Opinion filed June 11, 2020

In The

Eleventh Court of Appeals

No. 11-17-00328-CR

KHALIFAH IBN MUHAMMAD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 358th District Court
Ector County, Texas
Trial Court Cause No. D-45,839

M E M O R A N D U M O P I N I O N

The jury convicted Khalifah Ibn Muhammad of murder. The trial court assessed his punishment at confinement for life in the Institutional Division of the Texas Department of Criminal Justice and a $10,000 fine. Appellant challenges his conviction in six issues. We affirm.

Background Facts

Jimmy Joshua Tilghman and Brandon Lee Russell worked as vehicle repossession agents for West Texas Auto Recovery. On the night of September 30, 2015, Russell was working as a "spotter" in Odessa looking for vehicles to be repossessed. Tilghman was driving a tow truck that evening. Russell notified Tilghman that he had located a vehicle, a Chevrolet Malibu, at the Acacia Apartments in Odessa that was on their list of vehicles to be repossessed. Appellant owned the Malibu that Russell had located.

Tilghman testified that he arrived at the apartment complex, whereupon he confirmed that Appellant's Malibu was subject to repossession. As Tilghman was backing up the tow truck to the Malibu, Appellant exited the Malibu and approached the driver's side door of the tow truck. Russell had remained inside of his vehicle parked at the apartment complex as Tilghman was beginning the process of towing the Malibu. When Appellant exited the Malibu, Russell hurriedly exited his vehicle and got inside of the Malibu. Appellant then returned to the driver's side of his car and began talking to Russell, telling him to get out of the Malibu.

Tilghman lifted the front tires of the Malibu with the boom of his tow truck while Appellant was talking to Russell. Tilghman then began strapping down the front wheels of the Malibu, starting with the driver's side. When Tilghman moved to the passenger-side front tire of the Malibu, Appellant approached the open driver's door of the tow truck and entered the cab of the tow truck. Tilghman testified that he opened the passenger-side door of the tow truck, whereupon he observed Appellant trying to figure out how to lower the Malibu. Tilghman ordered Appellant to get out of the tow truck, and he activated a Taser that he carried in the center console of the tow truck. Appellant exited the tow truck and called 9-1-1 on his cell phone. Tilghman testified that the confrontation with Appellant "seem[ed] to be deescalating" at this point.

Russell had remained inside of the Malibu during the confrontation between Appellant and Tilghman. Tilghman testified that he and Russell had a plan to the effect that as soon as Appellant stepped away from the vehicles, Tilghman would drive away in the tow truck and Russell would "hop out" of the Malibu. Tilghman and Russell executed this plan, and Tilghman observed Russell running to his vehicle. Tilghman testified that Appellant initially walked toward the tow truck as it pulled away with the Malibu but that Appellant then started following Russell, who was walking in the opposite direction. As Tilghman pulled away, he observed Russell reentering his vehicle and closing the driver's door with Appellant following him. Tilghman also observed Appellant "reach for something," and then Tilghman heard "a series of shots ring out."

Appellant fired ten shots in close proximity at Russell as Russell sat in the front seat of his car. The bulk of the shots entered the vehicle through the driver-side front door window and the driver-side rear door window of Russell's vehicle. Appellant then fled the apartment complex on foot. Corporal Cory Wester of the Odessa Police Department was the first officer on the scene. He found Russell slumped over in the front seat gasping to breathe.

Russell's vehicle was equipped with cameras that were operating during this encounter. One of these cameras was pointed out the front windshield of Russell's vehicle. From a distance, it recorded Tilghman's tow truck, the Malibu, Appellant, and Russell. The video showed that Russell ran to the Malibu after Appellant initially exited it to confront Tilghman in the tow truck. The video also depicted Russell walking briskly back to his vehicle as the tow truck pulled away and Appellant walking behind him. Appellant had walked past the view of the camera when he fired the gunshots, but the audio from the camera recorded the sound of the gunshots being fired in very rapid succession.

Russell died as the result of multiple gunshot wounds to his chest. Dr. Marc Andrew Krouse of the Tarrant County Medical Examiner's Office testified that the fatal shot was one that entered the middle of Russell's back, went through his right lung "in a real bad spot," and then entered the right side of his heart. Russell also suffered gunshot wounds to the head, left arm, and right shoulder.

