IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1199-18

OBINNA EBIKAM, Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS BEXAR COUNTY

KEEL, J., delivered the opinion of the Court in which KELLER, P.J., and RICHARDSON, NEWELL, and SLAUGHTER, JJ., joined. NEWELL, J., filed a concurring opinion in which RICHARDSON and SLAUGHTER, JJ., joined. YEARY, J., filed a dissenting opinion in which WALKER, J., joined. KEASLER and HERVEY, JJ., dissented.

O P I N I O N

Appellant was convicted of assault causing bodily injury after the trial court refused to instruct the jury on self-defense. The court of appeals upheld the trial court's ruling because Appellant did not admit the manner and means of the assault alleged in the charging instrument. *Ebikam v. State*, No. 04-18-00215-CR, 2018 WL 4760126, at *2 (Tex. App.—San Antonio, Oct. 3, 2018) (mem. op., not designated for publication). We granted

Appellant's petition for discretionary review to decide whether such a specific admission was necessary. It was not. But in order for a defendant to be entitled to an instruction on a justification defense, his evidence cannot foreclose commission of the conduct in question. We remand to the court of appeals to decide whether that was the case here.

I. Background

Appellant was accused of assaulting Joy Ebo by intentionally, knowingly, or recklessly striking her with his hand.

According to the State's evidence, Ebo, who was in an intimate relationship with Appellant, went to his apartment after a woman answered his phone. When Appellant answered the door, he got mad, dragged her inside, and hit her in the face with his hands, giving her a bloody lip.

According to Appellant, who was the only witness for the defense, Ebo showed up at his apartment behaving aggressively, and she tried to barge in when he answered the door, so he intentionally closed the door on her to keep her out but tried not to hurt her while doing so. He stopped pushing on the door because the confrontation was getting too heated—"It became so much that I didn't want her to get hurt." He eventually let Ebo in and left the apartment himself in order to keep the peace. He did not see her with a bloody lip.

II. The Court of Appeals' Opinion

In upholding the trial court's refusal to instruct the jury on self-defense, the court of appeals compared Appellant's testimony with the charging instrument that accused him of intentionally, knowingly, or recklessly causing bodily injury "by striking the complainant

with" his hand. *Ebikam*, No. 04-18-00215-CR, 2018 WL 4760126, at *2. The court noted some inconsistency in this Court's pronouncements about what a defendant must admit in order to be entitled to a defensive instruction, ultimately holding that because Appellant did not "admit that he struck Ebo with his hand" in self-defense, the trial court did not err in refusing his requested instruction. *Id.*

III. Confession and Avoidance

We have sometimes said that certain defenses require a "confession and avoidance." *See, e.g.*, *Gamino v. State*, 537 S.W.3d 507, 511 (Tex. Crim. App. 2017) (self-defense); *Juarez v. State*, 308 S.W.3d 398, 404 (Tex. Crim. App. 2010) (necessity). We have sometimes imposed the requirement without naming it. *See Ex parte Nailor*, 149 S.W.3d 125, 132–33 (Tex. Crim. App. 2004); *Young v. State*, 991 S.W.2d 835, 838 (Tex. Crim. App. 1999).

The phrase "confession and avoidance" originated in the common law and was introduced into Texas criminal law by *Kimbro v. State*, 249 S.W.2d 919, 920 (Tex. Crim. App. 1952).[1] *See Juarez*, 308 S.W.3d at 402. It is a "judicially imposed prerequisite" for an instruction on a defensive issue. *See Bowen v. State*, 162 S.W.3d 226, 230 (Tex. Crim. App. 2005). Because it is a judicially-imposed requirement, the dissent would overrule our cases applying it. But neither Appellant nor the State advocates for that position, and they

[1] As of the date of this opinion, the confession-and-avoidance language in *Kimbro* appears only in the Lexis publication of *Kimbro*. In West's publications—both online and in print—that language is absent. *Compare Kimbro v. State,* 249 S.W.2d 919, 920 (Print), *with* 249 S.W.2d 919, 920 (Westlaw database), *and* 249 S.W.2d 919, 920, 1952 Tex. Crim. App. LEXIS 1838, *4 (Lexis database). Our original opinion, found by courtesy of the State Archives, includes the language.

did not brief it. Rather, they seek clarification of confession and avoidance. In order to clarify confession and avoidance, we first address an apparent conflict in our cases about whether it requires an admission of every element of the charged offense or something less than that.

