TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00391-CR

Tyler Harrell, Appellant

v.

The State of Texas, Appellee

FROM THE 299TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-DC-16-202466, THE HONORABLE KAREN SAGE, JUDGE PRESIDING

MEMORANDUM OPINION

A jury found appellant Tyler Harrell guilty of aggravated assault and assessed his punishment at confinement for thirteen and one-half years in the Texas Department of Criminal Justice and a $7,000 fine. *See* Tex. Penal Code §§ 12.32, 22.02(a). On appeal, appellant complains about the exclusion of evidence, challenges the sufficiency of the evidence, contends that he suffered egregious harm from alleged error in the punishment charge, and seeks modification of the court's written judgment to correct alleged error. We affirm the trial court's judgment of conviction.

BACKGROUND

Evidence at trial showed that Austin police received information that appellant was dealing drugs from the home he lived in with his parents and, in addition, that he had in his possession an AK-47. Based on that tip, the police conducted an investigation into appellant's

activities. Ultimately, the police obtained a search warrant authorizing a "no knock" entry. *See United States v. Banks*, 540 U.S. 31, 36 (2003) (confirming that police obligation to "knock and announce" before entering closed premises gives way when doing so "would be dangerous or futile, or . . . would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence" (quoting *Richards v. Wisconsin,* 520 U.S. 385, 394 (1997)).

The warrant was executed during the early morning hours of April 14, 2016, at approximately 6:00, by the Austin Police Department SWAT team, a group of officers with advanced training on tactical entry in situations with heightened security risk. The SWAT team entered appellant's house in two entry teams: one through the front door; the other through the back door. Just after the front door was breached, the officers placed a "distraction device" inside and entered the home. They made their way through the house and, when they were approximately ten to fifteen feet away from the bottom of a staircase, they encountered appellant standing at the top of the stairs.

Appellant was holding a semi-automatic rifle "in a very aggressive manner," pointing it directly at the officers. The officer in the lead position, Leighton Radtke, made eye contact with appellant and raised his weapon to respond to what he considered to be "a lethal threat" (since he "felt like in that moment that [appellant] was going to start shooting at [him]"). Appellant quickly disappeared from view, moving around a corner. Officer Radtke immediately began warning his fellow officers about the weapon, yelling, "Gun, gun, gun, gun." As he did so, another member of the front-entry SWAT team, James Pittman, moved past Officer Radtke to go up the stairs. Officer Radtke grabbed Officer Pittman by the shoulder to prevent him from going up the stairs and possibly encountering appellant with his rifle. At that same moment, appellant began firing down at the officers, striking Officer Pittman in the knee. Evidence from

the crime scene reflected that appellant fired his semi-automatic rifle at the officers twenty-three times.

Medical evidence at trial, including the testimony of an orthopedic surgeon who treated Officer Pittman, established that the gunshot inflicted a "substantial injury" to the officer, including "open fractures of both the femur and tibia, but more significantly . . . injuries to the joint surface itself." The doctor explained that "the bone that was at the surface of the joint . . . was pulverized"—there were "such tiny pieces that there [was] nothing to put back together." As a result, an external fixator was placed on Officer Pittman's leg—two pins were placed in the femur and two pins were placed in the tibia and they were connected on the outside of the leg with a metal rod to hold the bones in place.

The external fixator stayed on for approximately six weeks. Officer Pittman was unable to work for approximately three months. He underwent four surgeries and, six months after the shooting, had continued knee pain, stiffness, and functional limitations. At the time of trial, two years after the shooting, Officer Pittman was still suffering pain in his knee. Further, his orthopedic surgeon testified that the officer's prognosis is "not good" as there is "a very high likelihood" he will have to have a joint replacement at a young age, which, the doctor explained, is problematic because replacements have limited lifespans and the outcomes of subsequent revisions progressively decline. In his testimony at trial, the surgeon agreed that as a result of the gunshot to his knee, Officer Pittman had "suffered a protracted loss or impairment of the function of [a] bodily member or organ."

Appellant was charged in a two-count indictment with attempted capital murder, *see id.* §§ 15.01(a), 19.03(a)(1), and aggravated assault on a public servant, *see id.* § 22.02(a)(1), (b)(2)(B). At trial, in the guilt-innocence jury charge, the trial court submitted four offenses to

the jury: the charged offense of attempted capital murder and the lesser-included offense of attempted murder—both relating to the first count of the indictment, and the charged offense of aggravated assault of a public servant and the lesser-included offense of aggravated assault—both relating to the second count of the indictment. In addition, the trial court instructed the jury on self-defense, defense of a third person, and defense of property. During deliberations, the jury indicated that it was deadlocked, and the trial court gave a supplemental jury charge.[1] Ultimately, the jury acquitted appellant of attempted capital murder, attempted murder, and aggravated assault of a public servant and convicted him of aggravated assault. After hearing additional evidence in the punishment phase of trial, the jury assessed appellant's punishment at thirteen and one-half years' imprisonment and a $7,000.00 fine. Appellant filed a motion for new trial, which the trial court denied. *See* Tex. R. App. P. 21.8. This appeal followed.

DISCUSSION

Appellant raises six points of error. In his first point of error, he argues that the trial court erred by excluding testimony from his psychiatrist. In his second, third, and fourth points of error, appellant challenges the sufficiency of the evidence by contesting the jury's rejection of his justification defenses. In his fifth point of error, he contends that he suffered

[1] The supplemental charge, known as an "*Allen* charge," attempts to break a deadlocked jury by instructing jurors that the result of a hung jury is a mistrial and that jurors at a retrial would face essentially the same decision, encouraging them to resolve their differences without coercing one another or violating their individual choices. *See Allen v. United States*, 164 U.S. 492, 501 (1896); *see also Barnett v. State*, 189 S.W.3d 272, 277 n.13 (Tex. Crim. App. 2006) ("An *Allen* charge . . . reminds the jury that if it is unable to reach a verdict, a mistrial will result, the case will still be pending, and there is no guarantee that a second jury would find the issue any easier to resolve.").

egregious harm from error in the punishment charge. Finally, in his sixth point of error, appellant complains about error in the trial court's written judgment.

Sufficiency of the Evidence[2]

In his second, third, and fourth points of error, appellant argues the evidence is insufficient to support his conviction for aggravated assault because the State failed to disprove his claims of self-defense, defense of a third person, and defense of property. Specifically, appellant contends that the evidence showed that he did not realize that the individuals entering his home that morning were police officers and, therefore, the evidence established that he reasonably believed that deadly force was immediately necessary to protect himself, his mother, and his home from the use or attempted use of unlawful deadly force. Consequently, he maintains that the jury was not rational in rejecting his justification defenses.

