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Case Name: [Marvin Rodriguez v. The State of Texas](#)

- **OFFENSE:** Murder
- **COUNTY:** Tarrant
- **COURT OF APPEALS:** Fort Worth 2019
- **C/A CITATION:** Not Designated for Publication
- **C/A RESULT:** Conviction Affirmed
- **CCA. CASE No.** PD-1130-19 **DATE OF OPINION:** September 15, 2021
- **DISPOSITION:** Court of Appeals Reversed
- **OPINION:** [Judge Mary Lou Keel](#) **VOTE:** 7-2-0
- **TRIAL COURT:** 396th D/C; Hon. George Gallagher
- **LAWYERS:** [Jim Gibson](#) (Defense); [John Meskunas](#) (State)

(Background Facts): Appellant was charged with murder for shooting and killing Richard Sells. The events took place in the Cowboys Stadium parking lot after a football game. Appellant had been tailgating along with his brothers, Candido and Javier, and several others, including the victim, Sells. As people were fixing to leave, a fight broke out between Candido, and two other men, Miguel and Francisco. The fight grew into a chaotic brawl that culminated in Appellant shooting and killing Sells. The State’s evidence showed Sells was trying to break up the fight and help Candido out of the fight when Appellant shot him. Sells’ fiancée testified that she saw Appellant push Sells away once, and when Sells attempted to go back, Appellant came up behind Sells and shot him. Another tailgater, Rodney Webb, also believed Sells was breaking up the fight. He testified that by the time Appellant arrived with the gun, there were only two men still wrestling, and that as they were getting up, Appellant told one man to move, pointed the gun at Sells, and shot him. Webb also said that he did not see Appellant get hit or injured. Anthony Aguirre, another tailgater, testified that he did not see Sells strike anyone and saw Appellant shoot Sells.

 **324 Court’s Charge / Defensive Charges (Self-Defense):** Appellant testified that he saw Candido get sucker punched and attacked by multiple people. He tried to intervene with his fists and was hit several times, getting knocked down twice. He then retrieved a gun from his brother’s

Hummer. He got the gun because he feared he would be severely injured and that he needed to defend Candido but was unable to with just his fists. He denied the intent to kill anyone but instead got his gun to scare away the attackers. When he returned to the scene of the fight he drew the gun and threatened Lester Peters, who he believed was involved in the attack, and told him to leave. He then went to Candido, who was on the ground being beaten by a group of men. Sells was kneeling on Candido's back and punching him. Candido was screaming. Appellant testified that he grabbed Sells in a headlock and put the gun to his neck, at which point he felt Sells jerk away and felt someone pulling at his arm. The gun fired, mortally wounding Sells. Appellant insisted that he never intended to fire the gun, and that he was "shocked" when it went off. On cross examination he agreed that "the only way it would have gone off" was if his "finger was on the trigger." On redirect examination, he explained that when he felt people pulling his arm and grabbing at him, his "instinctual reaction would be to pull back" and that he instinctually "gripped" the gun "tightly." At trial Appellant requested jury instructions on the defenses of necessity, self-defense, and defense of a third person. The trial court denied his request, and he was convicted of murder. The Court of Appeals affirmed on grounds that Appellant failed to satisfy the confession-and-avoidance doctrine. The Court of Criminal Appeals granted Appellant's petition for discretionary review to consider whether his actions and admissions satisfied the doctrine of confession and avoidance, whether [Martinez v. State](#), 775 S.W.2d 645 (Tex.Cr.App. 1989), is still good law, and whether the facts leading to the charged conduct are relevant.

Holding: Confession and avoidance is a judicially imposed requirement that requires defendants who assert a justification defense to admit, or at a minimum to not deny, the charged conduct. See [Bowen v. State](#), 162 S.W.3d 226 (Tex.Cr.App. 2005)(see ¶¶, [Vol. 13, No. 18](#); 05/09/2005). *** Logically, one cannot both justify and deny conduct. Thus the Penal Code implies that the evidence must support, or at least not negate, the act and accompanying mental state that the defense seeks to justify. **(Voluntary Act)** Voluntariness is a low threshold. Even accidental or unintentional movements and actions are voluntary. *** Only if an outside force directly causes the movement, or if the movement is the result of truly nonvolitional action such as a muscle spasm, will an action be deemed involuntary. Appellant did not testify to an outside force causing the gun to fire. **(Mental State)** Appellant's testimony was also sufficient to support a finding of intent to kill. *** His admitted use of a deadly weapon also supported an intent to kill. *** Appellant's admissions of intent were more damning than those of [Martinez](#) because Appellant admitted to pointing the gun at Sells whereas [Martinez](#) blamed a third party for causing him to aim at his victim. *** Thus, overruling [Martinez](#) would not change the outcome in this case, and we decline to overrule it now. *** The DA argues that Appellant's case is like [Ex parte Nailor](#), 149 S.W.3d 125 (Tex.Cr.App. 2004)(see ¶¶, [Vol. 12, No. 12](#); 03/29/2004), where we held that [the defendant] was not entitled to a self-defense instruction because he did not satisfy confession and avoidance.. But [Nailor](#) is distinguishable from this case. **(The State's Arguments Re: Preservation, Deadly Force, and [Martinez](#)):** The DA argues that Appellant's claim is unpreserved because his assertion that he "sufficiently admitted the offense of murder" is different than his assertion at trial. *** Appellant counters that the quote from the record cited by the DA is out of context, and that trial counsel was making an argument in the alternative. The record supports this view. *** The DA also argues that even if confession and avoidance were met in this case, there is no evidence that Sells was

using or attempting to use deadly force, and Appellant therefore could not be justified in using deadly force against Sells. *** A rational jury could have believed that Appellant was justified in using deadly force. *** Finally, the DA takes issue with Appellant's briefing of his second point, that "a court should view the admissions and the actions of the defendant within the context of the entire episode and not focus myopically on the moment of the defendant's final criminal act" when ruling on confession and avoidance. The DA maintains that the point is inadequately briefed because "Appellant fails to allege the analytical steps that he believes the Second Court was required to undertake[.]" But Appellant does prescribe an analysis, namely, that the court consider Appellant's actions and mental state during the "entire process" of the fight, not just his denial of intent at the moment the trigger was pulled. **(Arguments by the State's Prosecuting Attorney):** The State Prosecuting Attorney argues that Martinez's statement that Martinez "sufficiently admitted" the charged offense was dicta because the deadly force issue ultimately decided that case. *** However, the Court could not have reached the deadly force issue without first deciding that Appellant had raised self-defense. *** So the "sufficiently admitted" statement was not dicta. *** The SPA also argues that Martinez should be overruled and that the other unintentional self-defense cases that support it did not actually allow unintentional self-defense against charges of an intentional offense, but only as a defense to non-intentional offenses. It points to Alonzo v. State, 353 S.W.3d 778 (Tex.Cr.App. 2011)(see ¶8, [Vol. 19, No. 37](#); 09/19/2011) to illustrate its point. However, Alonzo was given an instruction on self-defense to the murder charge. We held that he was also entitled to self-defense for the lesser-included manslaughter charge; we did not hold that self-defense for the murder charge was foreclosed because he denied intent. **(Conclusion):** Appellant satisfied confession and avoidance notwithstanding his assertion that he unintentionally fired the gun because his testimony impliedly supported the charged conduct. We reverse the judgment of the Court of Appeals and remand the case to the Court of Appeals for a harm analysis under Almanza v. State, 686 S.W.2d 157 (Tex.Cr.App. 1984)..

Concurring / Dissenting Opinions: Judge Kevin Yeary and Judge Scott Walker each concurred without note.