**Affirmed and Majority and Concurring Opinions filed June 30, 2020.**

**In the**

# Fourteenth Court of Appeals

---

**NO. 14-18-00229-CR**
**NO. 14-18-00231-CR**

---

**TRAVION DEPAUL FOUNTAIN, Appellant**

**v.**

**THE STATE OF TEXAS, Appellee**

---

**On Appeal from the 268th District Court**
**Fort Bend County, Texas**
**Trial Court Cause Nos. 16-DCR-074044A and 16-DCR-074054A**

---

## MAJORITY OPINION

A jury convicted appellant of the felony offenses of first degree murder and the third degree unlawful possession of a firearm, both for intentionally and knowingly causing the death of Corey Robinson by shooting him with a firearm on June 7, 2016. Tex. Penal Code Ann. §§ 19.02(b)(1), (c) (murder), 46.04(a), (e) (unlawful possession of firearm). The trial court assessed punishment at 24-years imprisonment for murder and 10 years for unlawful possession of a firearm,

without fines and to run concurrently. *See* Tex. Penal Code Ann. §§ 12.32, .34.[1]

[1] Although no party raises this issue, we recognize that the trial court made no oral finding regarding enhancement of punishment for appellant's murder conviction at the punishment hearing, although the trial court's signed judgment includes a finding of "true" regarding the enhancement paragraph for the prior felony conviction. The sentence of 24-years imprisonment for murder provides no further clarity, as that sentence falls within both the "standard" punishment range for first degree felonies (imprisonment for life or for any term of not more than 99 years or less than 5 years) as well as the "enhanced" range (imprisonment for life or for any term of not more than 99 years or less than 15 years). Tex. Penal Code Ann. §§ 12.32(a), 12.42(c)(1). While the trial court overruled appellant's double-jeopardy objection to the enhancement paragraph in the murder indictment, the trial court did not make a further pronouncement at the sentencing hearing concerning whether the sentence was based solely on the punishment range for a first degree felony or was based on the enhanced punishment range, and we express no opinion on the basis of the sentence.

In evaluating whether to exercise our discretion to modify the judgment to "make the record speak the truth," *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992), we note that this court has held that a trial court is not required to make oral findings on enhancement when it assesses punishment provided there is sufficient evidence in the record supporting the finding. *See Meineke v. State*, 171 S.W.3d 551, 557 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) ("The court was not required to make an oral pronouncement of its findings on the enhancements."). Here, appellant pleaded true to the enhancement paragraph of the murder indictment at the punishment hearing. This is sufficient evidence to support a finding of true to the enhancement paragraph. *See Wilson v. State*, 671 S.W.2d 524, 526 (Tex. Crim. App. 1984) ("A plea of 'true' will satisfy the State's burden of proof for enhancement allegations."). As the trial court's written finding of "true" to the enhancement paragraph is supported by the evidence, and as the sentence was within both the punishment range for a first degree felony and the enhanced range, we conclude it is unnecessary on this record to modify the judgment.

The concurrence first suggests that the court is not following the rules, presumably a reference to Texas Rule of Appellate Procedure 33.1(a)(1), preservation of error. Later the concurrence seems to acknowledge that the Court of Criminal Appeals requires us to ensure that the oral pronouncement of sentence is properly memorialized in the written judgment. *French*, 830 S.W.2d at 609 ("[A]n appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source."). To the extent there was any doubt, we hold that the reporter's record of the oral pronouncement of sentence and the judgement in the clerk's record falls within "any source."

Although unstated in *French*, the authority to make such a change derives from former Code of Criminal Procedure article 44.24(b), which was repealed by 1986 Texas Rule of Appellate Procedure 80(b) and is now current Texas Rule of Appellate Procedure 43.2(b). *See* Act of June 1, 1981, 67th Leg., R.S., ch. 291, § 133, art. 44.24(b), 1981 Tex. Gen. Laws 761, 816 ("The courts of appeals and the Court of Criminal Appeals . . . may reform and correct the judgment or may enter any other appropriate order, as the law and nature of the case may require."), *repealed by* Tex. R. App. P. 80(b) ("The court of appeals may: . . . (2) modify the

Appellant challenges the legal sufficiency of the evidence supporting his convictions. We affirm.

