

the Jasuta / Schulman report

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TIBA's Case of the Week Fourteenth Court of Appeals

Case Name: *Victor Hugo Cuevas v. The State of Texas*

- **OFFENSE:** Murder
- **COUNTY:** Fort Bend
- **C/A CASE No.** 14-22-00561-CR
- **DATE OF OPINION:** April 16, 2024 **OPINION:** [Justice Kevin Jewell](#)
- **DISPOSITION:** Conviction Affirmed
- **TRIAL COURT:** 240th D/C
- **LAWYERS:** [Stephen A. Doggett](#) (Defense); [Jason Bennyhoff](#) (State)

(Background Facts): Juan Garza was at a shopping center, intending to eat at one of the restaurants, Sushi Hana. Garza saw two motorcycles speed into the parking lot. The motorcycles were driven by Appellant and Milton Egbe. In Garza's opinion, the bikes were "extremely loud," louder than an average motorcycle. The motorcycles parked, and Garza saw a Hispanic male later identified as Appellant talking to the driver of a parked car through the driver's window. The person in the car was Ose. Egbe stayed near the parked motorcycles, several parking spots away from Ose's car. Ose's car was "backed in" to its parking spot, meaning the front end of the vehicle was facing the parking lot. Garza then heard a sound "like fireworks," "about five of them, one right after another." He saw Appellant chasing after the car as Ose tried to drive away. Appellant had a "gun out in his right hand." Bonifacio Benitez was walking through the parking lot when he heard "fireworks or gunshots." It was "[d]efinitely more than one [shot] and it was repetitive. It almost sounded like Black Cats, fireworks, that's how quick they were going." Benitez looked around and saw "[Appellant] on the motorcycle and [it] looked like he was putting on gear calmly"; he "was putting on gloves or getting prepared to start and head out." Appellant was wearing "some type of skull mask," which Benitez thought bikers wore to "kind of block the wind." Appellant and Egbe drove out of the parking lot toward the nearby freeway. Hoang Nguyen was working at Sushi Hana, which was in the immediate vicinity of the shooting. Nguyen did not see the shooting, but he heard it and then looked out the front door of the restaurant. He recognized Appellant, who was a "regular customer" of the restaurant. Nguyen remembered Appellant previously visiting the

restaurant while openly carrying two guns. Nguyen saw Appellant and the second motorcycle leave the parking lot, driving “fast.” Alexis Blanton was working at another restaurant, Buffalo Wild Wings, a short distance from Sushi Hana. She recalled a young man entering the restaurant, “frantic” and “looking for help.” Blanton testified that the man, later identified as Ose, said that he had been shot and needed help. Ose then fell to the ground and “was unresponsive.” Emergency responders transported Ose to a nearby hospital, where he was pronounced dead.

Ed Note (Defense Testimony): Appellant and Egbe testified in Appellant’s defense. According to Appellant, he and Egbe were planning to eat at Sushi Hana and then go to a nearby shooting range. This assertion was called into question, however, when Appellant admitted on cross-examination that they could not have eaten and then arrived at the shooting range before it closed. Appellant also testified that he planned on selling marijuana to Ose. He texted Ose the time, place, and price for the drug deal. Appellant armed himself with a gun and gave a loaded 5.7 caliber handgun to Egbe. Egbe testified that he did not know if the gun was loaded when Appellant gave it to him. Egbe denied knowing that Appellant was armed or that Appellant intended to sell drugs that night. Appellant testified that he carries a gun every day, including every time he sells drugs. Neither Appellant nor Egbe had a license to carry a gun or to drive a motorcycle. After parking the motorcycles in front of Sushi Hana, Appellant told Egbe to wait while Appellant walked to Ose’s car. Appellant sat in the car on the passenger side with his backpack containing marijuana. According to Appellant, Ose pressed a gun to Appellant’s head, choked him, took his phone and the marijuana, and then told him to “[g]et the fuck out.” After stepping out of the car, Appellant turned back to face Ose, who allegedly still pointed a gun at Appellant. Ose asked, “Do you have any bread.” When Appellant said he had no money, Ose said, “Stop playing with me. I will smoke you,” and then he cocked his gun. At this point, Appellant closed the door, pulled out a handgun tucked into his waistband, and shot seven times at Ose’s car. Ose drove away, initially heading toward the location where Egbe was waiting by the motorcycles. Egbe also shot at Ose’s car. Egbe testified that, when Appellant was in Ose’s car, he saw Ose put a hand to Appellant’s neck and a gun to Appellant’s head. Egbe then started looking in his backpack for his gun. He heard gunshots but did not know who was shooting. When he looked up, the car was heading toward him, so he shot at the car. Egbe testified that he was scared for Appellant’s life and his own life. Jesse Richey also testified in Appellant’s defense. Richey testified that he was at a friend’s house two weeks before the shooting and met Ose for the first and only time. According to Richey, “Ose was telling me that he wanted to rob somebody named Victor. And whenever I tried telling him that it wasn’t a good idea, that he should not do that, he said that he did not care and that Victor was an easy lick to him.” In its closing argument, the State presented this case as a drug deal that “went south,” and that Appellant intended to shoot and kill Ose. Appellant argued that Ose robbed Appellant and threatened Appellant with gun violence, and that Appellant acted in self-defense.