Juarez said that confession and avoidance is satisfied by defensive evidence of "both the act and the requisite mental state." *Juarez*, 308 S.W.3d at 405. But *Gamino* suggested that admitting the offense may mean admitting something less than every element. *Gamino*, 537 S.W.3d at 512. While these pronouncements standing alone appear contradictory, a closer examination demonstrates that these two cases are congruent.

In *Gamino*, the aggravated-assault defendant denied having threatened the complainant with imminent bodily injury. *Gamino*, 537 S.W.3d at 511. But he also testified that while he held his gun at his side he told the complainant "to 'stop,' 'get away,' and 'leave us alone.'" *Id.* at 511–12. Given that testimony, a jury could reasonably "infer that the words '*or else* I will have to use this gun to protect us' were implied." *Id.* at 512. In *Juarez*, the assault defendant denied biting the complainant on purpose, but he also testified that he bit him because he was being suffocated by him. *Juarez*, 308 S.W.3d at 405. A culpable mental state "could have reasonably been inferred from his testimony about the circumstances surrounding his conduct." *Id.* Though both defendants explicitly denied a culpable mental state, it could be inferred from other facts they testified to, so confession and avoidance was fulfilled. *Gamino*, 537 S.W.3d at 512; *Juarez*, 308 S.W.3d at 405.

We have taken the same approach in other cases, too, looking at what the defensive

evidence implied and not merely what it proclaimed. For example, in *Martinez v. State*, the murder defendant denied an intent to kill but also testified to facts from which a culpable mental state could be inferred. 775 S.W.2d 645, 647 (Tex. Crim. App. 1989). Specifically, he testified "to pulling out the gun, firing it into the air, and having his finger on the trigger when the fatal shot was fired." *Id.* Self-defense was not foreclosed on those facts despite his denial of the intent to kill. *Id.* (holding defendant not entitled to self-defense instruction on other grounds). Similarly, in *Sanders v. State*, a defendant charged with murder denied any intent to kill but admitted shooting in the direction of his attackers in an effort to scare them away. 632 S.W.2d 346, 346–48 (Tex. Crim. App. 1982). We held that he was entitled to a self-defense instruction. *Id.*

Alonzo v. State, 353 S.W.3d 778 (Tex. Crim. App. 2011), may be the most anomalous of our confession-and-avoidance cases, but even it may be reconciled by resort to its facts. Alonzo was charged with murder for killing a fellow prisoner. *Id.* at 779. He claimed self-defense and denied the intent to kill, but he also testified to the fatal struggle over a metal spike, describing the result in him-or-me terms—"it could have been me that got stuck too with that weapon." *Id.*

The jury instructions applied self-defense to murder but not to the lesser-included offenses of manslaughter and aggravated assault. *Id.* at 779–80. In response to a jury question during deliberations, the trial court specifically instructed the jury that self-defense did not apply to the lesser offenses. *Id.* at 780. The jury convicted Alonzo of manslaughter. *Id.* The issue before this court was whether the trial court erred in

precluding the application of self-defense to manslaughter. *Id.* at 781. We held it did err because the jury should have been instructed to acquit the defendant altogether if the State failed to disprove self-defense beyond a reasonable doubt. *Id.* at 781.

The State, however, argued that Alonzo was not entitled to any self-defense instruction because he denied the intent to kill. *Id.* at 782. We responded, "The Penal Code does not require that a defendant intend the death of an attacker in order to be justified in using deadly force in self-defense." *Id.* at 783. This would seem to undermine application of confession and avoidance, but it does not because murder does not necessarily depend on an intent to kill, either. *See* TEX. PENAL CODE § 19.02(b)(1), (2) (defining murder as intentionally or knowingly causing the death of an individual or as intending to cause serious bodily injury and committing an act clearly dangerous to human life that causes the death of an individual). Because Alonzo testified to facts from which a culpable mental state could be inferred, *Alonzo*, 353 S.W.3d at 779, our statement about what self-defense requires is robbed of its apparent force.

We reasoned that self-defense focuses "on the actor's motives and on the level of force used, not on the outcome of that use of force." *Id.* at 783. From Alonzo's testimony "a rational fact-finder could determine that [Alonzo] used deadly force against another when and to the degree he reasonably believed the force was immediately necessary to protect himself against [the victim's] use or attempted use of unlawful deadly force. That is all that the law requires to raise the issue of self-defense in these circumstances." *Id.* (footnote omitted).

The results of the foregoing cases correspond with the nature of justification defenses which excuse the offense rather than negate it, TEX. PENAL CODE § 9.02, and which are defined in terms of "conduct," meaning an act or omission and its accompanying mental state. *Id.* at § 1.07(a)(10). They also correspond with the principle that defensive theories may be inconsistent. *See Bowen*, 162 S.W.3d at 229.

