

No. PD-1199-18

---

IN THE TEXAS COURT OF CRIMINAL APPEALS  
AT AUSTIN, TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
11/20/2018  
DEANA WILLIAMSON, CLERK

---

**OBINNA EBIKAM, Appellant**

*v.*

**THE STATE OF TEXAS**

---

**ON PETITION FOR DISCRETIONARY REVIEW FROM THE DECISION  
BY THE FOURTH COURT OF APPEALS IN CAUSE NO. 04-18-00215-CR**

---

**APPELLANT'S PETITION FOR DISCRETIONARY REVIEW**

---

**Richard E. Wetzel  
State Bar No. 21236300**

**1411 West Avenue, Suite 100  
Austin, Texas 78701**

**(512) 469-7943 - phone  
(512) 474-5594 – facsimile  
wetzel\_law@1411west.com**

**Attorney for Appellant  
Obinna Ebikam**

**ORAL ARGUMENT REQUESTED**

## **Identity of Parties, Counsel, and Judge**

Appellant:	Obinna Ebikam
Trial Counsel for Appellant:	Jodi Soyars Therese Carter 310 S. St. Mary's St, Suite 1830 San Antonio, Texas 78205.
Appeal Counsel for Appellant:	Michael D. Robbins Assistant Public Defender 101 W. Nueva St., Suite 370 San Antonio, Texas 78205
PDR Counsel for Appellant:	Richard E. Wetzel Attorney at Law 1411 West Ave., Ste. 100 Austin, TX 78701
Appellee:	State of Texas
Trial Counsel for State:	Alicia Lovett Eric Cuellar Assistant District Attorneys 101 W. Nueva St. San Antonio, Texas 78205
Appeal Counsel for State:	Andrew Warthen Assistant District Attorneys 101 W. Nueva St. San Antonio, Texas 78205
Trial Judge:	Hon. Linda Rodriguez Sitting by Assignment County Court at Law No. 13 Bexar County, Texas

## **Table of Contents**

	<b>Page</b>
List of Parties .....	ii
Table of Contents .....	iii
Index of Authorities .....	iv
Statement Regarding Oral Argument .....	1
Statement of the Case .....	1
Statement of Procedural History .....	2
Question Presented for Review .....	2
Argument in Support of Question for Review .....	2
Whether a defendant's failure to admit the exact manner and means of an assault as set forth in a charging instrument is a sufficient basis to deny a jury charge on self-defense.	
Prayer .....	8
Certificate of Compliance .....	8
Certificate of Service .....	9
Appendix .....	9

## Index of Authorities

	<b>Page</b>
<b>Cases</b>	
<i>Bufkin v. State</i> , 207 S.W.3d 779 (Tex. Crim. App. 2006)	..... 5
<i>Ebikam v. State</i> , 2018 WL 4760126 (Tex. App.—San Antonio 2018, pet. pending)	..... <i>passim</i>
<i>Elizondo v. State</i> , 487 S.W.3d 185 (Tex. Crim. App. 2016)	..... 5
<i>Gamino v. State</i> , 537 S.W.3d 507 (Tex. Crim. App. 2017)	..... 5
<i>Holloman v. State</i> , 948 S.W.2d 349 (Tex. App.-Amarillo 1997, no pet.)	..... 6
<i>Hubbard v. State</i> , 133 S.W.3d 797 (Tex. App.—Texarkana 2004, pet. ref'd)	..... 6
<i>Jackson v. State</i> , 110 S.W.3d 626 (Tex. App.-Houston [14th Dist.] 2003, pet. ref'd)	..... 6
<i>Withers v. State</i> , 994 S.W.2d 742 (Tex. App.-Corpus Christi 1999, pet. ref'd)	..... 6
<i>Shaw v. State</i> , 243 S.W.3d 647 (Tex. Crim. App. 2007)	..... 5
<b>Statutes</b>	
TEX. PEN. CODE § 9.31(a)(1)(A)	..... 7
TEX. PEN. CODE § 9.33(1)	..... 7
TEX. PEN. CODE § 9.41(a)	..... 7

TEX. PEN. CODE § 22.01(a)(1)	1
------------------------------	---

## **Rules**

TEX. R. APP. P. 9.4	8
---------------------	---

TEX. R. APP. P. 66.3(a)	8
-------------------------	---

TEX. R. APP. P. 66.3(c)	8
-------------------------	---

## **Statement Regarding Oral Argument**

Argument is requested in the event this petition for discretionary review is granted. The question presented on discretionary review is both legally complex and factually intensive. Ebikam respectfully suggests argument would assist the court in the decisional process.