[§ 231.03 Jury Selection / Voir Dire Questions / Improper Voir Dire Techniques]: Appellant argues that the trial court erred in overruling his objections to the prosecutor’s alleged

misstatements of self-defense law during voir dire. The first challenged statement is the prosecutor's comment that "self defense becomes an issue, first, if the defendant says they did it and there is some evidence of self-defense." Appellant objected, arguing that a defendant "does not have to admit to the crime." The second challenged statement to the venire panel is the prosecutor's recitation of certain statutory elements regarding self-defense. The prosecutor said that, for deadly force to be justifiably deployed in self-defense, there must be an offense involving "some sort of weapon or some sort of extra force" and the defendant was "not engaged in criminal activity." Appellant objected, saying, "That's flat wrong. That's only if you want the presumption that it's reasonable." To this, the prosecutor responded, "Correct," and then said, "what I'm trying to explain to the jury . . . are situations where deadly force is reasonable under the law."

Holding (Admission of Guilt): At most, the prosecutor's statement is incomplete. Confession and avoidance is a judicially imposed requirement that requires defendants who assert a justification defense, such as self-defense, to admit, or at a minimum to not deny, the charged conduct. *Rodriguez v. State*, 629 S.W.3d 229 (Tex.Cr.App. 2021)(see [§§](#), [Vol. 29, No. 36](#); 09/20/2021); *Jordan v. State*, 593 S.W.3d 340, 343 (Tex.Cr.App. 2020)(see [§§](#), [Vol. 28, No. 6](#); 02/10/2020) ("Self-defense is a confession-and-avoidance defense requiring the defendant to admit to his otherwise illegal conduct"). Although the prosecutor's statement may have been incomplete, we cannot say that it was incorrect. The trial court did not abuse its discretion in overruling Appellant's objection.

Holding (Admission of Guilt): Under Penal Code section 9.32, a person is justified in using deadly force against another if (1) the person would be justified in using force against the other under Penal Code section 9.31, and (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary to protect the person from the other's use or attempted use of deadly force, or to prevent the other's imminent commission of certain felonies. *** Appellant contends that, during voir dire, the prosecutor repeatedly used the "not otherwise engaged in criminal activity" caveat to argue that a defendant is not entitled to a self-defense theory at all if he was engaged in criminal activity at the time of the alleged offense. *** Even if we were to agree with Appellant's characterization of the prosecutor's comments, we apply a harmless error analysis to a prosecutor's alleged misstatements of law during voir dire. *** Here, the record shows that defense counsel had the opportunity to examine the venire panel about self-defense and to correct any misstatement of law, including the reasonable-belief presumption or the criminal-activity caveat, and the record further shows that defense counsel did precisely that. See *Penry v. State*, 903 S.W.2d 715, 741 (Tex. Crim. App. 1995)(considering defense counsel's opportunity to examine venire members in assessing harm from misstatement of law during voir dire). At the end of voir dire, defense counsel concluded by saying, "It's just a jury question: Was the force reasonably used at the time under the circumstances. That's what it is. It has nothing to do with the presumption. That's something different." *** Lastly, Appellant challenges certain alleged misstatements made during a bench conference. Because these statements were not made in front of the jury, any error is harmless. *** Based on the record before us, we cannot say

that the alleged misstatements of law had a substantial and injurious effect or influence in determining the jury's ultimate verdict.

Concurring / Dissenting Opinions: [Chief Justice Tracy Christopher](#) filed a dissenting opinion pertaining to the majority's holding overruling a point of error claiming that the trial court erred by permitting the prosecutor to improperly advise the jury that one cannot raise self-defense if they are committing a crime. She argued that "the prosecutor and the judge got the law wrong." She would find error and "some harm" under an "[Almanza](#)" analysis, and grant a new trial.

Sidebars

[\(Troy McKinney\)](#) I side with Chief Justice Christopher's dissent. Her analysis is complete. The majority opinion is not even close to factually complete, as succinctly described in the dissent. Some harm under Almanza is not the same as -- indeed far less than -- TRAP 44.2(b). Even though some of the trial court errors would be governed by 44.2(b), those errors add to the "some harm" from the improper jury charge. Regrettably, it is doubtful that PDR would be granted on this issue.

[\(John G. Jasuta\)](#) So the State can be "incomplete" with the jury and thereby mislead them and it's not error? I always told my kids that a lie by omission is still a lie

[\(David A. Schulman\)](#) I'm with Troy, John, and CJ Christopher. It's true that the prosecutors statement was "incomplete." It is that incompleteness that made it a misstatement, and the misstatement made it wrong and made the trial judge wrong in not sustaining counsel's objection. Those events could easily have led the jury to believe that Appellant was not entitled to use self-defense regardless of what happened later and/or how they were instructed.

Ed. Note: Besides the misstatement of law issue, Appellant raised issues which have been raised and rejected in other cases, which the Court found error had not been preserved, or which are too fact specific to be of any importance to the bench and bar. Because they offer no insight into existing law and aren't new law, they aren't discussed in any depth. The holdings included were that ① the evidence is sufficient to support the conviction for murder; ② any error by the trial court made pertaining to a recording discussing Mike's and Ose's involvement in prior, unrelated robberies, was harmless; ③ the complaint that the trial court erred in admitting evidence constituting a comment on Appellant's invocation of his [Miranda](#) rights was not preserved for review; ④ the trial court did not err by overruling the Rule404(b) objection to the admission of photos of drugs, scales, plastic baggies, guns, and ammunition which the police took during the search of Appellant's house; ⑤ Appellant did not preserve his claim that the trial court erred in admitting video excerpts downloaded from his cell phone, which was previously admitted without objection; ⑥ all objections to the court's charge were overruled; ⑦ the trial court did not violate Appellant's constitutional rights by revoking his bond and placing him in handcuffs, in view of the jurors, after the guilty verdict was announced; ⑧ Appellant did not preserve his complaint that the

trial court erred in denying motions for mistrial; and 9 the alleged instances of prosecutorial misconduct did not undermine the reliability of the fact-finding process and did not deprive Appellant of a fundamentally fair trial.