ADVANCE SHEET HEADNOTE
June 24, 2024

2024 CO 48

No. 22SC835, *Martinez v. People*—Criminal Law—Jury Instructions—Self-defense—Traverse—Reckless Conduct.

The supreme court holds that the force-against-intruders defense provided by section 18-1-704.5(2), C.R.S. (2023), is a traverse and not an affirmative defense to crimes involving reckless conduct. Accordingly, the supreme court affirms the court of appeals and concludes that the district court properly instructed the jury that the prosecution was not required to affirmatively disprove the defendant's force-against-intruders defense against a charge of reckless manslaughter.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2024 CO 48

Supreme Court Case No. 22SC835
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1481

Petitioner:

Justin Brendan Martinez,

v.

Respondent:

The People of the State of Colorado.

Judgment Affirmed
en banc
June 24, 2024

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CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court, in which **JUSTICE MÁRQUEZ, JUSTICE HOOD**, **JUSTICE GABRIEL**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

CHIEF JUSTICE BOATRIGHT delivered the Opinion of the Court.

¶1 Facing a charge of reckless manslaughter, Justin Brendan Martinez raised the force-against-intruders defense, section 18-1-704.5(2), C.R.S. (2023).[1] At issue is whether the trial court erred by instructing the jury that this defense was an element-negating traverse (an argument that the prosecution failed to prove its case beyond a reasonable doubt) rather than an element-adding affirmative defense (an argument that the defendant's conduct was legally justified). Following our long line of precedents holding that self-defense is a traverse to crimes involving reckless conduct—*People v. Pickering*, 276 P.3d 553, 556 (Colo. 2011); *Case v. People*, 774 P.2d 866, 869–71 (Colo. 1989); *People v. Fink*, 574 P.2d 81, 83 (Colo. 1978)—we now hold that the force-against-intruders defense is a traverse to crimes involving reckless conduct.

¶2 We do so because the force-against-intruders defense, like self-defense, only protects defendants who acted justifiably and reasonably. These requirements make the defense irreconcilable with reckless conduct, which is intrinsically

[1] We refer to the statute at issue as the "force-against-intruders" defense rather than its colloquial name, the "make-my-day" defense, to better reflect its title and substance. *See* § 18-1-704.5 (titled, "Use of deadly physical force against an intruder"); *People v. Rau*, 2022 CO 3, ¶¶ 1–2, 11, 501 P.3d 803, 804, 808 (explaining that "Make My Day . . . is a misnomer" and referring to the statute as "the force-against-intruders statute").

unjustifiable and unreasonable. *See* § 18-1-501(8), C.R.S. (2023) ("A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists."). Thus, Martinez's defense that he acted justifiably and reasonably under the force-against-intruders statute directly conflicted with—or traversed over—the prosecution's burden of proving that he acted recklessly. Accordingly, we affirm the court of appeals' decision that the trial court properly instructed the jury to treat Martinez's force-against-intruders defense as a traverse rather than as an affirmative defense.

I. Facts and Procedural History

¶3 Martinez and two of his friends, I.H. and A.A., were drunk at Martinez's house one evening. Martinez wanted to drive to a bar, so he went outside and got behind the wheel of his car. I.H. and A.A. followed him outside. I.H. didn't want Martinez to drive drunk, so he punched Martinez in the face and wrestled him out of the car. Martinez returned to his house followed by I.H. and, a little later, A.A. When A.A. entered, he saw Martinez on the floor and I.H. kicking him. A.A. told them to calm down. As I.H. began walking out of the room, Martinez grabbed a shotgun and pointed it in I.H.'s direction. The shotgun fired, and the shot struck I.H. in the back of his leg, causing him to bleed to death. Martinez and A.A. later characterized the shooting as accidental, although A.A. was surprised that Martinez chose to brandish the shotgun at all.