## I. BACKGROUND

The parties do not dispute that, in the early morning hours of June 7, 2016, appellant shot at Corey Robinson. The trial court admitted the following evidence relating to our review.

In a statement given to police, appellant said that, in the days before the shooting, Robinson sent text messages and made social-media postings threatening to kill appellant and his sister, Sherrell Fountain. Appellant reported these threats to police before the shooting.

On the day of the shooting, appellant was riding in a car owned by Amber

---

judgment of the court below by correcting or reforming it . . . ."), 11 Tex. Reg. 1997, 2003–04, 49 Tex. B.J. 558, 581 (Tex. Crim. App. Apr. 10, 1986, eff. Sept. 1, 1986), *amended by* Tex. R. App. P. 43.2 ("The court of appeals may: . . . (b) modify the trial court's judgment and affirm it as modified . . . ."), 60 Tex. B.J. 876, 923 (Tex. Crim. App. Aug. 15, 1997, eff. Sept. 1, 1997); *see* Act of May 27, 1985, 69th Leg., R.S., ch. 685, § 4, 1985 Tex. Gen. Laws 2472, 2472 (authorizing promulgation of Texas Rules of Appellate Procedure and repeal of portions of Code of Criminal Procedure); *see generally* 43B George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 56.216 (3d ed. 2011).

The Court of Criminal Appeals in *French* expressly adopted the reasoning of the Fifth Court of Appeals in *Asberry v. State*, 813 S.W.2d 526 (Tex. App.—Dallas 1991, pet. ref'd) (authored by former Presiding Judge John Onion). *French*, 830 S.W.2d at 609. *Asberry* explicitly stated, "Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc where the evidence necessary to correct the judgment appears in the record." *Asberry*, 813 S.W.2d at 529. The Fifth Court went on to state, "The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court." *Id.* at 529–30 (citing former 1986 Texas Rule of Appellate Procedure 52(a) (preservation of appellate complaints), now current Texas Rule of Appellate Procedure 33.1(a)).

The court has discharged its duty, concluded that modification of the judgment pursuant to *French* and current Texas Rule of Appellate Procedure 43.2(b) (using the term "modify") is unnecessary, and memorialized that process in the opinion. We are unaware of any opinions from the Court of Criminal Appeals overruling *French* or holding that a court of appeals errs if it explains in its opinion why an ambiguity in the sentence and judgment does not require modification.

Lyons, with whom appellant has a child, and his sister, who was driving. An AR-15 assault rifle belonging to Lyons was in the trunk of the car. Appellant stated that he had loaded the weapon with a full 40-round magazine because of the threats he had received from Robinson.

In the early morning hours, appellant and the other passengers in the car pulled onto Maiden Lane in Richmond, Texas, and encountered a man walking toward them on the street. Appellant stated that he asked an onlooker who the man was and was informed it was Robinson. Appellant then retrieved the assault rifle from the trunk via a backseat pass-through. He stated that he saw Robinson tugging at his clothes and, thinking Robinson had a gun, shot at him with the rifle.[2]

A security camera at a nearby residence recorded the incident. The footage shows a car, identified by Lyons as the car in which she was riding with appellant and his sister, suddenly back up toward the left side of the frame. Robinson then enters the scene, walking toward the car from the right side of the frame. He takes approximately five steps without appearing to reach for anything or otherwise threaten the occupants of the car before stopping suddenly in response to gunfire from the car. He flees off the road, but the car accelerates towards his position, at which point it stops and additional shots are fired at Robinson from the car.

Appellant stated that he shot at Robinson at least 10 times. According to the autopsy, Robinson sustained five gunshot wounds. He died after being taken to the hospital, with the cause of death determined to be blood loss from the gunshot wounds. No gun was found on or near Robinson at the crime scene.