When reviewing the sufficiency of the evidence to support a conviction, we consider all the evidence in the light most favorable to the verdict to determine whether, based on that evidence and the reasonable inferences therefrom, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Braughton v. State*, 569 S.W.3d 592, 607–08 (Tex. Crim. App. 2018). We consider all the evidence in the record, whether direct or circumstantial, properly or improperly admitted, or submitted by the prosecution or the defense. *Thompson v. State*, 408 S.W.3d 614, 627 (Tex. App.—Austin 2013, no pet.); *see Jenkins v. State*, 493 S.W.3d 583, 599 (Tex. Crim. App. 2016); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and

[2] We address appellant's issues in a different order than presented in his brief.

drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009); *see Braughton*, 569 S.W.3d at 608. We consider only whether the factfinder reached a rational decision. *Arroyo v. State*, 559 S.W.3d 484, 487 (Tex. Crim. App. 2018).

The trier of fact is the sole judge of the weight and credibility of the evidence. *See Zuniga v. State*, 551 S.W.3d 729, 733 (Tex. Crim. App. 2018); *Blea v. State*, 483 S.W.3d 29, 33 (Tex. Crim. App. 2016); *see also* Tex. Code Crim. Proc. art. 36.13 (explaining that "the jury is the exclusive judge of the facts"). Thus, when performing an evidentiary-sufficiency review, we may not re-evaluate the weight and credibility of the evidence and substitute our judgment for that of the factfinder. *Braughton*, 569 S.W.3d at 608; *Arroyo*, 559 S.W.3d at 487. Instead, we must defer to the credibility and weight determinations of the factfinder. *Braughton*, 569 S.W.3d at 608; *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016). When the record supports conflicting reasonable inferences, we presume that the factfinder resolved the conflicts in favor of the verdict, and we defer to that resolution. *Zuniga*, 551 S.W.3d at 733; *Cary*, 507 S.W.3d at 757.

In evaluating a claim of insufficient evidence in the context of a justification defense, we apply the above general sufficiency review principles in conjunction with sufficiency review principles specific to justification defenses. *See Braughton*, 569 S.W.3d at 609. When a defendant raises a claim of self-defense, defense of a third person, or defense of property to justify the use of force or deadly force against another, "the defendant bears the burden to produce evidence supporting the defense, while the State bears the burden of persuasion to disprove the raised issues." *Id.* at 608 (citing *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Saxton v. State*, 804 S.W.2d 910, 913–14 (Tex. Crim. App. 1991)). The

defendant is required to produce "some evidence that would support a rational finding in his favor on the defensive issue." *Id.* (citing *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013)). The State, however, is not required to produce evidence; rather, its burden of persuasion only requires "that the State prove its case beyond a reasonable doubt." *Id.* (quoting *Zuliani*, 97 S.W.3d at 594); *Saxton*, 804 S.W.2d at 913. Therefore,

> [i]n resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted appellant's [evidence of a justification defense], but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of [the offense] beyond a reasonable doubt and also would have found against appellant on the [justification]-defense issue beyond a reasonable doubt.

Braughton, 569 S.W.3d at 609 (quoting *Saxton*, 804 S.W.2d at 914). Further, as with the general sufficiency principles, the trier of fact is the sole judge of the credibility of defensive evidence, and it is free to accept it or reject it. *Id.*; *Saxton*, 804 S.W.2d at 914. Ultimately, a justification defense is a fact issue that is determined by the jury, and "[a] jury verdict of guilty is an implicit finding rejecting the defendant's [justification]-defense theory." *Braughton*, 569 S.W.3d at 609 (quoting *Saxton*, 804 S.W.2d at 914); *Zuliani*, 97 S.W.3d at 594.

As relevant to this case, a person commits the offense of aggravated assault if the person commits assault causing bodily injury, *see* Tex. Penal Code § 22.01(a) (defining assault as "intentionally, knowingly, or recklessly causes bodily injury to another"), and causes serious bodily injury, *id.* § 22.02(a)(1), or uses or exhibits a deadly weapon during the commission of the assault, *id.* § 22.02(a)(2). A firearm is a deadly weapon per se. *See id.* § 1.07(a)(17)(A) (defining "deadly weapon" as "a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury"). It is a defense to prosecution that a

person's conduct is justified by a provision of Chapter 9 of the Penal Code. *Id.* § 9.02. In this case, appellant relied on self-defense, defense of a third person, and defense of property.

With respect to self-defense, Penal Code section 9.31 provides that "a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." *Id.* § 9.31(a). To use deadly force in self-defense, the actor must be authorized to use force under section 9.31 and must reasonably believe that deadly force is immediately necessary to protect himself against another's use or attempted use of unlawful deadly force, or to prevent another's imminent commission of aggravated kidnapping, murder, sexual assault, or robbery. *Id.* §§ 9.31(d), 9.32(a); *see id.* § 9.01(3) ("'Deadly force' means 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.")

Concerning defense of a third person, Penal Code section 9.33 provides that "[a] person is justified in using force or deadly force against another to protect a third person if: (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and (2) the actor reasonably believes that his intervention is immediately necessary to protect the third person." *Id.* § 9.33; *see Henley v. State*, 493 S.W.3d 77, 89 (Tex. Crim. App. 2016) ("[A] defendant is justified in defending a third person if, under the circumstances as the defendant reasonably believes them to be, the third person would be justified in defending himself.").

With regard to property, Penal Code section 9.41 provides that "[a] person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other's trespass on the land or unlawful interference with the property." Tex. Penal Code § 9.41(a). A person who would be justified in using force to protect property under section 9.41 "is justified in using deadly force against another to protect land or tangible, movable property . . . when and to the degree he reasonably believes the deadly force is immediately necessary to prevent the other's imminent commission of arson, burglary, robbery, aggravated robbery, theft during the nighttime, or criminal mischief during the nighttime," and he reasonably believes that the land or property cannot be protected by any other means or he reasonably believes that the use of force other than deadly force to protect the land or property would expose the actor or another to a substantial risk of death or serious bodily injury. *Id.* § 9.42.

Appellant does not argue that the evidence failed to prove any element of aggravated assault but contends that the evidence established that he was justified in committing the assault under the above provisions. He maintains that the jury's acquittals of him of the greater offenses of attempted capital murder, attempted murder, and aggravated assault on a public servant demonstrate that the jury concluded that appellant did not realize that the individuals entering the house were police officers. Thus, according to appellant, the evidence was insufficient to reject his justification defenses because the evidence at trial showed that he was shooting at "armed intruders invading [his] home" and that he was justified in doing so to protect himself, his mother, and his property. Appellant's argument is contingent on eliminating from consideration all the evidence demonstrating that police officers lawfully executing a

search warrant—rather than armed intruders—were entering his home because, in appellant's view, it is inconsistent with the jury's verdicts rejecting aggravated assault of a public servant and convicting him only of aggravated assault.

