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TIBA's Case of the Week

Court of Criminal Appeals

Case Name: [Patrick Jordan v. The State of Texas](#)

- **OFFENSE:** Deadly Conduct
- **COUNTY:** Bowie
- **COURT OF APPEALS:** Texarkana 2018
- **C/A CITATION:** 558 S.W.3d 173
- **C/A RESULT:** Conviction Affirmed
- **CCA. CASE No.** PD-0899-18 **DATE OF OPINION:** February 5, 2020
- **DISPOSITION:** Court of Appeals Reversed
- **OPINION:** [Judge Keel](#) **VOTE:** 6-3
- **TRIAL COURT:** 202nd D/C; Hon. John Tidwell
- **LAWYERS:** [Bart Craytor](#) (Defense); [Randle Solarz](#) (State); John Messinger (SPA)

(Background Facts): The factual recitation in this case is quite involved. In summary, the evidence shows that Appellant and his friend, Cody Lynn Bryan, stopped for dinner at the Silver Star Smokehouse & Saloon in Texarkana, after packing up Appellant's belongings in preparation for his move to Broken Bow, Oklahoma. Before arriving, Appellant sent a text message to his ex-girlfriend, Summer Varley, to see if she was working at Silver Star and to seek her permission to eat there. Varley, a waitress at the establishment, responded that she was at the restaurant, but was not currently working a shift. She granted Appellant permission to patronize the restaurant and buy her a drink. Varley was drinking with her friends Jordan Royal, Austin Blake Crumpton, Damon Prichard, and Joshua Stevenson. Things did not go well, and an altercation occurred in the parking lot of the establishment.

The altercation ended with Royal, an “over-six-foot” member of the Arkansas Army National Guard, and one of Varley’s friends, punching Bryan and knocking him unconscious, then attacking Appellant, and Varley trying to pull Royal off Appellant, but getting shot.

Ed Note (The Shooting): At trial, Appellant admitted that he had pulled out a loaded pistol from his pocket during the altercation. Appellant explained that Royal had an intimidating physique. After he saw what happened to Bryan, Appellant testified that he feared for his safety, believed he was getting mobbed, and felt that he had no alternative but to pull the trigger even though he could not see to aim the weapon. Varley believed that it was reasonable for Appellant to fear for his safety since multiple assailants were attacking him and because she, too, feared for his safety. Although it was undisputed that no one in Royal’s group was carrying a weapon, Cashatt testified that it was possible that Appellant thought Royal was a threat to his safety and welfare. Cashatt “recall[ed] Appellant telling [him] that he was going to his car when he felt somebody grab him from behind.” Cashatt also said he noticed Appellant’s eyes were bloodshot after Appellant reported that someone had scraped over his eyes during the altercation. After the shooting, Appellant testified that he walked back inside to tell the staff to dial 9-1-1. The surveillance recording from inside the restaurant showed that Appellant reentered the restaurant, walked to the kitchen, spoke to staff as he laid his pistol on the counter, held his hands up, and waited for police. Joseph Tefteller, a police officer with the TTPD, testified that a Silver Star employee led him to Appellant, who immediately pointed to a pistol on the counter, put his hands up, and said, “Here I am.” Appellant was arrested and soon confirmed with TTPD that he had discharged the firearm. As a result of the Silver Star shooting, Appellant was jointly tried for (1) aggravated assault with a deadly weapon against Royal and (2) deadly conduct against Varley and Crumpton. Appellant asserted self-defense as justification for his actions. In spite of a lengthy deliberation, the jury was unable to reach a verdict on the aggravated assault charge. The trial court declared a mistrial as a result of the hung jury on that charge. However, the jury found Appellant guilty of deadly conduct after concluding that he knowingly discharged a firearm in Varley and Crumpton’s direction.