Self-Defense

In his third issue, Appellant challenges the legal sufficiency of the evidence to support the jury's rejection of his self-defense claim. Self-defense is a fact issue to be determined by the jury, and a jury's verdict of guilt is an implicit finding that it rejected a defendant's self-defense theory. *Saxton v. State*, 804 S.W.2d 910, 913–14 (Tex. Crim. App. 1991). For self-defense claims, the defendant has the burden of producing some evidence to support the claim. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *see also Saxton*, 804 S.W.2d at 913–14 (contrasting self-defense from affirmative defenses and explaining how burdens shift for self-defense). If the defendant produces some evidence, the State has "the burden of persuasion to disprove the raised defense." *Zuliani*, 97 S.W.3d at 594. The State's burden does not require the production of any additional evidence; instead, "it requires only that the State prove its case beyond a reasonable doubt." *Id.*; *see Saxton*, 804 S.W.2d at 913. "Because the State bears the burden of persuasion to disprove" a claim of self-defense "by establishing its case beyond a reasonable doubt, we review both legal and factual sufficiency challenges to the jury's rejection of such a defense under" the legal sufficiency standard. *Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

We review a sufficiency of the evidence issue under the standard of review set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010); *Polk v. State*, 337 S.W.3d 286, 288–89 (Tex. App.—Eastland 2010, pet. ref'd). Under the *Jackson* standard, we review all of the

evidence in the light most favorable to the verdict and determine whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Thus, when reviewing the sufficiency of the evidence to support a conviction involving a claim of self-defense, we review the sufficiency of the evidence to support a jury's rejection of a defendant's self-defense theory by examining all the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense and also could have found against the defendant on the self-defense issue beyond a reasonable doubt. *Saxton*, 804 S.W.2d at 914 (citing *Jackson*, 443 U.S. 307).

When conducting a sufficiency review, we consider all the evidence admitted at trial, including pieces of evidence that may have been improperly admitted. *Winfrey v. State*, 393 S.W.3d 763, 767 (Tex. Crim. App. 2013); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007). We defer to the factfinder's role as the sole judge of the witnesses' credibility and the weight their testimony is to be afforded. *Brooks*, 323 S.W.3d at 899. This standard accounts for the factfinder's duty 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; *Clayton*, 235 S.W.3d at 778. When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the verdict and defer to that determination. *Jackson*, 443 U.S. at 326; *Clayton*, 235 S.W.3d at 778.

There is no dispute that Russell died as a result of injuries inflicted by Appellant. Under the Penal Code, a person commits murder if he "intentionally or knowingly causes the death of an individual" or if he "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (West 2019). However,

deadly force used in self-defense is a defense to prosecution for murder if that use of force is "justified." *Braughton v. State*, 569 S.W.3d 592, 606 (Tex. Crim. App. 2018) ("It is a defense to prosecution that the conduct in question is justified under this chapter." (quoting PENAL § 9.02)).

An individual "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." PENAL § 9.31(a). Furthermore, an individual "is justified in using deadly force against another . . . if the actor would be justified in using force against the other" and "when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to protect the actor against the other's use or attempted use of unlawful deadly force." *Id.* § 9.32(a). "'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." *Id.* § 9.01(3). A reasonable belief is a belief that would be held by an ordinary and prudent person in the same circumstances as the actor. *Id.* § 1.07(a)(42) (West Supp. 2019).

Appellant testified on his own behalf during the guilt/innocence phase. He testified that he is a former Marine and that he had a concealed-weapons permit issued by the police department of Gary, Indiana. Appellant used the laundromat at the apartment complex to do his laundry, and he was sitting in his car while waiting on his laundry. In that regard, Appellant was living out of the Malibu at the time. Appellant testified that the boom of the tow truck was already under the front wheels of the Malibu when he got out of the Malibu.