However, "the law does not bar inconsistent verdicts." *Hernandez v. State*, 556 S.W.3d 308, 321 (Tex. Crim. App. 2017) (quoting *Guthrie-Nail v. State*, 506 S.W.3d 1, 6 (Tex. Crim. App. 2015)); *see United States v. Powell*, 469 U.S. 57, 68–69 (1984). Thus, inconsistent verdicts, even when based on the same evidence, do not require reversal on the ground of legal insufficiency. *Dunn v. United States*, 284 U.S. 390, 393–94 (1932); *Felder v. State*, No. 03-13-00707-CR, 2014 WL 7475237, at *4 (Tex. App.—Austin Dec. 19, 2014, no pet.) (mem. op., not designated for publication); *see Bravo-Fernandez v. United States*, — U.S. —, 137 S. Ct. 352, 359 (2016) (discussing court's prior holding in *Dunn* "that a criminal defendant may not attack a jury's finding of guilt on one count as inconsistent with the jury's verdict of acquittal on another count"); *Bowman v. State*, No. 12-14-00154-CR, 2014 WL 6977807, at *3 (Tex. App.—Tyler Dec. 10, 2014, no pet.) (mem. op., not designated for publication) ("Inconsistent verdicts do not equate to insufficient evidence.").

"[I]t would be inappropriate for us to speculate as to why the jury rendered the verdicts they did." *Hernandez*, 556 S.W.3d at 321 (citing *Dunn*, 284 U.S. at 393–94). Inconsistent verdicts may simply result from a jury's desire to be lenient or to grant its own form of executive clemency. *Felder*, 2014 WL 7475237, at *4; *Thomas v. State*, 352 S.W.3d 95, 101 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd); *see Ward v. State*, 113 S.W.3d 518, 523 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (noting that apparent inconsistencies within jury verdicts are "often a product of jury lenity" that "may show error in favor of the defendant or the State"). Even when an inconsistent verdict might have been the result of compromise or

mistake, the verdict should not be upset by appellate speculation or inquiry into such matters. *Felder*, 2014 WL 7475237, at *4; *Jackson v. State*, 3 S.W.3d 58, 61 (Tex. App.—Dallas 1999, no pet.); *see Powell*, 469 U.S. at 64–67 (reaffirming *Dunn* rule and holding that any attempt to determine jury's reasons for reaching inconsistent verdicts would require pure speculation and involve improper inquiry into jury's deliberations); *Dunn*, 284 U.S. at 394 ("That the verdict may have been the result of compromise, or of a mistake on the part of the jury, is possible. But verdicts cannot be upset by speculation or inquiry into such matters.").

Consequently, when a multi-count verdict appears inconsistent, our inquiry is limited to a determination of whether the evidence is legally sufficient to support the count on which a conviction is returned. *Hernandez*, 556 S.W.3d at 321; *Felder*, 2014 WL 7475237, at *4; *see Powell*, 469 U.S. at 67 (stating that sufficiency review of count of conviction "should be independent of the jury's determination that evidence on another count was insufficient"). Thus, in this case, despite seemingly inconsistent jury findings, so long as the evidence supports the finding of guilt concerning aggravated assault and supports rejection of the justification defenses, the *Dunn* rule requires that the conviction be upheld. *See Hernandez*, 556 S.W.3d at 321.

The undisputed evidence at trial showed that appellant fired his semi-automatic rifle numerous times at police officers who were entering his home to execute a search warrant and, in doing so, shot Officer Pittman in the knee. The evidence further demonstrated that the gunshot caused serious bodily injury to the officer. Appellant did not contest these facts at trial. Instead, appellant claimed that he was justified in shooting the officer because he did not realize that the individuals entering his house that morning were police officers, so he fired his semi-automatic rifle in defense of himself, his mother, and his home.

Appellant's justification defenses were premised on his claim—presented primarily through his mother's testimony[3]—that he did not realize that the intruders into his home were the police. Appellant cites his mother's testimony that she heard people breaking into her house and looked down the staircase and saw one person in a military uniform but could not tell that the person was a police officer. However, appellant's mother admitted in her testimony that when she was interviewed by the police directly after the shooting—before she knew that her son had injured an officer—she said that she saw people in military uniform and assumed "from the beginning" that it was the police. Appellant also cites to his mother's testimony relating that immediately after firing on the police, appellant asked "Who is it? Who is it?" However, her initial testimony was that appellant did not say anything when he came out of his bedroom. Only when defense counsel explicitly asked if she "remembered" appellant making the statement "Who is it, who is it?" did she indicate that "that's [her] recollection." The jury is free to accept or reject defensive evidence on the issue of self-defense. *Braughton*, 569 S.W.3d at 609; *Saxton*, 804 S.W.2d at 914; *see Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018) ("A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony."). The jury, as exclusive judge of the credibility of witnesses, was free to conclude that appellant's mother was not a credible witness and, further, that she had a motive for testifying favorably on her son's behalf.

Moreover, justification defenses require that the defendant reasonably believe that his conduct is immediately necessary to avoid a greater harm.[4] *Mays v. State*, 318 S.W.3d 368,

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[3] Appellant did not testify at trial.

[4] *See, e.g.*, Tex. Penal Code §§ 9.22 (Necessity) ("Conduct is justified if the actor reasonably believes the conduct is immediately necessary to avoid imminent harm[.]"), 9.31

385 (Tex. Crim. App. 2010); *see, e.g.*, *Henley*, 493 S.W.3d at 89 (noting that both self-defense and defense of third person require that there be reasonable belief in immediate need to act). The Penal Code defines "reasonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." Tex. Penal Code § 1.07(a)(42). The law examines "reasonableness" from the perspective of an ordinary and prudent person. *See Mays*, 318 S.W.3d at 385.

Even if the jury believed that appellant was subjectively unaware that the individuals entering his home were the police—which could negate the mens rea for aggravated assault on a public servant, *see, e.g.*, *Ruffin v. State*, 270 S.W.3d 586, 594–95 (Tex. Crim. App. 2008) (observing that evidence that defendant, who suffered from auditory and visual delusions, perceived police officers as trespassers or Muslims (rather than police officers) rebutted mens rea element of intent to shoot police officers and would, if believed, lessen crime from first-degree aggravated assault of public servant to second-degree aggravated assault)—the jury could have concluded that such a belief was not reasonable under the circumstances.

The evidence at trial reflected that the officers were in uniform when they entered appellant's home. The evidence, which included photographs of the individual SWAT team members in uniform, showed that the uniforms had the word "POLICE" on the front across the

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(Self-Defense) ("a person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary . . . ."). 9.32 (Deadly Force in Defense of Person) ("A person is justified in using deadly force against another . . . when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . ."), 9.33 (Defense of Third Person) ("A person is justified in using force or deadly force against another to protect a third person if, under the circumstances as the actor reasonably believes them to be . . . the actor reasonably believes that his intervention is immediately necessary to protect the third person[.]"), 9.41 (Protection of One's Own Property) ("A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary . . . .").

upper chest, on the back across the upper back, and on each of the sleeves on the upper arms. In addition, patches that said "Austin Police" were on the sleeves. A person "is presumed to have known the person assaulted was a public servant . . . if the person was wearing a distinctive uniform or badge indicating the person's employment as a public servant[.]"[5] Tex. Penal Code § 22.02(c). Two of appellant's neighbors testified that they were able to identify the SWAT team members as police by observing them: one stated that she saw "somebody [who] looked like a SWAT officer" that "had camo gear and 'police' on the back of their uniform"; another confirmed that the SWAT team members were "easily identifiable . . . as police officers" to him because "[t]hey were SWAT officers or what a SWAT officer would look like. Heavy tactical gear and rifles and 'police' I think was written on the back."

