IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1199-18

OBINNA EBIKAM, Appellant

v.

THE STATE OF TEXAS

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

NEWELL, J., filed a concurring opinion in which RICHARDSON and SLAUGHTER, JJ., joined.

As I understand the Court's opinion, we have been asked to decide whether Appellant produced evidence establishing that he committed the assault, but his conduct was justified under self-defense. The Court is correct that neither party has argued that we should do away with our precedent involving "confession and avoidance." Neither party has briefed that issue.

They have only asked us to explain how the "confession and avoidance" doctrine applies to this case. Consequently, I join the Court's opinion because I believe it properly analyzes the issue under both the existing statute and this Court's applicable precedent.

That said, I believe the terminology of "confession and avoidance" has become a little misleading. Though we refer to the doctrine of "confession and avoidance," the Court correctly holds that our precedent does not require an actual "confession" by a defendant to entitle him to a jury instruction on self-defense.[1] And we don't really evaluate whether Appellant adequately "confessed" to the offense just because Appellant chose to admit some evidence supporting his self-defense claim through his own testimony.[2] So, if there is no real "confession" requirement, then there certainly can't be, as the court of appeals seems to have held, a requirement that a defendant confess to a particular manner and means.[3] The Court rightly corrects this aspect of the court of appeals opinion and remands the case to that court to

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[1] *See, e.g., Smith v. State*, 676 S.W.2d 584, 587 (Tex. Crim. App. 1984) (holding that evidence raised the issue of self-defense even though the defendant did not testify).

[2] *See Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007) (interpreting Penal Code § 2.03(c) to incorporate long-standing doctrine that a trial judge must, upon a defendant's proper request, instruct the jury on every defensive issue raised by the evidence without regard to it source or strength); *Booth v. State*, 679 S.W.2d 498, 500 (Tex. Crim. App. 1984) ("[T]he trial court must instruct the jury on every defensive theory raised by the evidence or testimony, and it makes no difference whether such evidence or testimony was produced by the prosecution or the accused.").

[3] *See Ebikam v. State*, No. 04-18-00215-CR, 2018 WL 4760126 at *2, (Tex. App.—San Antonio, Oct. 3, 2018) (not designated for publication) (concluding that in order for Ebikam to be entitled to a self-defense instruction, he was required "to admit that he struck Ebo with his hand," which was the manner and means alleged in the charging instrument.).

evaluate whether Appellant produced evidence to raise the issue of self-defense. I see nothing inconsistent with the text of section 2.03 of the Penal Code in this Court's approach. I also see nothing in this Court's opinion that requires a defendant to concede that he committed a crime.

The real dispute amongst the parties has nothing to do with the "confession and avoidance" doctrine; it's whether the evidence in the case raised the issue of self-defense at all. Under the Penal Code, statutory defenses are reserved for defensive theories in which a defendant claims he is not criminally culpable for the illegal conduct.[4] We have explained that if defensive evidence merely negates the commission of the offense, then the trial court's instructions regarding the elements of the offense and the burden of proof are sufficient to guide the jury.[5] If, however, the evidence raises the elements of a statutorily designated defensive issue, then a special defensive instruction may be warranted.[6] A defendant is entitled to an instruction on self-defense if the issue is raised by the evidence regardless of whether that

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[4] *See Giesberg v. State*, 984 S.W.2d 245, 248 (Tex. Crim. App 1998) ("In the revised Penal Code, the statutory defense distinction is reserved for defensive theories involving a defendant's admission that he or she committed the crime, but with explanations to justify a defendant's actions or absolve a defendant of culpability. It also includes defensive theories which do not involve admission of complicity in the commission of the alleged crime, but which nonetheless attempt to explain why a defendant is not criminally culpable.").

[5] *Id.*; *see also Ex parte Nailor*, 149 S.W.3d 125, 133–34 (Tex. Crim. App. 2004) (holding that trial counsel was not ineffective for failing to request self-defense instruction because evidence merely showed that assault occurred by accident rather than in self-defense).

[6] *See Geisberg*, 984 S.W.2d at 250.

evidence is strong, weak, unimpeached, or contradicted.[7] However, when the evidence, viewed in the light most favorable to the defendant does not establish self-defense, the defendant is not entitled to an instruction on the issue.[8] Looking to whether evidence raises a defensive issue, rather than merely negates the criminal offense, is also consistent with the text of section 2.03 of the Penal Code.

In this case, Appellant has not carried his burden of production on the issue of self-defense. Appellant presented no evidence that he struck, hit, or punched the victim out of concern for his safety. He presented no evidence that he split the victim's lip with the door to his apartment out of concern for his safety. Even if we can assume that his statement that "the lips are so tender, I didn't hit her" can imply that Appellant did hit the victim, albeit with the door, that evidence merely establishes an accident rather than an act of self-defense.[9]

Appellant denied ever hitting the victim, yet he wanted a jury instruction asking the jury to consider whether he hit the victim in self-defense. I recognize that the standard for giving a defensive instruction is a low one. But in this case, Appellant's defensive theory would have required the jury to take simultaneously contradictory views of the evidence to be able to find that

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[7] *Ferrel v. State*, 55 S.W.3d 586, 591 (Tex. Crim. App. 2001).

[8] *Id.*

[9] *See Nailor*, 149 S.W.3d at 133–34.

Appellant acted in self-defense. To the extent we can piece together a testimonial collage from different parts of the record, the evidence in this case does not paint a picture that would support a rational jury finding on the issue of self-defense.[10]

With these thoughts, I join the Court's opinion.

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[10] *Krajcovic v. State*, 393 S.W.3d 282, 286–87 (Tex. Crim. App. 2013).