§ 324 Court’s Charge / Defensive Charges / Self-Defense: Appellant was indicted for deadly conduct committed against Varley and Crumpton. Appellant made a request for a jury charge that included instructions pertaining to self-defense. The fact that Appellant was simultaneously tried for two charges arising from the same incident (i.e., the aggravated assault of Royal and the dangerous conduct directed toward Varley and Cumpton) may have raised confusion as to the content of the charge. In Appellant’s written request, it may be construed that Appellant was requesting a self-defense instruction only as to the charge against him for the alleged aggravated assault of Royal but not pertaining to the dangerous conduct charge. From the exchange at the charge conference, it appears that the trial court believed Appellant to be requesting a self-defense instruction as pertained to the deadly conduct charge. On appeal, Appellant alleged that the jury charge erroneously included a duty to retreat. He also argued that the trial court erred in denying his request to instruct the jury that it was required to acquit him if it had reasonable doubt as to whether the State disproved his justification of self-defense. The Court of Appeals concluded that Appellant was not entitled to a self-defense instruction at all, and the

failure to include multiple assailants language was not error. [*Jordan v. State*](#), 558 S.W.3d 173 (Tex.App. - Texarkana 2018)(see [§](#), [Vol. 26, No. 23](#); 06/11/2018).

Holding: In the light most favorable to the verdict, the evidence showed that five people who were united in their hostile intent acted together to intimidate and chase Appellant and Bryan. Right before firing the gun, Appellant heard Royal hit Bryan. When he turned around, he saw Royal, Crumpton, and Prichard standing over an unconscious Bryan, and saw Royal motion for Stevenson to chase Appellant as he was trying to flee. Varley and Crumpton followed. Royal, who was bigger than Appellant, grabbed him by the eye socket, and jumped on top of him. While he was wrestling with Royal, Appellant heard approaching footsteps, and he fired because he felt he had no other choice. On this evidence a rational jury could have found that Appellant reasonably believed that deadly force was immediately necessary to protect himself from the group's apparent or attempted use of deadly force against himself and Bryan. *** It does not matter whether Crumpton or Varley individually used deadly force against Appellant; it matters whether Appellant had a reasonable apprehension of actual or apparent danger from a group of assailants that included Crumpton and Varley. "If there is evidence of more assailants than one, the charge must inform the jury that the accused can defend against either, and it is error to require the jury to believe or find that there was more than one assailant attacking the accused." *** The State Prosecuting Attorney as *amicus curiae* argues that Appellant did not satisfy the confession-and-avoidance requirement for self-defense because he did not admit to knowingly shooting in the direction of Crumpton and Varley. The State took a different position at trial, maintaining that Appellant admitted to all of the elements of deadly conduct on cross examination . . . *** The State Prosecuting Attorney maintains that the trial court's instructions gave Appellant what he wanted: the right to defend against Varley and Crumpton because of Royal's actions. But the instructions focused exclusively on Royal's actions whereas the evidence viewed in the light most favorable to Appellant showed that he was facing a mob. This "unduly limited the jury in passing upon appellant's right of self-defense." See [*McCuin v. State*](#), 505 S.W.2d 831 (Tex.Cr.App. 1974). *** Since the evidence demonstrated that Appellant had a reasonable apprehension of apparent danger from multiple assailants, he was entitled to the instruction.

Concurring / Dissenting Opinions: [Judge Keasler](#) filed a dissenting opinion in which he argued that "a defensive instruction is appropriate only when the defendant's defensive evidence essentially admits to every element of the offense, including the culpable mental state, but interposes the justification to excuse the otherwise criminal conduct," and "if the defendant claims that he did not have the requisite intent to commit the offense that was alleged, he is not entitled to an instruction on self-defense." He concluded that, because the defendant did not admit to harboring the requisite culpable mental state for the particular deadly-conduct offense with which he was charged, he was not entitled to a multiple-assailants self-defense instruction.