## **Statement of the Case**

Obinna Ebikam was charged by information with the class A misdemeanor offense of assault causing bodily injury (CR 8).<sup>1</sup> *See* TEX. PEN. CODE § 22.01(a)(1). A jury was sworn (2 RR 90). Ebikam entered a plea of not guilty (3 RR 53). The jury found Ebikam guilty as charged in the information (CR 54, 4 RR 33). Ebikam did not elect for the jury to assess punishment (CR 63). The trial court assessed punishment of a \$500.00 fine and five months and 29 days of incarceration (CR 45). The period of incarceration was suspended and Ebikam placed on community supervision for a one year period (CR 45). The trial court certified Ebikam's right to appeal (CR 55). Notice of appeal was timely filed (CR 70).

---

<sup>1</sup> The information alleges Ebikam intentionally, knowingly, or recklessly caused bodily injury to Joy Ebo by striking her with his hand (CR 8).

## **Statement of Procedural History**

A single point of error was presented on direct appeal. The Fourth Court of Appeals affirmed Ebikam's conviction. *Ebikam v. State*, 2018 WL 4760126 (Tex. App.—San Antonio 2018, pet. pending) (Attached as Appendix A). No motion for rehearing was filed. On extension from this court, Ebikam now timely files his petition for discretionary review.

## **Question Presented for Review**

**Whether a defendant's failure to admit the exact manner and means of an assault as set forth in a charging instrument is a sufficient basis to deny a jury charge on self-defense.**

## **Argument in Support of Question for Review**

The question for review concerns the denial of Ebikam's requested charge to the jury on the justification of self-defense. Viewing the evidence in the light most favorable to the requested charge, the record reflects:

Obinna Ebikam met the complainant, Joy Ebo, at church and they started dating (3 RR 220).<sup>2</sup> On the day of the incident, Ebo called Ebikam and a woman

---

<sup>2</sup> Ebikam is not a citizen of the United States (4 RR 35). English is not his first language (3 RR 252). His native language is Igbo of southeastern Nigeria (3 RR 269).

unknown to her answered Ebikam's telephone (3 RR 226).<sup>3</sup> Ebo proceeded to repeatedly call Ebikam on the telephone (3 RR 226). She was yelling and screaming during the phone calls (3 RR 226). Ebikam testified the following transpired after Ebo's last telephone call:

Few seconds after the last call, then I heard ringing -- like banging on my door with the doorbell. And I didn't -- I was scared because the doorbell -- my doorbell is so loud. And when I opened the door, you know, Joy was standing right in front of my house, and she tried to barge into my house. She was like, who is the girl inside, you know, with a very loud voice, trying to grab me. So I'm -- oh, stop, stop. What are you trying to do? So she tried to push me, like, you have to stop because I became scared what in -- from what she was saying on the phone (3 RR 227).

Ebikam tried to close the door and prevent Ebo from entering his apartment (3 RR 228). Ebo barged into the apartment and was both violent and aggressive (3 RR 229, 233). Ebikam was scared he was going to be hurt by Ebo (3 RR 229). When Ebikam attempted to call the police, Ebo took his phone and broke it (3 RR 229). Both Ebikam and the other woman in his apartment were scared when Ebo barged into his apartment (3 RR 230).

In describing his interaction with Ebo in the apartment, Ebikam stated:

I tried to -- the only thing is I tried to stop her from coming into my house because I was scared what she was going to do to me or the

---

<sup>3</sup> Ebikam knew this woman by her holy name of Blessing (3 RR 253).

lady inside my house. I tried to stop her and I told don't come into my house. She kept pushing (3 RR 231).

Ebikam did not understand why Ebo wanted to fight him (3 RR 232). He had a confrontation with Ebo when she was barging into his apartment (3 RR 257). Both Ebikam and the other woman left his apartment while Ebo was still present in the apartment (3 RR 234).