Furthermore, testimony from the police officers reflected that a continuous announcement was broadcast over the long-range acoustic device (LRAD)—"a military style PA system" that "is louder than typical PA system on a police car"—mounted on top of the SWAT armored vehicle that repeatedly announced, "Police; search warrant" and the address of appellant's house. The announcement was broadcast loudly enough that the neighbors testified that they were able to hear the announcement while inside their homes, and officers testified that they could hear it from inside the house after they entered. In addition, one of the investigating detectives testified about making an audio recording while inside appellant's house when he recreated the LRAD announcement. He testified that when the front door of the house was open, the announcement was "extremely loud" and that when inside appellant's bedroom, even with the door closed, "it was still relatively loud." The audio recording was admitted into evidence, so the jurors were able to listen to it and determine for themselves whether the announcement

[5] The jury was instructed on this presumption in the court's jury charge.

indicating the police presence could be heard. Also, testimony from the police officers indicated that two officers from each entry team took turns announcing the police presence by stating, "Police; search warrant," as they entered the house, starting immediately after the door was breached. Thus, there was ample evidence demonstrating that it was readily apparent that the individuals entering the home were police officers.

In this case, considering all the evidence in the light most favorable to the verdict, we conclude that the jury could have rationally found beyond a reasonable doubt that appellant intentionally, knowingly, or recklessly caused serious bodily injury to Officer Pittman or that appellant, using a deadly weapon, intentionally, knowingly, or recklessly caused bodily injury to Officer Pittman and also could have rejected appellant's claims of self-defense, defense of a third person, and defense of property. Because we conclude that the evidence supports a rational jury finding that appellant shot Officer Pittman and a further finding that he was not justified in doing so to protect himself, his mother, or his property, we conclude that the evidence is sufficient to support appellant's conviction for aggravated assault. Accordingly, we overrule appellant's second, third, and fourth points of error.

Exclusion of Evidence

In his first point of error, appellant complains about the trial court's exclusion of testimony from his treating psychiatrist.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Gonzalez v. State*, 544 S.W.3d 363, 370 (Tex. Crim. App. 2018); *Henley*, 493 S.W.3d at 82–83; *see Rhomer v. State*, 569 S.W.3d 664, 669 (Tex. Crim. App. 2019) (observing that trial court abuses its discretion "when it acts without reference to any guiding rules and principles or

acts arbitrarily or unreasonably" (citing *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990))). Under this standard, we may not reverse the trial court's ruling unless it falls outside the zone of reasonable disagreement. *Beham v. State*, 559 S.W.3d 474, 478 (Tex. Crim. App. 2018); *see Henley*, 493 S.W.3d at 83 ("Before a reviewing court may reverse the trial court's decision, 'it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree.'" (quoting *Taylor v. State*, 268 S.W.3d 571, 579 (Tex. Crim. App. 2008))). An evidentiary ruling will be upheld if it is correct on any theory of law applicable to the case. *Henley*, 493 S.W.3d at 93; *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex. Crim. App. 2009). The first step in determining whether evidence is admissible is to determine whether it is relevant. *Henley*, 493 S.W.3d at 83 (citing *Montgomery*, 810 S.W.2d at 375).

Under Rule of Evidence 401, evidence is relevant if it has any tendency to make a "fact . . . of consequence" more or less probable than it would be without the evidence. Tex. R. Evid. 401. To be relevant, evidence must be both material and probative. *Henley*, 493 S.W.3d at 83; *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001). The Court of Criminal Appeals has explained,

> For evidence to be material, it must be shown to be addressed to the proof of a material proposition, which is "any fact that is of consequence to the determination of the action." For evidence to be probative, it "must tend to make the existence of the fact "more or less probable than it would be without the evidence."

Henley, 493 S.W.3d at 83–84 (quoting *Miller*, 36 S.W.3d at 507) (internal citations omitted). Thus, "proffered evidence is relevant if it has been shown to be material to a fact in issue and if it makes that fact more probable than it would be without the evidence." *Miller*, 36 S.W.3d at 507.

"Relevancy is not an inherent characteristic of any item of evidence but exists as a relation between an item of evidence and a matter properly provable in the case." *Henley*, 493 S.W.3d at 84 (quoting *Montgomery*, 810 S.W.2d at 375). "There is no purely legal test to determine whether evidence will tend to prove or disprove a proposition—it is a test of logic and common sense." *Miller*, 36 S.W.3d at 507. "In deciding whether a particular piece of evidence is relevant, a trial court judge should ask 'would a reasonable person, with some experience in the real world believe that the particular piece of evidence is helpful in determining the truth or falsity of any fact that is of consequence.'" *Montgomery*, 810 S.W.2d at 376; *see Beham*, 559 S.W.3d at 478 (describing trial court's role in determining relevance as "not exclusively a function of rule and logic" and observing that trial court "must rely in large part upon its own observations and experiences of the world, as exemplary of common observation and experience, and reason from there" and expressing that relevance determination "thus depends upon one judge's perception of common experience" (quoting *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g)). "A 'fact of consequence' includes either an elemental fact or an evidentiary fact from which an elemental fact can be inferred." *Henley*, 493 S.W.3d at 84 (quoting *Rankin v. State*, 974 S.W.2d 707, 710 (Tex. Crim. App. 1996) (op. withdrawn in part on reconsideration of other grounds)). "An evidentiary fact that stands wholly unconnected to an elemental fact, however, is not a 'fact of consequence.'" *Id.* (quoting *Rankin*, 974 S.W.2d at 710).

At trial, appellant sought to offer the testimony of Gabriel Garza, a child psychiatrist, who began treating appellant in July of 2014 for cannabis abuse, oppositional defiant disorder, attention deficit/hyperactivity disorder, and anxiety. On December 15, 2015, Dr. Garza saw appellant for "jitters and jumpiness" related to a robbery event that appellant had

experienced a few days before.[6] Dr. Garza diagnosed appellant with "an acute stress disorder," which, the doctor explained, is a condition that "has all the symptoms of PTSD" during the "immediate aftermath" of—up to thirty days after—a traumatic event.

Appellant maintained that Dr. Garza's testimony about his diagnosis of acute stress disorder was "admissible under 38.36(A) [of the Code of Criminal Procedure] going to relevant facts and circumstances to show the condition of the mind of [appellant] at the time of the incident" to "explain[] his state of mind given the nature of the intrusion and his reaction to the intrusion." In his proffer of Dr. Garza's testimony, appellant questioned the doctor outside the presence of the jury, eliciting the following:

> Q. Okay. In your professional opinion do you think that an acute stress disorder would affect a young man such as he if he were subject to loud flashes and bangs and noises that he might perceive as an invasion or an attack?
>
> A. That's possible.
>
> [discussion about what a flash bang is]
>
> Q. If that flash bang was introduced to a patient who had the symptoms of acute stress disorder, could you anticipate or expect more -- his reaction to that to be consistent with his complaint originally?
>
> A. Hard to say. Depends on at what point they were in the course of that disorder.
>
> Q. As you knew it to be on the 31st of March, what -- and you applied those same facts, how would you make -- how would you assess [appellant's] possible reaction to that?