([David A. Schulman](#)) In a sea of opinions over the last 15 years setting the numerous examples of why the particular defendant wasn't entitled to a requested defensive instruction, this opinion stands out as one well written and well thought out opinion.

([John G. Jasuta](#)) An opinion firmly rooted in reality.

Holding (Preservation): The district attorney maintains that error was not preserved because Appellant's proposed written charge referenced multiple assailants with respect to defense of a third person but not with respect to self-defense. But at the charge conference the prosecution explained the defense request to the judge in terms of both self-defense and defense of a third person, saying Appellant "wants this section regarding self-defense and defense of others in there to include Jordan Royal or others. So his argument is that it needs to say 'Jordan Royal or others.'" The trial court thus understood the defense request to apply to both self-defense and defense of a third person, and error was preserved. Consequently, we must review the error here for "some harm."

Holding (Harm Analysis): The Court of Appeals did not address harm because it found no error. Ordinarily we would not reach an issue that the court of appeals did not address; but if the resolution of the issue is "clear" or "plain," then judicial economy justifies this Court in reaching the issue in the first instance. *** As discussed below, the harmfulness of the trial court's refusal to instruct on multiple assailants was clear. Furthermore, both parties addressed harm in briefing before this Court. Thus, for the sake of judicial economy we address harm even though the Court of Appeals did not. *** The deadly conduct application paragraph instructed the jury to find Appellant guilty if he knowingly shot in the direction of Varley and Crumpton, conduct that he admitted at trial. But the self-defense application paragraph authorized an acquittal for that conduct only if Appellant reasonably believed it was immediately necessary to shoot Royal. Since a need to shoot at Royal alone would never justify also shooting at Varley and Crumpton, the instruction mandated a rejection of self-defense. Similarly, the self-defense reverse application paragraph specified that self-defense had to be rejected if Appellant did not reasonably believe that shooting at Varley and Crumpton was immediately necessary to protect himself against Royal. Since shooting at Varley and Crumpton would never be necessary to defend against Royal alone, this instruction also mandated a rejection of self-defense. *** By contrast, correct instructions would have authorized an acquittal if Appellant reasonably believed that shooting in the direction of Varley and Crumpton had been immediately necessary to protect himself against "Royal or others" and would have required rejection of self-defense if Appellant did not reasonably believe that shooting at Varley and Crumpton was immediately necessary to protect himself against deadly force by "Royal or others." 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. That difference clearly demonstrates that Appellant was harmed by the refusal to instruct on multiple assailants. Thus it is unnecessary to further assess harm in relation to other charge errors such as: the failure to put the burden of persuasion on the State with respect to self-defense, the failure to instruct on the presumption of reasonableness with respect

to a defendant's belief that deadly force is immediately necessary, and conditioning self-defense on the duty to retreat.

Concurring / Dissenting Opinions: [Judge Yeary](#) filed a dissenting opinion. He was joined by Presiding Judge Keller and argued that it is inappropriate for the Court to address the harm issue for the first time in this opinion. He would remand the case and "leave it to the Court of Appeals in the first instance to decide on remand whether the lack of a multiple-assailants instruction was harmful."

([John G. Jasuta](#)) Of course Judge Yeary is correct, but why keep the ball in the air that long, either for a defendant or the State that may choose to re-try this case? The majority rely on judicial economy. They are also correct. Justice, it would seem, prevailed.

([David A. Schulman](#)) My understanding as to why the Court of Criminal Appeals most generally remands cases in which they have found jury charge error to have the particular Court of Appeals determine if there was harm "in the first instance" is because the "discretionary review" jurisdiction, as set out in Rule 66.1, Tex.R.App.Pro., says only that the Court "may review a Court of Appeals' decision in a criminal case" Under that theory, Judge Yeary is correct. I've always thought, however, that a rigid application of that Rule, such as to remand a case like this to see how the Court of Appeals would handle the harm analysis, made absolutely no sense. I believe that this is the correct way to handle the situation.