At the conclusion of the guilt or innocence phase of the trial, Ebikam requested the court charge the jury on the justification of self-defense (3 RR 271).<sup>4</sup> The State opposed the requested charge because Ebikam did not admit striking Ebo with his hand as alleged in the misdemeanor information (3 RR 278). The trial court denied the requested charge on self-defense (3 RR 282).

On direct appeal, Ebikam presented a single point of error urging the trial court erred by failing to charge the jury on self-defense. The court of appeals noted conflict in the case law as to whether the defendant must admit the exact acts within the charging instrument before being entitled to a defensive issue. *Ebikam*, slip op. at 3 - 4. Those conflicts are both in this court and the various courts of appeals. *Id.* The court of appeals noted its strict adherence to its own rule requiring a defendant to admit the offense as alleged in the charging instrument

---

<sup>4</sup> Defense counsel questioned the prospective jurors on voir dire on the justification of self-defense (2 RR 43 – 46).

before a defensive issue need be included in the charge to the jury. *Id.* Ultimately, the court of appeals affirmed upon finding Ebikam was not entitled to a charge on self-defense because he never admitted striking the complainant with his hand as alleged in the information. *Ebikam*, slip op. at 4.

A defendant is entitled to a jury instruction on self-defense if the issue of self-defense is raised by the evidence, whether that evidence is strong or weak, unimpeached or contradicted, and regardless of what the trial court may think about the credibility of the defense. *Gamino v. State*, 537 S.W.3d 507, 510 (Tex. Crim. App. 2017); *Elizondo v. State*, 487 S.W.3d 185, 196 (Tex. Crim. App. 2016). When reviewing a trial court's decision denying a request for a self-defense instruction, the evidence is viewed in the light most favorable to the defendant's requested submission. *Bufkin v. State*, 207 S.W.3d 779, 782 (Tex. Crim. App. 2006). A trial court errs in denying a self-defense instruction if there is some evidence, from any source, when viewed in the light most favorable to the defendant, that will support the elements of self-defense. *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

A defendant is not required to concede the State's version of the events in order to be entitled to a self-defense instruction. *Gamino*, 537 S.W.3d at 512. Admitting to the conduct does not necessarily mean admitting to every element of

the offense. *Gamino*, 537 S.W.3d at 511 – 512) (rejecting State’s claim that defendant not entitled to self-defense charge because he failed to explicitly admit that he threatened the complainant with imminent harm).

Other courts have been willing to afford defendants defensive instructions when they have demonstrated some evidence on each element of the defense—even though the defendant may not have admitted every element of the offense as alleged in the charging instrument. *See, e.g., Hubbard v. State*, 133 S.W.3d 797, 802 (Tex. App.—Texarkana 2004, pet. ref’d) (finding that although defendant did not admit intentionally, knowingly, or recklessly causing complainant’s death, he did admit the conduct underlying the offense, that is, striking the complainant sufficient to satisfy the admission element required to raise the issue of necessity); *Jackson v. State*, 110 S.W.3d 626, 631–32 (Tex. App.-Houston [14th Dist.] 2003, pet. ref’d) (holding even if a defendant denies the specific allegations in the indictment, he is not necessarily precluded from raising defensive issues as long as he sufficiently admits conduct underlying the offense and provides evidence justifying a defensive instruction); *Withers v. State*, 994 S.W.2d 742, 745–46 (Tex. App.-Corpus Christi 1999, pet. ref’d) (finding that although not admitting specific charging instrument allegation, defendant adequately admitted the conduct required to raise the defensive issues, of self-defense, defense of a third person and necessity); *Holloman v. State*, 948 S.W.2d 349, 351–52 (Tex. App.-Amarillo 1997,

no pet.) (holding defendant entitled to a self-defense instruction even without admitting the particular physical act alleged in the charging instrument).

Ebikam's testimony presented multiple issues warranting a self-defense charge to the jury. The use of force was presumed reasonable in view of Ebo unlawfully and with force entering Ebikam's apartment. *See* TEX. PEN. CODE § 9.31(a)(1)(A). The use of force in the defense of the third person, Blessing, was justified. *See* TEX. PEN. CODE § 9.33(1). Finally, Ebikam was justified in using force to terminate Ebo's unlawful trespass in his apartment and destruction of his cell phone. *See* TEX. PEN. CODE § 9.41(a).