Appellant acknowledged walking to the cab of the tow truck and standing on the foot rail. He testified that he was trying to remove the keys from the tow truck when Tilghman activated the Taser, an action that Appellant considered to be a physical threat with a deadly weapon. Appellant stated that he called 9-1-1 when

Russell would not get out of the Malibu. Appellant testified that the tow truck almost hit him as Tilghman pulled away. Appellant described the events immediately preceding the shooting as follows:

> A. . . . So at this time I am walking back with Mr. Russell towards his vehicle.
>
> Q. Are you still on the phone on that 911 call that we heard earlier today, are you on that phone call when the car pulls away?
>
> A. I am, yes.
>
> Q. Okay. And are you on that phone call when you are walking?
>
> A. I am, yes.
>
> Q. Okay. What happened next?
>
> A. Well, as I -- as I approached the vehicle, I want to say I asked him, I state to him, so, Bro, are you not going to let me get my stuff? And he never responds to me. His immediate reaction was, he got back into the vehicle. At that particular time I see him, like I say, look towards me and I see him reaching for what I believe to be a weapon.
>
> Q. Did you feel threatened at that time?
>
> A. I did, yes.
>
> Q. And what did you do in response?
>
> A. At that time I was -- actually I was still on the phone with dispatch so -- it was an immediate reaction. I hung up and I drew my weapon and I fired.

Appellant acknowledged that he fired ten rounds in close proximity to Russell.

On cross-examination, Appellant testified that he was behind by six months on payments on the Malibu, which he said was by choice because of issues that he had with the bank. Appellant also acknowledged that he knew that the bank was looking for the Malibu to repossess it.

Appellant testified that Russell did not verbally threaten him. However, Appellant testified that he viewed Russell's actions as a threat because Russell walked away from Appellant as Appellant was "engaging" Russell in a conversation. Appellant further described Russell's act of walking away as a "behavior cue" of "dissociative behavior" that was "not appropriate for what's going on at night." Appellant further described the shooting as follows:

> Q. Okay. And this is in response to Mr. Russell reaching for something?
>
> A. Yes.
>
> Q. But you don't know what he was reaching for?
>
> A. He -- like I said, it is not just that. He was not only reaching, he -- I will say that he was in the process of -- he was in the process of turning back towards me when I first initially start to pull the trigger. I will say that because his immediate reaction after that was, he was trying to go through seats, and so this -- like I said, this escalated my position, you see, because once I saw that, I said, no way. You know, I already got you on the draw. You don't acknowledge that. And he started to swim the seat, so that is when I move -- I start -- I fired from start from left and I am going to the rear of the car because he is trying to swim basically to the sweet seat. I see, I feel that he is trying to get out of the back door.

Appellant stated that Russell's actions of "turning away" from him was a hostile act "given the situation." Appellant also faulted Russell for not responding "in some type of aggressive way" to get Appellant to stop shooting Russell.

On appeal, Appellant acknowledges that Russell was unarmed. Appellant cites *Espinoza v. State*, 951 S.W.2d 100, 101 (Tex. App.—Corpus Christi–Edinburg 1997, pet. ref'd), for the proposition that, if a victim is unarmed, the defendant's claim of self-defense must rest entirely upon a perceived danger. *See Fry v. State*, 915 S.W.2d 554, 560 (Tex. App.—Houston [14th Dist.] 1995, no pet.). Appellant asserts that he believed he saw Russell reaching for a weapon and that it was

reasonable for him to assume that Russell had a weapon since Tilghman had a weapon in the form of a Taser.

Appellant asserts that the evidence was insufficient for a rational jury to find against him on the issue of self-defense. We disagree. The only evidence that Appellant was acting in self-defense came from his own testimony. As such, his theory of self-defense was inherently a credibility question for the jury to resolve. The credibility of Appellant's self-defense testimony was solely within the jury's province to determine, and the jurors were free to reject it. *See Saxton*, 804 S.W.2d at 914; *see also Braughton*, 569 S.W.3d at 611–13.

Additionally, there is evidence that supports the jury's rejection of Appellant's claim of self-defense. Appellant was agitated because his car had just been repossessed by Russell and Tilghman. Appellant testified that he was upset at Russell because Russell did not permit Appellant to remove his personal property from the Malibu. Furthermore, the recording from Russell's car indicates that only a matter of a few seconds transpired from when Russell entered his car before Appellant opened fire on Russell, shooting him ten times in rapid succession. We conclude that the State adduced sufficient evidence from which a rational trier of fact could have found, beyond a reasonable doubt, all of the elements of murder and also could have found against Appellant on the self-defense issue beyond a reasonable doubt. We overrule Appellant's third issue.