¶4 The prosecution charged Martinez with second degree murder. In his defense, Martinez twice invoked the force-against-intruders statute, which allows a person to use deadly force against an intruder in certain circumstances. First, he filed a pretrial motion to dismiss, arguing that the statute immunized him from prosecution. The trial court denied this motion. Second, at trial, Martinez set forth his defense theory that even though his conduct was accidental, it was also justified both as self-defense and under the force-against-intruders defense. *See People v. Rau*, 2022 CO 3, ¶ 20, 501 P.3d 803, 810 ("[I]f a pretrial motion to dismiss on grounds of immunity under [the force-against-intruders statute] fails, the defendant gets a second bite at the apple . . . at trial . . . .").

¶5 After the presentation of evidence and prior to closing arguments, the trial court instructed the jury on the prosecution's burden regarding second degree murder as well as the lesser included charges of reckless manslaughter and criminally negligent homicide. Regarding second degree murder, the court instructed the jury that Martinez's force-against-intruders defense was an affirmative defense, meaning the prosecution bore the burden of disproving it beyond a reasonable doubt. Regarding reckless manslaughter and criminally negligent homicide, however, the court rejected Martinez's argument that the force-against-intruders defense is likewise an affirmative defense. Instead, over Martinez's objection, the trial court gave Instruction 14, which stated that for

reckless manslaughter and criminally negligent homicide, Martinez "was legally authorized to use any degree of physical force, including deadly physical force, against another person" if his conduct met the requirements of the force-against-intruders statute:

> 1. [Martinez] was an occupant of a dwelling, and
>
> 2. The other person had made a knowingly unlawful entry into that dwelling, and
>
> 3. [Martinez] had a reasonable belief that, in addition to the uninvited entry, the other person had committed, was committing, or intended to commit a crime in the dwelling, and
>
> 4. [Martinez] reasonably believed the other person might use any physical force, no matter how slight, against any occupant of the dwelling.

Instruction 14 (closely following § 18-1-704.5(2)). The instruction further provided that for these lesser offenses, "the prosecution does not have an additional burden to disprove self-defense. You are instructed, though, that a person does not act recklessly or in a criminally negligent manner if his conduct is legally justified as set forth above."

¶6 The jury acquitted Martinez of second degree murder but found him guilty of reckless manslaughter. The court sentenced him to five years in prison.

¶7 Martinez appealed, arguing again that Instruction 14 was erroneous because the force-against-intruders statute provides an affirmative defense to reckless manslaughter. A division of the court of appeals disagreed, affirming Martinez's

conviction and holding that the force-against-intruders defense is a traverse to reckless conduct, not an affirmative defense. *People v. Martinez*, 2022 COA 111, ¶¶ 17, 27, 522 P.3d 725, 729–30 (explaining that a traverse "refutes the possibility that the defendant committed the charged offense by negating one or more elements of the offense," so it does not add an element for the prosecution to disprove like an affirmative defense does).

¶8 Martinez petitioned this court for certiorari review. We agreed to answer "[w]hether the prosecution is required to disprove a make-my-day defense beyond a reasonable doubt as to reckless conduct."

II. Analysis

¶9 After laying out the standard of review, we describe the two general types of defenses—affirmative defenses and traverses. We then hold that the force-against-intruders defense is a traverse to crimes involving reckless conduct. Consequently, the prosecution was not required to affirmatively disprove Martinez's force-against-intruders defense as to reckless manslaughter, and the trial court's instruction was appropriate.

A. Standard of Review

¶10 "We review de novo the question of whether a trial court accurately instructed the jury on the law." *Tibbels v. People*, 2022 CO 1, ¶ 22, 501 P.3d 792, 797. If an instruction impermissibly lowered the prosecution's burden and the

defendant objected, we will reverse unless we find that the error was harmless beyond a reasonable doubt. *See Pearson v. People*, 2022 CO 4, ¶ 16, 502 P.3d 1003, 1007 (discussing constitutional harmless error review).

B. The Prosecution Was Not Required to Affirmatively Disprove Martinez's Force-Against-Intruders Defense

¶11 The presumption of innocence protects criminal defendants by requiring the prosecution to prove each factual element of the offense charged beyond a reasonable doubt. *Johnson v. People*, 2019 CO 17, ¶ 10, 436 P.3d 529, 531–32. In practice, this requires the trial court to instruct the jury to determine whether the prosecution proved each element. *Pickering*, 276 P.3d at 555.