Ebikam initially attempted to close the door on Ebo when she tried to enter his apartment. That proved unsuccessful and the violent and aggressive Ebo unlawfully entered the apartment. She wanted to fight Ebikam. The intruder destroyed his property. Both Ebikam and his female guest were in fear of the intruder. Ebikam admitted he engaged in a confrontation with Ebo in his apartment.

Viewing the evidence in the light most favorable to the requested self-defense instruction, Ebikam sufficiently admitted to the assaultive conduct set forth in the information. The Fourth Court of Appeals doesn't get to have its own rule. The court of appeals strict adherence to a rule in conflict with applicable case law

by this court and the courts of appeals warrants the granting of this petition. *See* TEX. R. APP. P. 66.3(a) and (c).

### **Prayer**

Ebikam prays the Court will grant the petition for discretionary review on the question presented.

Respectfully submitted,

/s/Richard E. Wetzel  
Richard E. Wetzel  
Bar No. 21236300

1411 West Avenue, Suite 100  
Austin, Texas 78701

(512) 469-7943  
(512) 474-5594 – fax  
wetzel\_law@1411west.com

Attorney for Appellant  
Obinna Ebikam

### **Certificate of Compliance**

This pleading complies with TEX. R. APP. P. 9.4. According to the word count function of the computer program used to prepare the document, the document contains 1,390 words excluding the items not to be included within the word count limit.

/s/ Richard E. Wetzel  
Richard E. Wetzel  
State Bar No. 21236300

## **Certificate of Service**

This is to certify a true and correct copy of this pleading was sent by email to Counsel for the State of Texas, Andrew Warthen, Assistant District Attorney, at his Email address of awarthen@bexar.com and the State Prosecuting Attorney, at her email address of information@spa.texas.gov on this the 20<sup>th</sup> day of November, 2018.

/s/Richard E. Wetzel  
Richard E. Wetzel  
State Bar No. 21236300

## **Appendix**

*Ebikam v. State*, 2018 WL 4760126  
(Tex. App.—San Antonio 2018, pet. pending)



## Fourth Court of Appeals San Antonio, Texas

### MEMORANDUM OPINION

No. 04-18-00215-CR

Obinna **EBIKAM**,  
Appellant

v.

The **STATE** of Texas,  
Appellee

From the County Court at Law No. 13, Bexar County, Texas  
Trial Court No. 553192  
Honorable Crystal D. Chandler, Judge Presiding

Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice  
Marialyn Barnard, Justice  
Patricia O. Alvarez, Justice

Delivered and Filed: October 3, 2018

### AFFIRMED

Obinna Ebikam was convicted by a jury of assault causing bodily injury. The only issue raised on appeal is whether the trial court erred in denying Ebikam's request for a jury charge on self-defense. We affirm the trial court's judgment.

### BACKGROUND

Joy Ebo was injured after a confrontation with Ebikam at his apartment. Ebo arrived at Ebikam's apartment after a woman answered his phone. The woman was still present in Ebikam's apartment when Ebo arrived.

Ebikam was subsequently charged with committing the offense of assault bodily injury. With regard to the requested self-defense charge, the trial court stated the defendant was required to testify that he committed the act but did so in self-defense in order to be entitled to the charge. Defense counsel disagreed, arguing Ebikam was not required to testify that he meant to hurt Ebo, but only that he made contact with Ebo when he tried to prevent her from entering the door of his apartment. The trial court disagreed and denied the request. The jury found Ebikam guilty, and this appeal ensued.

#### **STANDARD OF REVIEW**

“Our first duty in analyzing a jury-charge issue is to decide whether error exists.” *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). “Then, if we find error, we analyze that error for harm.” *Id.*

#### **DISCUSSION**

In his brief, Ebikam argues, “Mr. Ebikam did not admit to intentionally or knowingly assaulting Ms. Ebo, but he did not have to. He was required to admit to the conduct with which he was charged, but that does not mean that he was required to admit to every statutory element of the off[ense].” Ebikam testified he tried to stop Ebo from entering his apartment because he was afraid of what she was going to do, and Ebo kept pushing on his door. Ebikam denied striking or hitting Ebo.<sup>1</sup> Ebikam argues he was entitled to the self-defense charge because he used force in trying to prevent Ebo from pushing his door open.