Sudden Passion

In Appellant's first and second issues, he asserts that the evidence was legally and factually insufficient to support the trial court's rejection of his claim of sudden passion. Murder is typically a first-degree felony. PENAL § 19.02(c). But at the punishment phase of a trial, "the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause. If the defendant proves the issue in the affirmative by a

preponderance of the evidence, the offense is a felony of the second degree." *Id.* § 19.02(d); *see McKinney v. State*, 179 S.W.3d 565, 569 (Tex. Crim. App. 2005). "Sudden passion" means passion provoked by the decedent or by another acting with the decedent that "arises at the time of the offense and is not solely the result of former provocation." PENAL § 19.02(a)(2). An "adequate cause" is a cause that would "commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." *Id.* § 19.02(a)(1).

The issue of sudden passion is akin to an affirmative defense because the defendant has the burden of proof by a preponderance of the evidence. *See Matlock v. State*, 392 S.W.3d 662, 667 & n.14 (Tex. Crim. App. 2013); *Bradshaw v. State*, 244 S.W.3d 490, 502 (Tex. App.—Texarkana 2007, pet. ref'd). As an affirmative defense, sudden passion may be evaluated for legal and factual sufficiency, even after the Court of Criminal Appeals issued its opinion in *Brooks*. *See Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015); *Matlock*, 392 S.W.3d at 669–70.

In a legal sufficiency review of an affirmative defense, reviewing courts should first examine the record for a scintilla of evidence favorable to the factfinder's finding and disregard all evidence to the contrary unless a reasonable factfinder could not. *Butcher*, 454 S.W.3d at 20; *Matlock*, 392 S.W.3d at 669–70. The factfinder's rejection of a defendant's affirmative defense should be overturned for lack of legal sufficiency only if the appealing party establishes that the evidence conclusively proves his affirmative defense and that "no reasonable [factfinder] was free to think otherwise." *Butcher*, 454 S.W.3d at 20 (alteration in original) (quoting *Matlock*, 392 S.W.3d at 670).

In a factual sufficiency review of a finding rejecting an affirmative defense, courts examine all of the evidence in a neutral light. *Id.*; *Matlock*, 392 S.W.3d at

671. A finding rejecting a defendant's affirmative defense cannot be overturned unless, after setting out the relevant evidence supporting the verdict, the court clearly states why the verdict is so much against the great weight of the evidence as to be manifestly unjust, conscience-shocking, or clearly biased. *Butcher*, 454 S.W.3d at 20; *Matlock*, 392 S.W.3d at 671.

With respect to the element of adequate cause, Appellant asserts that the repossession was wrongful under both the applicable statute and the policies of West Texas Auto Recovery. Appellant contends that the repossession was illegal because the actions of Tilghman and Russell constituted a breach of the peace. *See* TEX. BUS. & COM. CODE ANN. § 9.609(b)(2) (West 2011). Additionally, Appellant called Russell and Tilghman's supervisor as a witness to establish that they were trained not to get into altercations or arguments with vehicle owners and that Russell should not have barricaded himself in the Malibu. Appellant asserts that Russell and Tilghman essentially stole his car and that their conduct was sufficient to render a person of ordinary temper incapable of cool reflection.

In reviewing Appellant's legal sufficiency challenge, we first review the evidence supporting the trial court's rejection of Appellant's claim of sudden passion. *See Matlock*, 392 S.W.3d at 670. Prior to shooting Russell, Appellant terminated the 9-1-1 call, placed his cell phone in his pants pocket, and then drew his weapon to shoot Russell. These purposeful acts by Appellant are evidence supporting a determination that he was not rendered incapable of cool reflection.

The evidence that conflicts with the trial court's rejection of Appellant's claim of sudden passion is virtually identical to the evidence upon which he based his claim of self-defense. As we noted previously, Appellant's assertion about his interaction with Russell was inherently dependent on the jury's evaluation of Appellant's credibility. The trial court was free to reject any or all of his version of the events. Appellant's testimony about the altercation did not conclusively prove his claim of

sudden passion. Accordingly, Appellant's legal sufficiency challenge to the jury's rejection of his claim of sudden passion must fail. *See Matlock*, 392 S.W.3d at 670. We overrule Appellant's first issue.