A flat denial of the conduct in question will foreclose an instruction on a justification defense. *Nailor*, 149 S.W.3d at 134 (holding that defensive theory denying commission of crime rather than justifying the crime did not warrant a self-defense instruction); *Young*, 991 S.W.2d at 839 (holding defendant was not entitled to a necessity instruction because he argued he did not have the requisite intent and did not perform the actions alleged). A defensive theory of that nature does not seek to justify the conduct in question, denying it instead. *See Nailor*, 149 S.W.3d at 134. But an inconsistent or implicit concession of the conduct will meet the requirement. *See Jordan v. State*, 593 S.W.3d 340, 343 (Tex. Crim. App. 2020); *Juarez*, 308 S.W.3d at 406. Consequently, although one cannot justify an offense that he insists he did not commit, he may equivocate on whether he committed the conduct in question and still get a justification instruction.

On the contrary, overruling our confession and avoidance cases would provoke inconsistency and confusion because of the doctrine's extensive influence. For example, it informs our harm analysis when trial courts erroneously refuse to instruct on justification defenses. *See Rogers v. State*, 550 S.W.3d 190, 192 (Tex. Crim. App. 2018); *Cornet v. State*, 417 S.W.3d 446, 451 (Tex. Crim. App. 2013). It has been applied to a variety of

defenses. *See, e.g.*, *Cornet v. State*, 359 S.W.3d 217, 225 (Tex. Crim. App. 2012) (applying it to the medical care defense); *Shaw v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007) (applying it to the good Samaritan defense). And it has been applied repeatedly to self-defense. *See, e.g.*, *Nailor*, 149 S.W.3d at 132–33; *Hill v. State*, 99 S.W.3d 248, 250–51 (Tex. App.—Fort Worth 2003, pet. ref'd); *Anderson v. State*, 11 S.W.3d 369, 372 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).

The question here is whether confession and avoidance requires an admission about the alleged manner and means.

IV. Manner and Means

Assault causing bodily injury is a result-oriented crime. *Landrian v. State*, 268 S.W.3d 532, 536 (Tex. Crim. App. 2008). Its elements are intentionally, knowingly, or reckless causing bodily injury to another. TEX. PENAL CODE § 22.01(a)(1). The alleged manner and means of an assault, e.g., "striking with the hand," is a non-statutory description of the offense. *See Johnson v. State*, 364 S.W.3d 292, 295–96 (Tex. Crim. App. 2012). If the State were to allege an assault by one manner but prove another, the evidence would be sufficient to uphold the conviction if the difference did not convert the proven offense into a different one than was pled. *See, e.g.*, *Hernandez v. State*, 556 S.W.3d 308, 316 (Tex. Crim. App. 2017) (choking with hand versus striking with hand not a material variance).

Under the same reasoning, a defendant claiming self-defense who admits an assault by a different manner and means than that alleged in the charging instrument will be entitled to a self-defense instruction as long as his admission pertains to the same event. *Cf. Bufkin v.*

State, 207 S.W.3d 779, 781–82 (Tex. Crim. App. 2006) (a defendant may not "foist upon the State a crime the State did not intend to prosecute" but may claim a different version of events).

Nailor, however, could be read to suggest that a defendant must admit the alleged manner and means. *Nailor*, 149 S.W.3d at 133. Nailor was accused of assault by striking the complainant with his hand, but he testified that he unintentionally hit her with a brass eagle. *Id.* We noted that Nailor

> denied that the act the State alleged as causing her injury—striking [the complainant] with his hand—was, in fact, the cause of her injury. According to [Nailor], it was the falling brass eagle that caused her injury. Therefore, [Nailor]'s defense was more in the nature of a denial of two of the State's alleged elements, rather than an admission of those elements with a legal justification for them.

Id. at 133. The hands-versus-eagle discrepancy would not have necessarily deprived Nailor of a self-defense instruction. To the extent that *Nailor* suggests otherwise, we reject the suggestion.

VI. Conclusion

Appellant did not have to admit the manner and means of the assault alleged against him in order to meet the requirements of our confession and avoidance doctrine. But under that doctrine, a defensive theory that completely forecloses the commission of the offense itself does not entitle a defendant to a jury instruction on the defensive issue. We reverse and remand to the court of appeals to consider whether Appellant's defensive theory foreclosed his commission of assault or justified it under self-defense.

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