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[6] According to Dr. Garza, appellant told him that he had been shot at by somebody who was attempting to rob him at a friend's apartment. Appellant described the person being in front of him and firing a gun past his head; he told the doctor that it "hurt his hearing in that ear" and was "a very frightening experience." Dr. Garza confirmed that appellant also told him that the robber "was beat[en] up and ran out of the apartment," and that appellant chased the robber with a pistol, firing at the robber as he chased him down the street. The record reflects that, despite Dr. Garza's repeated urging, neither appellant nor his parents reported the incident to police.

A. At our last -- at our last appointment, he was not reporting any ongoing symptoms. He felt his anxiety was well controlled. At that point it makes it a little bit more unpredictable as far as how he might respond.

. . .

Q. So if he's within that 30-day period of the acute symptoms, if we extrapolated out another 60 days, which brings him to the end of March, or 90 days to the end of March, and then introduced a series of flash bangs that caused new stress to him, would you -- could you -- could you predict that his reactions would not have been consistent with acute stress disorder?

A. I couldn't necessarily predict what his reactions would be at the time.

Q. So if you were to learn that [appellant] was subjected to a flash bang within five feet of his head while he was laying [sic] in bed asleep, the sounds of his mother screaming, some muddled noises that were unintelligible, and a series of flash bangs, all that took place within the span of either 19 seconds, as long as 26 seconds, would you think that his reaction would be that of a normal person or would it be more along the lines of what he complained and his mother complained of and his father complained of when he was first presented with that condition?

A. It's hard for me to say what his reaction would be. Although, he would be at higher risk for something like that.

Q. If his reaction was that he immediately jumped up and grabbed his gun and went to defend what he thought was his mother's being under attack and he, himself, being under attack, wouldn't that be consistent with somebody who was suffering from acute stress disorder and maybe onset of some -- early onset PTSD?

A. That could be consistent.

Q. And isn't the natural reaction in some cases -- in most cases actually to that kind of stimulus from a person who suffers from this acute stress disorder or early onset PTSD, the triggering of the flight or fight response?

A. That was one of the ways that it can play out, yes.

Q. And is it -- if you were to learn that [appellant] took his rifle and fired in the direction of what he thought were intruders who were attacking his house, would that be consistent with acute stress disorder after being subjected to those stimuli in such a short period of time?

A. That could be consistent, yes.

Q. Had [appellant] not been interrupted, as we would say, and his treatment would have continued, and let's say a police officer was -- let me put it this way. And that police officer had not been shot, but instead there was an exchange of gunfire and no harm to anybody and you saw [appellant] again, would you still treat him for acute stress disorder under those circumstances that I've just described?

A. That would be one the -- a hyper startled response, you know, like -- something like that would be one of the criteria that would -- he would need to meet for PTSD. You know, there are others that he would still need to meet. I mean, if he did meet that then, yes.

Q. So he would be a candidate for the diagnosis of hyper startle response?

A. Well, it's not a diagnosis, but it's a symptom.

Q. I see. And that's a symptom of the acute stress disorder that you diagnosed him with?

A. Correct.

On cross examination, Dr. Garza confirmed that he last saw appellant on March 31, 2016—two weeks before the shooting at issue in this case and three and one-half months after he diagnosed appellant with acute stress disorder—and at that time appellant was not exhibiting symptoms. The doctor also verified that, at no point, did he diagnose appellant with PTSD. Dr. Garza also agreed with the prosecutor that appellant's hypotheticals involving the situation that morning and appellant's response "could be" consistent with somebody who did not have acute stress disorder. On redirect, Dr. Garza expressed that it was "possible" that "even though [appellant] said that he was symptom-free, if triggered again, . . . this condition [might] affect a patient's ability to process adequately information in a short amount of time to make a decision whether to go to a phone or to a gun."

The trial court excluded Dr. Garza's testimony, finding that the evidence of appellant's diagnosis of acute stress disorder was not relevant given that the shooting at issue

occurred well beyond the thirty-day period of the condition and, further, because the condition had been treated and was under control. Alternatively, the trial court concluded that even if the court found that "somehow [appellant] did still suffer from the disorder," the evidence was "just a diminished capacity [defense] dressed up in a different disguise and would be excludable under that" because it did not negate the necessary mens rea at the time of the shooting.[7]

As noted previously, in deciding whether evidence is relevant, the proper inquiry is whether the evidence is helpful in determining the truth or falsity of any fact that is of consequence in the case. *See Henley*, 493 S.W.3d at 88 (citing *Montgomery*, 810 S.W.2d at 376). To decide whether a fact is "of consequence" to the case, we must look at appellant's purpose for offering the evidence and decide whether that purpose can be achieved with such evidence. *See id.* Appellant's stated purpose at trial for offering the testimony of his psychiatrist was to support his claim of self-defense. Similarly, on appeal, appellant contends that the trial court erred in excluding Dr. Garza's testimony because "it was relevant to show appellant's state of mind when he acted in self-defense."[8]

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[7] Before the proffer of Dr. Garza's testimony, the trial court ruled that article 38.36 of the Code of Criminal Procedure, the statute on which appellant relied, "doesn't apply at all" and was "completely irrelevant" since it relates to "a prior relationship between the decedent" and a defendant and no such prior relationship existed here. *See* Tex. Code Crim. Proc. art. 38.36(a) (governing admission of evidence in prosecutions for murder and permitting "testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense"). Appellant does not challenge this ruling on appeal.

[8] In his argument in his brief, appellant asserts that the proffered testimony "would have aided the jury in determining if appellant had a reasonable belief that he was justified in acting in self-defense, defense of a third party[,] or in defense of his property." However, appellant did not articulate either the defense of a third person or the defense of property as a legal basis supporting admission of the excluded testimony but only asserted self-defense. Thus, as to these two justification defenses, appellant did not properly preserve error. *See Golliday v. State*,

However, the testimony that appellant proffered related to a condition that, based on Dr. Garza's testimony, existed during the immediate aftermath of a traumatic event, up to a maximum of thirty days. The purported traumatic event here (the robbery that appellant described to Dr. Garza) happened more than three months before appellant shot Officer Pittman. Furthermore, Dr. Garza's testimony indicated that the last time he saw appellant—just two weeks before the shooting—appellant was not experiencing any symptoms and had not been diagnosed with any further condition beyond acute stress disorder, such as PTSD. Accordingly, we cannot conclude that the trial court was "clearly wrong" in concluding that evidence of a mental-health condition that appellant no longer had (that is, at a point beyond the time frame in which the condition exists) and for which appellant no longer experienced symptoms was not relevant to his actions that morning. *See* Tex. R. Evid. 401 (setting forth test for relevance).