¶12 Defendants may add to the prosecution's burden by credibly raising an affirmative defense. § 18-1-407, C.R.S. (2023). An affirmative defense "becomes an additional element of the charged offense" and requires the trial court to instruct the jury that the prosecution must disprove the defense beyond a reasonable doubt. *Pearson*, ¶ 18, 502 P.3d at 1007. Defendants raising an affirmative defense essentially argue that even if the prosecution proves all the elements of the crime charged, an additional factor justifies, excuses, or mitigates their conduct. *See id.* But not every defense is an affirmative defense.

¶13 We have long recognized a second type of defense, a traverse, which defendants may raise to cast doubt on whether the prosecution has proved each element of the offense. *Id.* at ¶ 19, 502 P.3d at 1007–08. Whereas an affirmative

defense creates an additional element that the prosecution must disprove, a traverse aims to thwart the prosecution from proving one or more of the crime's existing elements. Thus, a defendant who raises a traverse "is not entitled to an affirmative defense instruction." *Id.* at ¶ 19, 502 P.3d at 1008 (quoting *Roberts v. People*, 2017 CO 76, ¶ 22, 399 P.3d 702, 705).

¶14 This case tasks us with determining whether a force-against-intruders defense is an affirmative defense or a traverse when raised against a charge involving reckless conduct.[2] Martinez argues that it is always an affirmative defense. In doing so, he acknowledges the precedential elephant in the room, *Pickering*, in which we reiterated that although self-defense is an affirmative defense to crimes "requiring intent, knowledge, or willfulness" (such as second degree murder), it is a traverse to crimes "requiring recklessness, criminal negligence, or extreme indifference" (such as reckless manslaughter). 276 P.3d at 555–56. In *Pickering*, we extended that reasoning to the jury instruction at issue and concluded that "instructing the jury . . . that the prosecution bears no burden of disproving self-defense with respect to crimes to which self-defense is not an

[2] We have previously recognized that the force-against-intruders defense is an affirmative defense against a charge involving intentional or knowing conduct. *See Ray v. People*, 2019 CO 21, ¶¶ 12–13, 440 P.3d 412, 415–16 (citing *People v. Janes*, 982 P.2d 300, 303–04 (Colo. 1999)). Likewise, when we discussed defendants raising the force-against-intruders defense "at trial, as an affirmative defense" in *Rau*, ¶ 20, 501 P.3d at 810, we did so in the context of an indictment for second degree murder. *Id.* at ¶ 9, 501 P.3d at 808.

affirmative defense is an accurate statement of Colorado law and does not improperly shift the prosecution's burden to prove recklessness." *Id.* at 557. Thus, Martinez's argument rests on distinguishing the force-against-intruders statute at issue in this case from the self-defense statute at issue in *Pickering*.

¶15 In *Pickering*, we found the concept of acting recklessly irreconcilable with the concept of acting in justified self-defense. *Id.* at 556. We reasoned that "it is impossible for a person to act both recklessly and in self-defense, because self-defense requires one to act justifiably, while recklessness requires one to act with conscious disregard of an unjustifiable risk." *Id.* (citation omitted) (first citing § 18-1-704(1), C.R.S. (2023) (defining self-defense); and then citing § 18-1-501(8) (defining recklessness)). Essentially, we recognized that it is logical for a defendant to argue, "I acted justifiably," but illogical to argue, "Even if I acted unjustifiably, I also acted justifiably." Because conduct cannot be both justified and unjustified, we concluded that self-defense is a traverse to crimes involving reckless conduct. *Id.* at 556.

¶16 Regarding appropriate jury instructions when self-defense is a traverse and not an affirmative defense, we turned to section 18-1-704(4), which accounts for "case[s] in which the defendant is not entitled to a jury instruction regarding self-defense as an affirmative defense"—e.g., a crime involving recklessness—but the defendant has nonetheless presented credible evidence of self-defense. In such

a case, "the court shall instruct the jury with a self-defense law instruction . . . [and] it may consider the evidence of self-defense in determining whether the defendant acted recklessly . . . ." *Id.* "However, the self-defense law instruction shall not be an affirmative defense instruction and the prosecuting attorney shall not have the burden of disproving self-defense." *Id.* We determined that an instruction conforming to section 18-1-704(4) "is an accurate statement of Colorado law and does not improperly shift the prosecution's burden to prove recklessness, extreme indifference, or criminal negligence." *Pickering*, 276 P.3d at 557.