In reviewing Appellant's factual sufficiency challenge to the trial court's rejection of his claim of sudden passion, we review all of the evidence in a neutral light to determine if the contrary evidence greatly outweighs the evidence supporting the jury's determination. *See id.* at 671. As noted previously, the contrary evidence in this case consisted of Appellant's version of the interaction, which the trial court rejected. Appellant's narrative of the encounter did not greatly outweigh the evidence supporting the trial court's rejection of Appellant's claim of sudden passion. Based on all of the evidence, the trial court could have disbelieved Appellant's narrative of events and inferred from other evidence that Appellant's acts were purposeful, rather than a result of sudden passion. Viewing the evidence in a neutral light, we find that the trial court's rejection of sudden passion is not so against the great weight and preponderance of the evidence as to be manifestly unjust or clearly wrong. We overrule Appellant's second issue.

Evidentiary Issues

In his fourth issue, Appellant contends that the trial court abused its discretion when it admitted photographs and physical items into evidence during the guilt/innocence phase. He contends that the items should have been excluded under Rule 403 because their probative value was substantially outweighed by the danger of unfair prejudice and because they were cumulative. Whether to admit evidence at trial is a preliminary question to be decided by the trial court. TEX. R. EVID. 104(a); *Tienda v. State*, 358 S.W.3d 633, 637–38 (Tex. Crim. App. 2012). We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *Cameron v. State*, 241 S.W.3d 15, 19 (Tex. Crim. App. 2007). We will uphold the trial court's decision unless it lies outside the zone of reasonable

disagreement. *Id.* (citing *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991)).

Rule 403 provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403. "Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial." *Hayes v. State*, 85 S.W.3d 809, 815 (Tex. Crim. App. 2002) (citing *Montgomery*, 810 S.W.2d at 376); *see Martin v. State*, 570 S.W.3d 426, 437 (Tex. App.—Eastland 2019, pet. ref'd). In reviewing a trial court's determination under Rule 403, the reviewing court is to reverse the trial court's judgment "rarely and only after a clear abuse of discretion." *Mozon v. State*, 991 S.W.2d 841, 847 (Tex. Crim. App. 1999) (quoting *Montgomery*, 810 S.W.2d at 392); *Martin*, 570 S.W.3d at 437.

An analysis under Rule 403 includes, but is not limited to, the following factors: (1) the probative value of the evidence; (2) the potential to impress the jury in some irrational, yet indelible, way; (3) the time needed to develop the evidence; and (4) the proponent's need for the evidence. *Hernandez v. State*, 390 S.W.3d 310, 324 (Tex. Crim. App. 2012); *Shuffield v. State*, 189 S.W.3d 782, 787 (Tex. Crim. App. 2006); *Martin*, 570 S.W.3d at 437. Rule 403, however, does not require that the balancing test be performed on the record. *Martin*, 570 S.W.3d at 437; *Greene v. State*, 287 S.W.3d 277, 284 (Tex. App.—Eastland 2009, pet. ref'd). In overruling a Rule 403 objection, the trial court is assumed to have applied a Rule 403 balancing test and determined that the evidence was admissible. *Martin*, 570 S.W.3d at 437; *Greene*, 287 S.W.3d at 284.

The photographs that Appellant challenges were sixteen photographs taken of Russell's body at the hospital on the night of the shooting. The State originally

sought to offer twenty-four hospital photographs. Appellant did not object to two of the photographs but lodged a Rule 403 objection to the remaining twenty-two photographs. The trial court sustained Appellant's objection to six of the photographs but overruled his objection to the other sixteen photographs. Appellant asserts that the photographs were cumulative of autopsy photographs offered through Dr. Krouse immediately prior to the admission of the hospital photographs. He contends that the photographs were unduly prejudicial because they were graphic, in color, and numerous.