[2] Lyons likewise testified that Robinson "looked like he was, like, tugging at his clothes, reaching for something." Richmond Police Department peace officer Childs testified that he interviewed appellant, Lyons, and Sherrell Fountain after the shooting and that each stated Robinson made a movement to pull up his shirt shortly before the shooting.

## II. ANALYSIS

### A. Standard of review

Appellant argues that the evidence is legally insufficient to support his convictions for murder and unlawful possession of a firearm. In evaluating a legal-sufficiency claim, we consider all the evidence in the light most favorable to the verdict. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011); *Malik v. State*, 953 S.W.2d 234, 236–37 (Tex. Crim. App. 1997). We determine whether any rational jury could have found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Adames*, 353 S.W.3d at 860; *Malik*, 953 S.W.2d at 236–37. We measure sufficiency to support a conviction by comparing the evidence presented at trial to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik*, 953 S.W.2d at 240. A hypothetically correct jury charge reflects the governing law, the indictment, the State's burden of proof and theories of liability, and an adequate description of the offense for the particular case. *Id.*

When the defendant raises a justification defense, such as the self-defense and necessity defenses raised by appellant in this case, a jury's verdict of guilt is an implicit finding that it rejected the defense. *See* Tex. Penal Code Ann. §§ 9.02, .22, .31–.32; *Saxton v. State*, 804 S.W.2d 910, 913–14 (Tex. Crim. App. 1991). Because the State bears the burden of persuasion to disprove a section 2.03 defense such as justification by establishing its case beyond a reasonable doubt, we review a legal-sufficiency challenge to the jury's rejection of such a defense under the *Jackson* standard. *See* Tex. Penal Code Ann. §§ 2.03(a), 9.02; *Jackson*, 443 U.S. at 319; *Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (citing *Brooks v. State*, 323 S.W.3d 893, 895 (Tex. Crim. App.

2010)).[3] We do not look at whether the State refuted the defensive theory, but whether, after viewing all the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and could have found against the defensive theory beyond a reasonable doubt. *Saxton*, 804 S.W.2d at 913.

The jury is the exclusive judge of the facts proved, and of the weight to be given to the testimony. Tex. Code Crim. Proc. Ann. arts. 36.13, 38.04. We are not to act as a thirteenth juror and must not disregard, realign, or reevaluate the weight and credibility of the evidence. *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999); *Moreno v. State*, 755 S.W.2d 866, 867 (Tex. Crim. App. 1988). Therefore, we accord great deference to the jury to "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. When the record supports conflicting inferences, the reviewing court presumes the jury resolved the conflicts in favor of the prosecution and defers to that determination. *Id.* at 326. We may only overturn a verdict if it is irrational or unsupported by more than a "mere modicum" of the evidence. *Moreno*, 755 S.W.2d at 867.

**B. Murder**

As pertains to this case, a person commits the offense of murder if he "intentionally or knowingly causes the death of an individual." Tex. Penal Code Ann. § 19.02(b)(1). Appellant's statement that he shot at Robinson at least 10 times with an assault rifle, along with the video showing appellant shooting at

[3] While appellant's briefing includes discussion of factual as well as legal sufficiency with regard to his justification defenses, the State bore the burden to disprove these defenses beyond a reasonable doubt, and accordingly the only applicable standard on appellate review is the legal-sufficiency standard set forth in *Jackson*. *See* 443 U.S. at 319; *Brooks*, 323 S.W.3d at 895.

Robinson from the car, is sufficient evidence to support the jury's verdict that appellant intentionally or knowingly caused Robinson's death. Appellant, however, argues he was justified in using deadly force against Robinson. As relevant here, a person is justified in using deadly force against another if, among other things, he "reasonably believes the deadly force is immediately necessary" to protect himself "against the other's use of use or attempted use of unlawful deadly force." Tex. Penal Code Ann. § 9.32(a)(2)(A). "Deadly force" is defined as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." Tex. Penal Code Ann. § 9.01(3).