¶17 Martinez argues that *Pickering* is inapposite to this case because the force-against-intruders defense, section 18-1-704.5, is distinct from its neighbor, the self-defense statute, section 18-1-704. He points out that self-defense requires that a person use *proportional* force to defend oneself. § 18-1-704(1) (authorizing "a degree of force which [the defendant] reasonably believes to be necessary"). Conversely, the force-against-intruders statute allows a person to use *disproportionate* force when the statute's conditions are met. § 18-1-704.5(2) (allowing "*any degree* of physical force, including deadly physical force," when the defendant "has a reasonable belief that [the intruder] has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry" (emphasis added)). That is, provided the statute's conditions are met, a person defending

themself against an intruder may use disproportionate force, not just reasonable force. Martinez contends that such a statutorily authorized use of disproportionate force is consistent with reckless conduct (i.e., consciously disregarding a substantial and unjustifiable risk), meaning the force-against-intruders defense operates as an affirmative defense, not a traverse.

¶18 While we agree with Martinez that there are differences between self-defense and the force-against-intruders defense, the People point out two salient similarities: Both defenses "justif[y]" a use of force to defend oneself and require a person to act "reasonab[ly]." *Compare* § 18-1-704(1), *with* § 18-1-704.5(2); *see also Rau*, ¶ 20, 501 P.3d at 810 (discussing the defenses' similarities regarding their potential use as affirmative defenses). The court of appeals also focused on these similarities and—recalling that reckless conduct is necessarily unjustifiable—concluded that "the force-against-intruders statute does not allow an occupant to consciously disregard a substantial and *unjustifiable* risk of harm to the intruder. Instead, like ordinary self-defense, the force-against-intruders statute requires that the occupant act reasonably and justifiably." *Martinez*, ¶ 27, 522 P.3d at 730. We find no fault in this reasoning.

¶19 As applied to his reckless manslaughter charge, Martinez's force-against-intruders defense wasn't an affirmative defense because Martinez wasn't admitting that he could have acted recklessly; to the contrary, he was

claiming that, by satisfying the statute's conditions, he acted justifiably and not recklessly. Therefore, this defense was a traverse because it attempted to negate—or traverse over—the prosecution's burden of proving that Martinez disregarded a substantial and unjustifiable risk, which was necessary to prove reckless manslaughter. *See* § 18-1-501(8); *Pickering*, 276 P.3d at 556 (applying the same logic to self-defense). Accordingly, the prosecution was not required to separately disprove Martinez's force-against-intruders defense because that defense is irreconcilable with reckless conduct. Therefore, Instruction 14 did not improperly lower the prosecution's burden.

¶20 Additionally, Martinez argues that even if Instruction 14 correctly described the prosecution's burden in a technical sense, it was too confusing for the jury in practice. We disagree. Instruction 14 clarified the prosecution's burden by mirroring the requirements of section 18-1-704(4) (even though that subsection only clearly pertains to self-defense). This was a "case in which [Martinez was] not entitled to a jury instruction regarding [the force-against-intruders defense] as an affirmative defense" but Martinez nonetheless presented credible evidence of justification under the force-against-intruders defense. *See* § 18-1-704(4). Instruction 14 parsed the statutory requirements of the force-against-intruders defense and provided that the defense could thwart the prosecution's effort to prove the "recklessly" element of reckless manslaughter. Thus, even if the

force-against-intruders defense's allowance for disproportionate force would not otherwise be justifiable under a juror's personal understanding of what constitutes recklessness, Instruction 14 ensured that the jury would understand that such force did *not* qualify as reckless conduct if Martinez satisfied the defense's conditions.

III. Conclusion

¶21 Accordingly, we hold that the force-against-intruders defense is a traverse to crimes involving reckless conduct, and in this case, reckless manslaughter. We therefore affirm the judgment of the court of appeals and Martinez's conviction.