The admissibility of a photograph is within the sound discretion of the trial court. *Sonnier v. State*, 913 S.W.2d 511, 518 (Tex. Crim. App. 1995). A court may consider many factors in determining whether the probative value of a photograph is substantially outweighed by the danger of unfair prejudice. *Hayes*, 85 S.W.3d at 815. "These factors include: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or in black and white, whether they are close-up and whether the body depicted is clothed or naked." *Id.* A trial court does not err merely because it admits gruesome photographs into evidence. *Sonnier*, 913 S.W.2d at 519; *Luna v. State*, 264 S.W.3d 821, 829 (Tex. App.—Eastland 2008, no pet.).

The term "probative value" refers to the inherent probative force of an item of evidence—that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation—coupled with the proponent's need for that item of evidence. *Gigliobianco v. State*, 210 S.W.3d 637, 641 (Tex. Crim. App. 2006). Appellant was charged with committing murder in two ways: (1) by intentionally and knowingly causing the death of Russell by shooting him with a deadly weapon and (2) by intentionally and knowingly committing an act clearly dangerous to human life by shooting Russell with a deadly weapon. The photographs taken of Russell's body at the hospital on the night of the shooting are

relevant to the injuries that Appellant inflicted upon Russell; thus, the photographs had probative value. However, the State's need for the photographs was not particularly compelling because some of the photographs were cumulative of the autopsy photographs that had previously been admitted.

"[U]ndue delay" and "needless presentation of cumulative evidence" concern the efficiency of the trial proceeding rather than the threat of an inaccurate decision. *Id.* We disagree with Appellant's contention that the testimony accompanying the photographs took a substantial amount of time. This testimony only spanned five pages of the reporter's record.

Rule 403 does not require the exclusion of all cumulative evidence; rather it requires exclusion if the probative value of the evidence is substantially outweighed by the needless presentation of cumulative evidence. The determination of whether evidence is needlessly cumulative is inherently a discretionary decision for the trial court to resolve. The record does not indicate that the trial court abused its discretion by determining that the photographs did not disrupt the efficient administration of the trial.

The most significant factor to consider with the admission of the hospital photographs was their potential to impress the jury in some irrational, indelible way. *See Hernandez*, 390 S.W.3d at 324. "[U]nfair prejudice" refers to a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. *Gigliobianco*, 210 S.W.3d at 641. Appellant shot Russell ten times. Some of the bullets caused exit wounds in addition to entry wounds. Thus, Russell's body had a large number of bullet wounds. While the photographs taken at the hospital were numerous and graphic, they primarily showed the injuries that

Appellant inflicted,[1] and they are not more gruesome than would be expected for a person shot ten times at close range. *See Shuffield*, 189 S.W.3d at 787.

Russell's body was depicted unclothed but only from the waist up. The photographs essentially depict Russell's appearance at the hospital near the time that he was pronounced dead. To the extent Russell's body appears bloody in the photographs, this condition was the direct result of Appellant's actions. "[W]hen the power of the visible evidence emanates from nothing more than what the defendant has himself done[,] we cannot hold that the trial court has abused its discretion merely because it admitted the evidence." *Sonnier*, 913 S.W.2d at 519. Thus, it was not outside the zone of reasonable disagreement for the trial court to conclude that the probative value of the photographs was not substantially outweighed by their inflammatory nature.

The items of physical evidence that Appellant challenges are three windows and a door panel from Russell's car. Appellant objected to these items on the basis that they were cumulative of photographs of the same items that had been admitted into evidence. Appellant also asserts that the windows and door panel were unfairly prejudicial. As noted previously, Rule 403 does not preclude all cumulative evidence. Much like with the hospital photographs, the items of physical evidence were cumulative. However, we disagree with Appellant that the trial court abused its discretion by determining that the physical evidence items were not needlessly cumulative or that they were not unfairly prejudicial. We overrule Appellant's fourth issue.

In his fifth issue, Appellant contends that the trial court abused its discretion by admitting the recording from Russell's vehicle after the point that Appellant shot

[1]Two of the photographs showed an incision performed at the hospital in an effort to save Russell's life. This surgical incision is attributable to the injuries that Appellant inflicted.

