the Jasuta / Schulman report

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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: ***Bethany Grace Maciel v. The State of Texas***

- **OFFENSE**: Driving While Intoxicated
- **COUNTY**: Brazos
- **COURT OF APPEALS**: Corpus Christi 2020
- **C/A CITATION**: Not Designated for Publication
- **C/A RESULT**: Conviction Affirmed
- **CCA. CASE No**. PD-0753-20 **DATE OF OPINION**: October 6, 2021
- **DISPOSITION**: Court of Appeals Reversed
- **OPINION**: Judge Jesse McClure **VOTE**: 8-1-0
- **TRIAL COURT**: CCL 1; Hon. Amanda Matzke
- **LAWYERS**: Jacob Spiegelhauer (Defense); John Messinger (SPA)

(**Background Facts**): On January 31, 2016, Appellant went out drinking with her brother and his wife. Appellant was too intoxicated to drive home so her brother drove her vehicle. On the way back to Appellant's apartment, Appellant's brother became ill and stopped the car in the middle of the road and began vomiting. Appellant climbed over from the passenger seat to the driver's seat. Although Appellant was intoxicated and did not feel safe to drive, she had "to try and move the car out of the middle of the road to the closest parking lot." However, Appellant could not get the car to move. She testified, "I couldn't get the car to move, so I wasn't driving. I don't think I was operating it."

324 Court's Charge / Defensive Charges (Necessity): Appellant testified, "*I couldn't get the car to move, so I wasn't driving. I don't think I was operating it." She* then requested a charge on

necessity because she was trying to move the vehicle from the roadway. The State responded that Appellant could not argue that she was not driving or operating the vehicle and also claim she was driving out of necessity. The trial court denied the request for the defensive instruction. On appeal, Appellant argued that the trial court erred by denying her requested jury instruction on the defense of necessity. The Court of Appeals held that there was no error in refusing the jury charge on necessity because Appellant's defense was that she did not operate the vehicle. The Court of Appeals held that, because Appellant did not admit the underlying DWI, she was not entitled to the defense of necessity. The Court of Criminal Appeals granted Appellant's petition for discretionary review to address her claim that the Court of Appeals applied an incorrect legal standard.

Holding: Necessity is a confession-and-avoidance defense requiring the defendant to admit to his otherwise illegal conduct. ***Juarez v. State***, 308 S.W.3d 398 (Tex.Cr.App. 2010)(see ☙, Vol. 18, No. 13; 04/05/2010). To be entitled to a defensive instruction for necessity, a defendant must put on evidence that "essentially admits to every element of the offense, including the culpable mental state." ***Shaw v. State***, 243 S.W.3d 647 (Tex.Cr.App. 2007). In other words, a defendant cannot both invoke necessity and flatly deny the charged conduct. *** [In ***Juarez***] we held that a defendant cannot flatly deny the charged conduct, but if he admits to circumstances surrounding his conduct from which the jury could infer the mental state, the doctrine of confession and avoidance would still be satisfied. *** Therefore, ***Juarez*** satisfied the confession-and-avoidance doctrine because he had both admitted the act and offered evidence from which the requisite mental state could be inferred. *** Turning to the case before us, we recognize that DWI is a strict liability crime, meaning that it does not require a specific mental state (e.g., intentionally, knowingly, or recklessly to operating a motor vehicle while intoxicated). *** Therefore, Appellant need not present defensive evidence regarding her mental state. *** Appellant's testimony, recounted above, essentially admitted to every element of the offense charged. She admitted to being intoxicated, admitted to being behind the wheel of her vehicle with the engine running, admitted that she got into the driver's seat to try and move the car, and admitted that she was trying to get the car safely to a parking lot. As this Court noted in ***Denton v. State***, 911 S.W.3d 388 (Tex.Cr.App. 1995)(see ☙, Vol. 3, No. 36; 12/11/1995), Texas juries have rendered guilty verdicts even when the evidence showed that the operator did not successfully make the vehicle "go." *** Similarly, in this case, Appellant was sitting in the driver's seat of a running vehicle and admitted she was trying to move it. In accord with our jurisprudence, Appellant's testimony was sufficient to admit commission of DWI. *** We conclude that the totality of Appellant's defensive evidence satisfied the confession-and-avoidance requirement, even if Appellant was incorrect about whether she had legally "operated" the vehicle. The Court of Appeals erred by holding to the contrary. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for a harm analysis.

> **Concurring / Dissenting Opinions**: Judge David Newell filed concurring opinion, arguing the Court should recognize that "an evaluation for harm flowing from error is as much a systemic requirement as determining whether that error has been

preserved. As such, this Court should feel free (after holding that error occurred) to address the question of whether a particular error harmed the defendant. Reflexively remanding for an evaluation of harm under well-established standards is unnecessary." He would dispense with the practice of remanding for a harm analysis in these situations. "Rather than expecting the Courts of Appeals to be clairvoyant on remand, we should just answer the question when we have the chance."

(**David A. Schulman**) As to the "confession-and-avoidance" question, it's a simple concept. If the defendant admits the conduct and that admission is enough to warrant a conviction, they get the defensive instruction. As to Judge Newell's suggestion on the harm analysis, I recall this very issue being brought up in conference (when I was a staff attorney and often present during the Court of Criminal Appeals' weekly conference). Those wanting the Court to perform the harm analysis in the first instance cited and lauded judicial economy. Those who didn't want that to happen relied on the idea that the Court's jurisdiction was limited to reviewing decisions from the Court of Appeals. The argument was that, where the Court of Appeals had not done a harm analysis, the high Court lacked discretionary jurisdiction to perform the harm analysis. Certainly both the Texas Constitution and Code of Criminal Appeals back up that argument. I would like to be able to agree with Judge Newell based on judicial economy. Sadly, however, I cannot.

(**John G. Jasuta**) Judge McClure hit another homer. This case applies the law correctly, in my book, and reaches a just result. As to harm, I have written before about the practice of imagining what a jury might do. I might have to again.