Furthermore, when arguing for the admission of Dr. Garza's testimony and responding to the State's objection that the evidence constituted inadmissible evidence of diminished capacity, appellant argued,

> We are saying it's a startle instance, a reflex action that he was being treated for, not a diminished capacity. We're not saying that. What we're saying is that his reaction was different. So we're not arguing *Ruffin*. They've always been arguing *Ruffin*. . . . We've never said *Ruffin*. We've always said this is startle reflex. This has something else to do with that.

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560 S.W.3d 664, 669 (Tex. Crim. App. 2018) (observing that "the party complaining on appeal (whether it be the State or the defendant) about a trial court's admission, exclusion, or suppression of evidence must, at the earliest opportunity, have done everything necessary to bring to the judge's attention the evidence rule or statute in question and its precise application to the evidence in question" (quoting *Reyna v. State*, 168 S.W.3d 173, 177 (Tex. Crim. App. 2005)). Nevertheless, the reasoning underlying our analysis as it relates to self-defense applies equally to all three justification defenses.

Appellant asserted that his psychiatrist's testimony "would be highly relevant and informative as to why [appellant] reacted the way that he did at that time" and expressed that "[i]t's a predisposition." The crux of appellant's argument was, essentially, that, because of his previously diagnosed mental-health condition, his response to the police intrusion into his home that morning was an automatic response. Such an unthinking reaction—a "reflex action"—however, demonstrated, at most, a possible lack of impulse control not an altered perception relating to a "reasonable belief" for using force against another.

Moreover, as we noted previously, justification defenses require that the defendant reasonably believe that his conduct is immediately necessary to avoid a greater harm. *Mays*, 318 S.W.3d at 385. A "reasonable belief" is "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor," Tex. Penal Code § 1.07(a)(42), and the law examines "reasonableness" from the perspective of an ordinary and prudent person, *see Mays*, 318 S.W.3d at 385. Accordingly, the Court of Criminal Appeals has rejected the notion that a justification defense, such as self-defense, supported by a mental-health condition is a recognized defense in Texas:

> [E]ach of [the] justification defenses requires that the defendant reasonably believe that his conduct is immediately necessary to avoid a greater harm. . . . [A] "reasonable belief" is one that would be held by an ordinary and prudent person, not by a paranoid psychotic. Appellant's repeated claim that "his paranoid ideations and active psychosis" raise a "reasonable belief" that his actions were justified is supported neither by law nor common sense.
>
> Texas law does not recognize the "ordinary and prudent" paranoid psychotic for purposes of Penal Code justification defenses. The only affirmative defense available under Texas law for those who commit crimes while suffering from an abnormal mental disease or defect is insanity under [Penal Code] Section 8.01. Appellant did not assert an insanity defense at trial, and he cannot now claim entitlement to some other statutory defense based upon his mental disease or defect.

Id. at 385–86 (internal citations omitted); *see, e.g.*, *Cummings v. State*, No. 05-17-00852-CR, 2018 WL 3629105, at *5–6 (Tex. App.—Dallas July 31, 2018, pet. ref'd) (mem. op., not designated for publication) ("Necessity based upon paranoia is not a recognized defense in Texas."); *Rodriguez v. State*, No. 13-16-00396-CR, 2018 WL 2252882, at *5–6 (Tex. App.—Corpus Christi May 17, 2018, no pet.) (mem. op., not designated for publication) ("[S]elf-defense supported by a paranoid delusion is not a recognized defense in Texas."). At trial appellant attempted—and attempts again on appeal—to establish self-defense for the ordinary and prudent person suffering from acute stress disorder, which is not a recognized justification defense.

Because self-defense supported by a mental-health condition is not a recognized defense in Texas, we cannot conclude that the trial court was "clearly wrong" in determining that the testimony about appellant's mental health-condition was not admissible to support his claim of self-defense. *See, e.g.*, *Rodriguez*, 2018 WL 2252882, at *4–6 (concluding that trial court did not err in excluding psychologist's testimony that appellant suffered from delusional disorder to support claim of self-defense); *Trujillo v. State*, No. 01-14-00397-CR, 2015 WL 4549242, at *6 (Tex. App.—Houston [1st Dist.] July 28, 2015, pet. ref'd) (mem. op., not designated for publication) (concluding that testimony of licensed professional counselor—that appellant suffered from "impaired" judgment and "overreacted" because of her abnormal "aggressive stance"—was properly excluded because it was evidence of appellant's subjective belief that was product of psychological trauma that would not have been shared by ordinary and prudent person in same circumstances).

Finally, appellant asserts that Dr. Garza's testimony should have been admitted because "[u]nder the Due Process Clause of the Fourteenth Amendment, a defendant must be

afforded a meaningful opportunity to present a complete defense." At trial, appellant sought admission of the testimony "under 38.36, under *Soto*, under *Chambers v Mississippi*, *Washington v Texas*, *Green v Georgia*, and *Holmes versus South Carolina*, which are all Supreme Court cases regarding the defendant's right to present a defense[.]" Assuming that this recitation of cases properly notified the trial court of appellant's contention that the exclusion of Dr. Garza's testimony violated his due process right to present a defense, the Court of Criminal Appeals has cautioned that "[a] defendant's right to present evidence relevant to a valid justification defense should not be confused with a defendant's right to present his case-in-chief." *Henley*, 493 S.W.3d at 83. The court explained,

> A defendant has the right to put on his case-in-chief, but that right is not without limitations. A defendant does not have an unfettered right to present evidence that has no relevance. In citing to United States Supreme Court case law, this Court has held that "[a] defendant has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule." *Miller v. State*, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001) (citing to *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). Only relevant evidence is admissible, and the trial court judge has the discretion to exclude irrelevant evidence. Tex. R. Evid. 402 ("Irrelevant evidence is not admissible.").

Id.

Here, given the fact that the shooting occurred outside the timeframe of the mental-health condition appellant claimed as well as the absence of symptoms related to the condition, the trial court concluded that Dr. Garza's testimony was not relevant. Further, as we observed, evidence of appellant's purported "reflex action," which may have resulted from his mental-health condition, did not demonstrate an altered perception relating to a reasonable belief on appellant's part that he needed to use force against another. Moreover, as we explained, appellant was not entitled to a justification defense supported by a mental-health condition

because such a defense is not recognized in Texas. Accordingly, we cannot conclude that the exclusion of the psychiatrist's testimony violated appellant's due process right to present a defense.

For the above reasons, we conclude that the trial court did not abuse its discretion in excluding Dr. Garza's testimony. We overrule appellant's first point of error.

Punishment Charge and Written Judgment

In his last two points of error, appellant complains about error in the punishment charge and error in the trial court's written judgment of conviction. The dispositive issue in resolving these final two points of error is whether, in finding appellant guilty of the lesser-included offense of aggravated assault, the jury made an affirmative finding that appellant used a deadly weapon during his assault of Officer Pittman.

