circumstances as the actor"); *see also Dugar v. State*, 464 S.W.3d 811, 818 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (stating, "[t]he only requirement is that the person be justified in acting against the danger as he reasonably apprehends it. The reasonableness of the person's belief is viewed from the person's standpoint at the time he acted").

Only appellant could have described her subjective mental state at the time of her instant conduct. The State thus effectively complains that the instant record is insufficient simply because appellant did not testify. But, any person with knowledge can raise the issue of self-defense. *See Smith v. State*, 676 S.W.2d 584, 587 (Tex. Crim. App. 1984) (finding statements made by third person involved in same altercation sufficed to raise self-defense on behalf of defendant).

Here, Rollins' admissions to the doctors at the E.R., to Tracy Thomas in Atlanta, and to the instant jury below, all work to objectively establish that an ordinary and prudent person, under the circumstances that appellant faced here, would have reasonably believed that deadly force was needed immediately to protect herself or Rollins from a violent home intruder. *See Thomas v. State*, 699 S.W.2d 845, 851 (Tex. Crim. App. 1985) (stating, "[t]he attendant circumstances from which the

defendant's mental state can be inferred must be collectively examined"); *Torres v. State,* 343 S.W.3d 297, 299 (Tex. App.—Eastland 2011, pet. ref'd) (observing, "[p]roof of … mental state almost always depends upon circumstantial evidence").

Further, the State — like the court of appeals — largely ignores that use of deadly force is presumptively reasonable if "some evidence" shows an intruder has forcefully entered a person's occupied habitation. *See* TEX. PENAL CODE § 9.32(b)(1)(A) (West 2015) (providing presumption just described). That the instant transaction happened in an occupied habitation is undisputed. Rather, the State contends there is no objective grounds for appellant to have reasonably feared for herself or Rollins because there is no evidence that appellant saw the instant intruder actually break into her home. *See* State's Response, p. 21 n. 7 (arguing, "[t]here is no evidence Selectman knew another person entered the residence unlawfully entered [sic] with force"); *but see Dugar*, 464 S.W.3d at 817 (stating, "[w]e do not take such a narrow view of self-defense"). Here, the unlawful forceful entry by a man — who even the court of appeals concedes appellant "thought was an intruder"[5] — could readily be inferred from the fact that he was found physically assaulting a female occupant inside

5. *Selectman v. State*, 2020 WL 1442645, at *3 (Tex. App.—San Antonio March 25, 2020, pet. granted) (mem op., not designated for publication).

appellant's home. (4 RR 126); *see also* (4 RR 104) (confirming by Dr. Malouf that, at the E.R., Rollins initially told Malouf that "an intruder had broken into the house").

As she has noted previously, given the court of appeals has misconstrued: (1) the "apparent danger" and "reasonable belief" elements of Penal Code §§ 9.31; 9.32; & 9.33; and (2) failed to view the instant record either from appellant's standpoint on April 2, 2015 or in the light most favorable to the instructions requested, appellant's first ground should be sustained and a new trial ordered.

Ground for Review No. 2

The court of appeals erred by ruling the instant record insufficient, as a matter of law, to satisfy the confession and avoidance doctrine because: (1) appellant never "flatly denied" an essential element of the offense charged; and (2) the record contains more than ample evidence from which the jury could rationally find that appellant either did fire, or otherwise cause, the shot that injured the complainant.

A. State's Response.

The State claims confession and avoidance is not satisfied because appellant "casts herself as a passive observer of events during which the gun goes off" and "offers no evidence of what her conduct actually was that morning." State's Response, p. 22, 24. It further contends "[t]here is no evidence that Selectman fired the gun to protect Rollins or herself." State's Response, p. 22, 24. Finally, they note *Ebikam v. State,* 2020 WL 3067581 (Tex. Crim. App. 2020), was not yet decided when the lower court issued its opinion here. State's Response, p. 22 n.9.