In support of his argument, Ebikam cites the same opinion in his brief that defense counsel cited to the trial court. In that case, the Houston court stated the law as follows:

To be entitled to an instruction on self-defense, appellant was required first to admit the conduct charged in the indictment and then to offer evidence justifying the

---

<sup>1</sup> Ebo testified Ebikam hit her several times. Video from the investigating officers’ body cams and photographs were introduced into evidence showing the injuries Ebo sustained.

conduct. Admitting the conduct, however, does not necessarily mean admitting the commission of every statutory element of the offense. Instead, a defendant can sufficiently admit the conduct alleged and justify a defensive instruction. In addition, a defendant's repudiation of the specific actions his defense is meant to justify will not necessarily preclude a self-defense instruction when a defendant admits to some participation in the offense.

*Jackson v. State*, 110 S.W.3d 626, 631-32 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (internal citations omitted). Ultimately, however, the Houston court held the appellant was not entitled to an instruction on self-defense in that case because appellant testified the complainant did not hit him; therefore, “viewing the evidence in the light most favorable to appellant, we are left with a picture in which appellant assaulted a person who never used or attempted to use unlawful force against him.” *Id.* at 632.

The Texarkana court has noted the Texas Court of Criminal Appeals has been inconsistent about whether a defendant must admit having committed the offense with which he or she is charged before being entitled to a defensive instruction. *Hubbard v. State*, 133 S.W.3d 797, 799 (Tex. App.—Texarkana 2004, pet. ref'd) (comparing *Young v. State*, 991 S.W.2d 835, 858 (Tex. Crim. App. 1999) with *Willis v. State*, 790 S.W.2d 307, 314-14 (Tex. Crim. App. 1990) and *Golden v. State*, 851 S.W.2d 291, 295 (Tex. Crim. App. 1993)). The Texarkana court also noted the intermediate appellate courts are also inconsistent in their holdings; however, the court acknowledged this court has “strictly held that a defendant must specifically admit the offense, including the culpable mental state the crime requires.” *Id.* at 800 (citing *McGarity v. State*, 5 S.W.3d 223 (Tex. App.—San Antonio 1999, no pet.)). More recently, this court reaffirmed its strict adherence to our position, noting ““a defensive instruction is only appropriate when the defendant’s defensive evidence essentially admits to every element of the offense *including* the culpable mental state, but interposes [a] justification to excuse the otherwise criminal conduct.””

*Valverde v. State*, 490 S.W.3d 526, 528 (Tex. App.—San Antonio 2016, pet. ref'd) (quoting *Shaw*

*v. State*, 243 S.W.3d 647, 659 (Tex. Crim. App. 2007)) (emphasis in original). However, the Texas Court of Criminal Appeals has even more recently stated, “Admitting to the conduct does not necessarily mean admitting to every element of the offense.” *Gamino v. State*, 537 S.W.3d 507, 512 (Tex. Crim. App. 2017).

Regardless of whether a defendant generally has to admit to every element of an offense to be entitled to a self-defense instruction, we hold Ebikam had to admit to more than using force to push on the door to block Ebo’s entry in order to be entitled to a self-defense charge in this case. In order to find Ebikam guilty, the jury was instructed in the jury charge that it had to find that Ebikam intentionally or knowingly or recklessly caused bodily injury to Ebo “by striking the complainant with the hand of the defendant.” Therefore, in order to be entitled to a self-defense instruction, Ebikam was required to admit that he struck Ebo with his hand but did so because he reasonably believed striking Ebo with his hand was immediately necessary to protect himself against Ebo’s use or attempted use of unlawful force. *See TEX. PENAL CODE ANN. § 9.31(a)* (West 2011). Because the evidence did not contain any such admission by Ebikam, the trial court did not err in denying his request for a self-defense charge.

## **CONCLUSION**

The trial court’s judgment is affirmed.

Sandee Bryan Marion, Chief Justice

DO NOT PUBLISH