The term "affirmative finding" means the trier of fact's express determination that a deadly weapon was actually used or exhibited during the commission of the offense. *Polk v. State*, 693 S.W.2d 391, 393 (Tex. Crim. App. 1985); *see Guthrie-Nail*, 506 S.W.3d at 4 ("An affirmative deadly-weapon finding must be an 'express' determination in order to be effective." (citing *Ex parte Empey*, 757 S.W.2d 771, 774 (Tex. Crim. App. 1988)). The Court of Criminal Appeals has outlined three circumstances indicative of an express deadly weapon finding by a trier of fact:

(1) the indictment specifically alleged that a deadly weapon was used (using the words "deadly weapon") and the defendant was found guilty "as charged in the indictment";

(2) the indictment did not use the words "deadly weapon" but alleged the use of a deadly weapon *per se* (such as a firearm); or

(3) the jury affirmatively answered a special issue regarding the use of a deadly weapon.

Polk, 693 S.W.2d at 396; *accord Duran v. State*, 492 S.W.3d 741, 746 (Tex. Crim. App. 2016). Additionally, to accommodate the lesser-included offense scenario, the Court of Criminal Appeals has held that a jury makes an express finding that a deadly weapon was used or exhibited when:

(1) the indictment specifically alleges the use of a "deadly weapon";

(2) the jury charge's application paragraph on the lesser-included offense requires a finding from the jury beyond a reasonable doubt that the defendant committed an offense using the alleged "deadly weapon"; and

(3) the jury finds the defendant guilty of that lesser-included offense.

Lafleur v. State, 106 S.W.3d 91, 98–99 (Tex. Crim. App. 2003). Courts look to the charging instrument, the application paragraph of the jury charge, and the jury verdict to evaluate whether the jury made a deadly weapon. *Duran*, 492 S.W.3d at 746 (citing *Polk*, 693 S.W.2d at 393–96); *Lafleur*, 106 S.W.3d at 98.

In this case, appellant was found guilty of aggravated assault, a lesser-included offense of aggravated assault of a public servant—the offense that was charged in Count II of the indictment. The verdict form stated: "We, the Jury, find the defendant, Tyler Harrell, GUILTY of the offense of Aggravated Assault." Count II of the indictment charged appellant with "intentionally, knowingly, or recklessly caus[ing] serious bodily injury to James Pittman, by shooting James Pittman with a firearm, a deadly weapon." This allegation not only contained specific deadly weapon language but also alleged a deadly weapon *per se*. *See* Tex. Penal Code

§ 1.07(a)(17)(A). In the jury charge, the application paragraph for the lesser-included offense referred the jury back to the indictment:

> Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt that the defendant, Tyler Harrell, on or about the 14th day of April, 2016, in the County of Travis, and State of Texas, *as alleged in the indictment* did then and there . . . intentionally, knowingly, or recklessly cause serious bodily injury to James Pittman or the defendant did then and there cause bodily injury and did use or exhibit a deadly weapon, to wit: a firearm, during the commission of the said assault, you will find the defendant guilty of the offense of Aggravated Assault and so say by your verdict; but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict not guilty.

(Emphasis added.)

While it is true, as appellant notes, that the application paragraph authorized conviction for aggravated assault on a finding of either aggravating factor—that appellant caused serious bodily injury or that he used or exhibited a deadly weapon when he caused bodily injury—both manners and means were explicitly based on the conduct alleged in the indictment—shooting Officer Pittman with a firearm—that was incorporated into the application paragraph by reference. Thus, the application paragraph required a finding that appellant shot Officer Pittman with a firearm and, in doing so, required a finding from the jury beyond a reasonable doubt that appellant committed the offense using the alleged deadly weapon *per se*. *See Lafleur*, 106 S.W.3d at 98 (recognizing that "[i]f the jury's verdict of a lesser-included offense is based upon an application paragraph that explicitly and expressly requires the jury to find that the defendant used a deadly weapon in the commission of the offense, the underlying purpose of *Polk* has been achieved").

Furthermore, resort to deductive reasoning also supports the conclusion that the jury made an affirmative deadly weapon finding when it found appellant guilty of aggravated

assault. *See Duran*, 492 S.W.3d at 746–49 (discussing degree to which courts can rely upon deductive reasoning to determine whether jury made affirmative deadly weapon finding); *Lafleur*, 106 S.W.3d at 98 (declining to "exalt form over substance to no discernible jurisprudential purpose" when determining whether jury made deadly weapon finding). The Court of Criminal Appeals has observed that there is no logical way to commit the offense of aggravated assault without using a deadly weapon. *See Landrian v. State*, 268 S.W.3d 532, 538 (Tex. Crim. App. 2008) (noting that both statutory aggravators of simple assault involve use of deadly weapon); *Blount v. State*, 257 S.W.3d 712, 714 (Tex. Crim. App. 2008) (holding that defendant charged with burglary of habitation with commission of or attempt to commit aggravated assault received adequate notice of deadly weapon issue because "[a]ggravated assault may be committed in only two ways"—by causing serious bodily injury or by using or exhibiting deadly weapon during commission of assault—and "[e]ach of these involves the use of a deadly weapon"). This premise is demonstrably true in this case where the application paragraph authorized the jury to find appellant guilty of aggravated assault only if it believed that he committed the offense by engaging in the conduct alleged in the indictment—shooting Officer Pittman with a firearm. The only assaultive conduct alleged in this case involved using a firearm to inflict injury.

Accordingly, although the verdict form did not contain an explicit deadly weapon finding or a direct reference to the indictment, the record shows that "the jury necessarily decided whether a deadly weapon was used or exhibited in light of the application paragraph." *See Duran*, 492 S.W.3d at 747–48 (describing "scenarios" under which trial court can properly conclude jury made determination as to use of deadly weapon). Therefore, on this record, we conclude that the jury made an affirmative deadly weapon finding when it found appellant guilty

of the lesser-included offense of aggravated assault. *See Lafleur*, 106 S.W.3d at 98 (approving "looking to the explicit requirements of the application paragraph as well as to the indictment and verdict form" to determine whether "express finding" of deadly weapon is satisfied); *see also Guthrie-Nail*, 506 S.W.3d at 12 (Keasler, J., dissenting) ("It follows that, after a finding of guilt for an offense defined by an indictment alleging the use of a deadly weapon, a deadly-weapon finding is necessarily made.").

Having concluded that the jury made an affirmative deadly weapon finding when it found appellant guilty of aggravated assault, we now address the arguments that appellant raises in his final two points of error.

Punishment Charge

In his fifth point of error, appellant argues that he suffered egregious harm from error in the punishment charge.

We review alleged jury charge error in two steps: first, we determine whether error exists; if so, we then evaluate whether sufficient harm resulted from the error to require reversal. *Arteaga v. State*, 521 S.W.3d 329, 333 (Tex. Crim. App. 2017); *Ngo v. State*, 175 S.W.3d 738, 743–44 (Tex. Crim. App. 2005). The degree of harm required for reversal depends on whether the jury charge error was preserved in the trial court. *Mendez v. State*, 545 S.W.3d 548, 552 (Tex. Crim. App. 2018); *see Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g) (setting forth procedure for appellate review of claim of jury charge error); *see also Jordan v. State*, 593 S.W.3d 340, 346 (Tex. Crim. App. 2020) ("The standard of review for jury charge error depends on whether the error was preserved."). If the charge error was not properly preserved by an objection or request for instruction, *see* Tex. Code

Crim. Proc. arts. 36.14, 36.15, as is the case here, the error requires reversal only if it was "egregious" in that it "created such harm that the [defendant] was deprived of a fair and impartial trial." *Chambers v. State*, 580 S.W.3d 149, 154 (Tex. Crim. App. 2019); *see Almanza*, 686 S.W.2d at 171.