Russell. Appellant asserted at trial that the admission of the recording past the point of the shooting violated Rule 403 because its prejudicial nature substantially outweighed its probative value. Appellant contends that this portion of the video was unduly prejudicial because listeners can hear Russell groaning in pain and gasping for air, Tilghman screaming Russell's name, and Corporal Wester talking to Russell by encouraging him to breathe and to "hang in there." The recording also showed Russell being loaded into an ambulance from a distance.

Similar to the hospital photographs, Russell's moaning and gasping for breath, as heard in the recording, were matters that were directly attributable to Appellant's act of shooting Russell ten times. *See Sonnier*, 913 S.W.2d at 519; *see also Shuffield*, 189 S.W.3d at 787. Furthermore, Russell's subsequent moans and gasps were much softer than when he screamed loudly in pain when Appellant started shooting him. We conclude that the trial court did not abuse its discretion by admitting the entire recording. We overrule Appellant's fifth issue.

In his sixth issue, Appellant contends that the trial court abused its discretion at the punishment phase by admitting personal property items belonging to Appellant. These items were recovered, pursuant to a search warrant, from a storage unit rented by Appellant, and they included the following: a green ammunition box; ammunition; a red "Lifeline" case containing medical items; a green bag containing a breathing apparatus; a "ghillie suit" or "sniper suit"; receipts for rental fees and gun and ammunition purchases; a flash suppressor; various documents and manuals, including but not limited to Marine Corps warfighting functions instructions, Leupold Tactical Optics manuals for riflescope and reticle system, and a Sig Sauer owner's manual; a shooter's log; and military discharge papers. Appellant objected to the items on the basis that they were not relevant. Based on trial counsel's voir dire examination of the sponsoring witness, Appellant took the position that the

physical items were not relevant because they did not play any role in the events on the night of the shooting.

Appellant asserts on appeal that the State failed to show that the items were relevant in response to Appellant's objections. He further contends that the trial court abused its discretion by failing to require the State to show that the items were relevant in response to Appellant's objections. Appellant contends that the items were not relevant because they had no connection to Russell's murder. Appellant also asserts that the possession of these items was not illegal and therefore should not have been considered by the trial court in assessing Appellant's punishment.

At the punishment phase of trial, there are no discrete factual issues; instead, the task of deciding what punishment to assess is a normative process. *Rogers v. State*, 991 S.W.2d 263, 265 (Tex. Crim. App. 1999) (citing *Miller-El v. State*, 782 S.W.2d 892, 895–96 (Tex. Crim. App. 1990)). "[A]dmissibility of evidence at the punishment phase of a non-capital felony offense is a function of policy rather than relevancy." *Miller-El*, 782 S.W.2d at 895. Thus, "[r]elevancy in the punishment phase is 'a question of what is helpful to the [factfinder] in determining the appropriate sentence for a particular defendant in a particular case.'" *Ellison v. State*, 201 S.W.3d 714, 719 (Tex. Crim. App. 2006) (quoting *Rogers*, 991 S.W.2d at 265).

The factfinder is entitled to consider "any matter the court deems relevant to sentencing." TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (West Supp. 2019). These matters include the defendant's character, the circumstances of the offense for which he is being tried, and evidence pertaining to the accused's personal responsibility and moral culpability for the crime charged. *See id.*; *Stavinoha v. State*, 808 S.W.2d 76, 79 (Tex. Crim. App. 1991) (per curiam). Thus, a trial court has broad discretion in determining the admissibility of evidence presented at the punishment phase of trial. *Henderson v. State*, 29 S.W.3d 616, 626 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).

We disagree with Appellant's contention that the items recovered from Appellant's storage unit had to be connected to Russell's murder in order to be relevant to his punishment. As noted above, the matters relevant to sentencing are quite broad. Given the manner in which Appellant shot Russell, we conclude that the trial court did not abuse its discretion by overruling Appellant's relevancy objections to the items that were related to his firearms and his military background. Moreover, the trial court made no reference to these items when pronouncing Appellant's sentence. Instead, the trial court stated that it found that Appellant's "conduct was senseless, it was inexcusable, and essentially it was tantamount to an execution of this person." We overrule Appellant's sixth issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

June 11, 2020
Do not publish. *See* TEX. R. APP. P. 47.2(b).
Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[2]

Willson, J., not participating.

[2]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.