Viewed in the light most favorable to the verdict, the evidence shows that appellant was driving around with a loaded assault rifle and, from his car, shot Robinson, who was walking down the street unarmed. While appellant, his sister, and Lyons stated that Robinson made a move to reach into his clothing, no such movement is reflected in the video of the incident, which was admitted into evidence and seen by the jury, and which shows Robinson taking approximately five steps into the frame without appearing to reach for a weapon, never mind brandish a gun or otherwise act in a manner that would threaten any of the individuals in the car. Moreover, the jury was free to disregard this testimony as inconsistent with the video evidence that Robinson was not acting in a threatening manner and with the fact that no weapon was found on or near Robinson after the shooting. *See Jackson*, 443 U.S. at 319 (it is province of jury to weigh evidence and draw reasonable inferences from basic facts to ultimate facts). The jury could have concluded from this evidence that, under the circumstances, appellant did not reasonably believe that deadly force was immediately necessary to protect himself. *See* Tex. Penal Code Ann. § 9.32(a)(2)(A).

Appellant argues that Robinson's threats against appellant and his family, before the shooting, as well as other evidence that Robinson was prone to violence, weigh in favor of his justification defense.[4] Again, however, it is the role of the jury to weigh such evidence against evidence that Robinson posed no threat to appellant at the time appellant shot him. *See Jackson*, 443 U.S. at 319. Moreover, in the absence of an immediate threat, which the jury could have concluded was missing here, threats before the incident are insufficient to conclusively prove self-defense. *See* Tex. Penal Code Ann. § 9.32(a)(2) (requiring that "the actor reasonably believes the deadly force is *immediately* necessary" for self-defense) (emphasis added); *see also* Tex. Pen. Code Ann. § 9.31(b)(1) ("The use of force against another is not justified . . . in response to verbal provocation alone . . . .").

We conclude from the evidence summarized above that a rational jury could have concluded beyond a reasonable doubt that appellant intentionally caused Robinson's death and was not justified in using deadly force in doing so.

**C. Unlawful possession of firearm**

Penal Code section 46.04 defines the offense of unlawful possession of a firearm, in relevant part, as follows:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> > (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later . . . .

[4] For example, Glenda Martin testified that Robinson had assaulted her and threatened her with a gun. Kenneth Ross testified that twice in the week before the shooting he saw Robinson outside of appellant's place of residence with a weapon. Carolyn Turner testified that, on the day of the shooting, Robinson asked her for a gun, but she did not have one.

Tex. Penal Code Ann. § 46.04(a). "Possession" is defined as "actual care, custody, control, or management." Tex. Penal Code Ann. § 1.07(a)(39). Here, appellant exercised control over the AR-15 rifle when he used it to shoot at Robinson. This occurred on June 7, 2016, fewer than five years after appellant's conviction of a second degree felony for "POSESSION OF COCAINE 4G – 200G," for which appellant was sentenced to two-years imprisonment on October 23, 2013.

Appellant argues his possession of the rifle was justified by necessity. Conduct is justified by necessity if:

> (1) the actor reasonably believes the conduct is immediately necessary to avoid imminent harm;
>
> (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and
>
> (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear.

Tex. Penal Code Ann. § 9.22. Appellant makes essentially the same argument for necessity that he makes for self-defense: that it was immediately necessary to use the rifle due to the threat of imminent harm from Robinson. However, as above, the jury could have credited evidence that Robinson did not pose imminent harm to appellant when appellant possessed the rifle in the course of shooting Robinson. Accordingly, we conclude that a rational jury could have concluded beyond a reasonable doubt that appellant unlawfully possessed a firearm and that his conduct was not justified by necessity.

## III. CONCLUSION

We affirm the trial court's judgments.

/s/ Charles A. Spain
Justice

Panel consists of Chief Justice Frost and Justices Spain and Poissant (Frost, C.J., concurring).

Publish — TEX. R. APP. P. 47.2(b).