A trial court is statutorily obligated to instruct the jury on the "law applicable to the case." *See* Tex. Code Crim. Proc. art. 36.14; *Mendez*, 545 S.W.3d at 552. The trial court's duty to instruct the jury on the "law applicable to the case" exists even when defense counsel fails to object to inclusions or exclusions in the charge. *Mendez*, 545 S.W.3d at 552; *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013). The trial court is "ultimately responsible for the accuracy of the jury charge and accompanying instructions." *Mendez*, 545 S.W.3d at 552 (quoting *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007)); *Vega*, 394 S.W.3d at 518.

In this case, the jury found appellant guilty of the lesser-included offense of aggravated assault. The punishment charge stated that the jury had found him guilty of aggravated assault with a deadly weapon—rather than aggravated assault—and throughout the charge referred to the offense of which appellant was convicted as "aggravated assault with a deadly weapon." Appellant contends that this reference was erroneous.

However, we concluded above that, based on the indictment and application paragraph in the jury charge, the jury made an affirmative deadly weapon finding when it found appellant guilty of aggravated assault—that is, the jury found that appellant used a deadly weapon during his assault against Officer Pittman. Consequently, we cannot conclude that the trial court's statement in the punishment charge that the jury convicted appellant of aggravated

assault with a deadly weapon or its designation of the offense in the charge as "aggravated assault with a deadly weapon" was erroneous.

Appellant further argues that, based on the designation of the offense as aggravated assault with a deadly weapon, the trial court gave an incorrect parole instruction that erroneously instructed the jury that appellant would not become eligible for parole until he served one-half of the sentence imposed.

Section 4 of article 37.07 of the Code of Criminal Procedure requires that the trial court's instructions to the jury in the punishment charge contain information on parole law. *See* Tex. Code Crim. Proc. art. 37.07, § 4; *Taylor v. State*, 233 S.W.3d 356, 359 (Tex. Crim. App. 2007). In most cases, when a defendant is found guilty of a felony offense and the jury assesses punishment, the trial court is statutorily mandated to include the prescribed parole eligibility and good conduct time instruction in its charge. *See* Tex. Code Crim. Proc. art. 37.07, § 4. This instruction explains generally the concepts of good conduct time and parole, states the defendant's eligibility for parole in terms of calendar years or sentence portion, and states that no one can predict whether parole or good time might be applied to the defendant. *See id.* art. 37.07, § 4(a)–(c); *Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002). Depending on the offense of which a defendant has been convicted, whether his sentence is to be enhanced, and whether a deadly weapon finding has been made in connection with the offense, the trial court is to select one of three statutory alternatives to give to the jury. *See* Tex. Code Crim. Proc. art. 37.07, § 4(a)–(c).

Here, as we previously concluded, the jury made an affirmative finding that appellant used a deadly weapon, a firearm, during his assault of Officer Pittman. A trial court is required to enter a deadly weapon finding in the judgment "[o]n an affirmative finding regarding

the use or exhibition of a deadly weapon as described by [Code of Criminal Procedure article 42A.054(b)]."[9] Tex. Code Crim. Proc. art. 42A.054(c); *see also id.* art. 42.01, § 1(21) (requiring judgment to reflect affirmative deadly weapon findings). Thus, the trial court here was not only authorized but statutorily required to enter an affirmative deadly weapon finding in the judgment. As a result, subsection (a) of section 4 of article 37.07 was the applicable statutory provision regarding parole eligibility. That subsection provides, in relevant part:

> In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, . . . *if the judgment contains an affirmative finding under Article 42A.054(c) or (d)* [of the Code of Criminal Procedure], . . . the court shall charge the jury in writing as follows:
>
> The length of time for which a defendant is imprisoned may be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less.

Id. art. 37.07, § 4(a) (emphasis added). Therefore, contrary to appellant's contention, the trial court did not err by instructing the jury in the punishment charge that appellant would not become eligible for parole until he served one-half of the sentence imposed.

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[9] The circumstances described by that statutory subsection are:

> [W]hen it is shown that:
> (1) a deadly weapon as defined by Section 1.07, Penal Code, was used or exhibited during the:
>   (A) commission of a felony offense; or
>   (B) immediate flight from the commission of a felony offense; and
> (2) the defendant:
>   (A) used or exhibited the deadly weapon; or
>   (B) was a party to the offense and knew that a deadly weapon would be used or exhibited.

Tex. Code Crim. Proc. art. 42A.054(b).

Finding no error in the trial court's punishment charge, we overrule appellant's fifth point of error.[10]

Judgment of Conviction

In his sixth point of error, appellant argues that the trial court's written judgment of conviction erroneously states that he was convicted of aggravated assault with a deadly weapon—rather than aggravated assault—and erroneously contains an affirmative deadly weapon finding.

However, for the same reason that the trial court did not err in referring to the offense as "aggravated assault with a deadly weapon" in the punishment charge—because the jury made an affirmative finding that appellant used a deadly weapon, a firearm, during his assault of Officer Pittman—we cannot conclude that the trial court erred in stating in its written judgment that appellant was convicted of aggravated assault with a deadly weapon. *See id.* art. 42.01, § 1(13) (requiring judgment to reflect "[t]he offense or offenses for which the defendant was convicted").

Further, as we previously noted, the trial court was not only authorized but statutorily required to enter an affirmative deadly weapon finding in the judgment. *See id.* arts. 42.01, § 1(21) (requiring judgment to reflect affirmative deadly weapon findings); 42A.054(c) (providing that "[o]n an affirmative finding regarding the use or exhibition of a deadly weapon . . ., the trial court shall enter the finding in the judgment of the court"), (d) (providing that "[o]n an affirmative finding that the deadly weapon . . . was a firearm, the court shall enter

[10] Because we conclude that no error exists in the punishment charge, we need not reach appellant's claim that he suffered "egregious harm." *See Celis v. State*, 416 S.W.3d 419, 423 (Tex. Crim. App. 2013); *Barrios v. State*, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009).

that finding in its judgment"). Therefore, we cannot conclude that the affirmative deadly weapon findings in the trial court's judgment are erroneous.

Finding no error in the trial court's written judgment of conviction, we overrule appellant's sixth point of error.

CONCLUSION

Having concluded that the evidence is sufficient to support the jury's rejection of appellant's justification defenses, that the trial court did not abuse its discretion in excluding Dr. Garza's testimony, and that no error exists in the punishment charge or written judgment, we affirm the trial court's judgment of conviction.

____

Edward Smith, Justice

Before Chief Justice Rose, Justices Goodwin and Smith

Affirmed

Filed: May 28, 2020

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