B. Appellant's Reply.

Appellant first notes that she asked the court of appeals to withhold its opinion until this Court decided *Ebikam v. State*, but it declined. *See* Appellant's Second Amended Reply, p. 28 (filed on June 23, 2019) (requesting formal submission be postponed "until the parties, and this Court [of Appeals], may receive the benefit of the Texas Court of Criminal Appeals' opinion in *Ebikam v. State*, PD-1199-18"). That said, *Ebikam* is a well-reasoned decision that was worth the wait. There, this Court held defendants need not admit the exact manner and means alleged in the charging instrument, and, in fact, need not actually "confess" anything at all. Rather, the confession and avoidance doctrine will only hamper defendants who "flatly deny" an essential element of the offense. No such flat denials occurred here.

Further, the instant record does contain evidence from which a jury could rationally find that appellant actively caused the complainant's injury. *See* (4 RR 129, 150) (showing Rollins admitted appellant "instantly came upstairs to her defense" and "started tussling with [the intruder] because he was tussling with Erica"). Rollins also indicated that her injury only occurred after — and thus at least arguably because — appellant intervened to protect both herself and Rollins from either an actual,

or reasonably apparent, source of immediate serious danger: a violent home intruder.[6] Given the evidence that raises a defense can come from any source, *Elizondo*, 487 S.W.3d at 196, appellant, herself, did not need to offer any evidence of "what her conduct actually was that morning."

In addition, this Court has already ruled that a defendant may be found guilty of aggravated assault even if no evidence shows the accused desired, contemplated, or even risked causing serious bodily injury. *See Rodriguez v. State*, 538 S.W.3d 623, 629 (Tex. Crim. App. 2018) (holding gravamen of simple assault and aggravated assault are exactly the same; the only difference is the *incidental* result of serious bodily injury). However, by that same token, if an act of force — even deadly force — is justified at its inception (by either self-defense, defense of third party, necessity, or otherwise), then the actor should also absolved of responsibility for any other harm that follows *incidentally*. Which is to say that, under these facts, appellant's

6. The record from which this jury could rationally find that the man appellant encountered in her home on April 2, 2015 was in fact an unlawful intruder is also robust. *See, e.g.,*(4 RR 126) (confirming that Rollins admitted she had kept "a boyfriend behind Nicole's back"); (4 RR 168, 187, 198-211) (showing that around the time of the offense, Rollins and her boyfriend [or fiancé] were actively engaged in prostitution); (4 RR 126) (showing that on the date of her injury, Rollins owed her boyfriend money); (4 RR 126) (noting that when appellant came home from work that morning, she found a man she likely did not know physically assaulting Rollins); and (4 RR 126, 129, 150) (showing Rollins admitted appellant immediately intervened to defend herself and/or Rollins). Contrary to assertions by the State, appellant did not need to wait to see if this man actually killed Rollins before she could reasonably infer that he had broken into her home.

mental state on April 2, 2015 was a question of fact for a jury to decide.[7] Things might be different had the State charged appellant with recklessly injuring an innocent bystander, and then assumed the burden to prove those elements. *See Dugar*, 464 S.W.3d at 816 (reversing, in part, because "the [trial] court concluded the complainant was an innocent bystander, as a matter of law"). But, that is not how the State charged appellant here.

Under these facts, for confession and avoidance purposes, three [3] questions are pertinent: (1) did appellant "flatly deny" any element of the offense charged?; (2) is there any evidence to support that appellant fired, or otherwise caused, the shot that injured Rollins?; and (3) is any there evidence from which a jury could rationally find that appellant's conduct was justified?

The answers here are thus:

(1). Appellant never flatly denied any element of the offense charged.

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7. Among those who will likely agree with this argument are the Louisville police officers who shot Breonna Taylor on March 13, 2020 and the Houston officers who shot one-year-old Legend Smalls on March 3, 2021. *See* https://abc13.com/officer-involved-shooting-baby-shot-houston-police-man-by/10422149 (last accessed March 17, 2021). In each of those cases, some evidence shows a third person was injured by an actor seeking to neutralize a reasonably perceived, imminent, serious threat, no different than our record shows appellant did here. If appellant may be denied a self-defense instruction under these circumstances, then so may a member of Texas law enforcement. The only difference is in who prosecutors *choose* to believe. But, who prosecutors believe should not determine what instructions are given to juries.

(2). A State firearms expert and the complainant, alike, offered evidence from which the jury could rationally find that appellant did in fact fire the shot that injured Rollins. *See, e.g.,* (4 RR 82) (opining by forensic scientist Chistina Vachon, "Nicole … may have discharged a firearm"); (3 RR 76) (admitting by Rollins, "she never aimed it at me").

(3). Rollins' admissions at the E.R. in 2015, at the event in Atlanta in 2017, and at trial in 2018, all provide "some evidence" that appellant reasonably believed a home assailant posed an imminent serious danger to both Rollins and appellant on April 2, 2015. The trial court thus reversibly erred when it refused appellant's requests for instructions on self-defense and defense of a third person. Appellant's second ground for review should thus also be sustained and a new trial granted.

Ground for Review No. 3

The intermediate appellate court effectively substituted its own harm analysis for findings of fact by a properly instructed jury.

A. State's Response.

Though it concedes "the lower court did not conduct a rigorous harm analysis," the State still concludes the court of appeals analyzed the correct factors and reached the right result, namely, "Appellant was not harmed by the lack of the instruction[s] [she requested]." State's Response, p. 27.

B. Appellant's Reply.

Since *Ebikam*, the instant court of appeals has reexamined how it analyzes denied requests for self-defense instructions. *See Ayala v. State*, 2020 WL5647048, at *4 (Tex. App.—San Antonio, September 2020, no pet.) (holding, "[a]fter considering the jury charge, the contested issues, the weight of the probative evidence, the arguments of counsel … we conclude the denial of a self-defense instruction caused 'some harm' to Ayala's rights). If the lower court reviewed these same facts today, it might well reach a different result, as it should. "The difference between the instructions that were given and those that should have been given is the difference between foreclosing self-defense and allowing fair consideration of it." *Jordan v. State*, 593 S.W.3d 340, 348 (Tex. Crim. App. February 5, 2020).

PRAYER

WHEREFORE, PREMISES CONSIDERED, appellant respectfully prays the Honorable Court of Criminal Appeals of Texas reverses the judgements of the courts below and remands this case for a new trial.

Respectfully submitted,

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.
Paul Elizondo Tower
101 W. Nueva St., Suite 310
San Antonio, Texas 78204
Phone: (210) 335-0701
Fax: (210) 335-0707
TBN: 00796464
E-mail: dean.diachin@bexar.org

ATTORNEY FOR APPELLANT.

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies this brief was generated by computer, and thus is limited to fifteen-thousand (15,000) words. The "word count" function within Microsoft Word 10.0 indicates this brief consists, in relevant part, of no more than 3,779 words. The reply therefore complies with TEX. R. APP. 9.4(i)(2)(C) (West 2019).

/s/ *Dean A. Diachin*

DEAN A. DIACHIN
Bexar County Assistant Public Defender.

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above and foregoing motion has been e-served upon: (1) Bexar County District Attorney's Office, Appellate Division, 101 W. Nueva St., San Antonio, TX 78205; and (2) State Prosecuting Attorney's Office, 209 W. 14th Street, Austin, TX 78701 on March 19, 2021.

/s/ *Dean A. Diachin*
DEAN A. DIACHIN
Bexar County Assistant Public Defender.

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Bar No. 796464
Dean.Diachin@Bexar.org
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Associated Case Party: NicolePatriceSelectman

Name	BarNumber	Email	TimestampSubmitted	Status
Dean AndrewDiachin		dean.diachin@bexar.org	3/19/2021 4:12:33 PM	SENT

Associated Case Party: State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Shameka A.Roberts		shameka.roberts@bexar.org	3/19/2021 4:12:33 PM	SENT
Laura Durbin		laura.durbin@bexar.org	3/19/2021 4:12:33 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	3/19/2021 4:12:33 PM	SENT
Michael LeeYoung		Michael.Young@bexar.org	3/19/2021 4:12:33 PM	SENT