AFFIRMED as MODIFIED and Opinion Filed July 18, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-00317-CR

DONALD EVERETTE HARDGE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-1775493-H

MEMORANDUM OPINION

Before Justices Partida-Kipness, Reichek, and Miskel
Opinion by Justice Reichek

Donald Everette Hardge appeals his conviction for capital murder. In ten issues, he challenges the sufficiency of the evidence, contends the State failed to corroborate an accomplice witness's testimony, challenges the constitutionality of his mandatory, automatic sentence of life without parole, and asks the Court to correct a clerical error in the judgment. The State asks the Court to correct two additional errors in the judgment. We affirm as modified.

Background

Appellant was charged by indictment with the capital murder of Leon Gulley. The indictment alleged that on March 29, 2017, appellant intentionally caused Gulley's death by shooting him with a firearm, a deadly weapon, while in the course of kidnapping or attempting to kidnap him. The trial court later granted the State's motion to amend the indictment to add the following language:

> And it is further presented in and to said Court that a deadly weapon, to-wit: A FIREARM, was used or exhibited during the commission of the aforesaid offense or during immediate flight following the commission of the aforesaid offense, and that the defendant used or exhibited said deadly weapon or was a party to the aforesaid offense and knew that a deadly weapon would be used or exhibited.

In June 2018, the trial court appointed an expert to determine whether appellant was competent to stand trial. A psychiatrist determined appellant was mentally incompetent to stand trial due to "Schizoaffective Disorder, Depressed Type." Appellant was committed a state hospital for further examination and treatment. After a period of treatment, doctors determined that appellant's competency was restored. On January 12, 2022, the trial court ordered that appellant was competent to stand trial. Appellant pleaded not guilty by reason of insanity.

Evidence showed that the incident resulting in Gulley's death began in the middle of the night on March 29, 2017, at a house on Denley Drive in Dallas. McClemon Grant's father owned the house, and Grant lived there with his girlfriend Margaret Jenkins. At the time of the offense, Gulley and his girlfriend Christina

Cork lived there too. Grant described the house as a "smoke house," a place where people come to smoke small quantities of dope they purchase on the streets. Grant, Jenkins, Gulley, and Cork all used crack cocaine. Sometimes people shared their crack with Grant in exchange for use of his house.

On March 29, Cork was asleep at the Denley house when she heard a knock on the door. It was appellant and Kenneth Williamson looking for Gulley. Cork knew appellant and thought he was her friend. Appellant had a gun in his hand. At the time, Gulley was in "the junk room," a room filled with "everything that you didn't want to throw away." When appellant and Williamson found Gulley, appellant said something about Gulley breaking into his car. Cork saw appellant raise his gun and then the gun went off. She did not see Gulley get shot, but knew a shot went off. After Cork heard the gunshot, she heard Gulley say that he did not break into appellant's car. Appellant turned to Cork and said, "I told you I was a killer." Cork ran out of the house to look for help, and appellant came out after her. She heard him say, "[H]ey, come help get this nigga and put him in the trunk of my car." Cork turned around and saw Brian Porter get out of appellant's car, which was a PT Cruiser. Cork continued on her way to look for help, but did not get any at that time. When she returned to the house, appellant was gone and so was Gulley. Jenkins was in her room, and Cork asked her where Gulley was. Jenkins told her "they took him." Cork did not see any blood at the house.

After the shooting, at about 4:00 a.m., Cork went to appellant's apartment to ask him where Gulley was. Gulley was not there, and appellant would not talk to her. Jenkins, Grant, and Porter were all at appellant's apartment too.

Cork called 911 about eight hours later to report a crime committed against Gulley. She reported there was a gunshot and "they took his body away." Police picked her up, and she was taken to the Dallas Police Department (DPD) for an interview.

Jenkins remembered appellant coming to the Denley house on March 29. He came inside and went from room to room looking for Gulley. Appellant went into the junk room, and Jenkins heard him say, "[H]ere this son of a bitch is." Then Jenkins heard one gunshot. Looking out a window, Jenkins next saw appellant and Williamson at the back of a grey PT Cruiser. They were holding Gulley up, and they put him in the back of the car. Jenkins testified that Gulley was still alive at that time. He was wiggling, and there was a struggle to get him in the car. Jenkins went to appellant's apartment about 30 minutes later because she wanted to know what was going on. Appellant, Williamson, and Porter were present, but she did not see Gulley there.

On March 29, Grant saw Gulley at the Denley house. Gulley looked afraid of something. Gulley told Grant he was hiding because he broke into appellant's car to steal something. Grant told Gulley to leave and gave him a heavy coat to wear because it was cold outside. Grant went into his bedroom to tell Jenkins what was

going on. He then heard a gunshot. He came out of his bedroom to tell everyone to get out of the house. He saw appellant and Williamson standing in front of the junk room door. Appellant was holding a gun and was the only person with a gun. Porter came in the house, and appellant told him and Williamson to get Gulley. Williamson and Porter pulled Gulley out of the junk room. Grant testified that Gulley was alive; he saw him moving and heard him talk. The men carried Gulley outside and put him in appellant's PT Cruiser. Grant did not see any blood in the house.

Mary Washington Johnson testified that she lived at the same apartment complex as appellant at the time of the offense. On the morning of March 29, 2017, appellant rang her doorbell. When Johnson opened the door, appellant gave her a gun and a clip and told her to "put it up." She put the items in her closet and later turned them over to the police.

Dallas Police Officer Mark Gonzales was asked to go to appellant's apartment complex to watch the PT Cruiser. After a few minutes, two men got in the car. Gonzales followed them until patrol officers could make a felony stop. Appellant was the driver of the car and was taken into custody. Police obtained a search warrant for a cell phone found in the car.

Detective Stephen Prince investigated this case before Gulley's body was found. Prince interviewed appellant on March 29 after he was taken into custody. Appellant told the detective that two Cadillacs he owned were broken into, and that he heard Gulley and two other men were involved. Appellant went to find Gulley

at the Denley house in the middle of the night. Appellant denied having a gun with him and also denied that Porter and Williamson were with him. He told the detective that he spoke to Gulley and they left together in appellant's PT Cruiser. Appellant dropped Gulley off near a park.

Detective Prince testified that Gulley's body was found on March 30, 2017. Porter showed police where Gulley's body was. The location of the body was about three miles from appellant's apartment.

Porter testified that he was convicted of aggravated kidnapping and sentenced to six years in prison for his involvement in the crime against Gulley. Porter reached a plea deal with the State in exchange for his testimony against appellant. On March 28, 2017, appellant told Porter that Gulley and another man broke into his car and stole a gun. Porter went with appellant to look for them. When they arrived at the Denley house, appellant went inside and he had a gun with him. By the time Porter went inside, he saw Grant and Williamson holding Gulley. He did not hear any gunshots or see what happened in the house. Porter did not think Gulley looked hurt and thought maybe he was having a drug overdose. Grant was holding Gulley's feet, but dropped them, and Porter then helped Williamson put Gulley in the back of the PT Cruiser.

When they left the house, appellant was driving, Porter was in the front passenger seat, and Williamson and Gulley were in the back. Porter thought they were taking Gulley to a hospital, but instead appellant turned into a park in a wooded

area. Appellant got out of the car and so did Williamson and Porter. Appellant had his gun out, and he told Williamson and Porter to get Gulley out of the car. They dumped the body in the woods, but appellant said he needed to "pop him two more times." Williamson held Gulley up, and appellant shot Gulley two times. They got back in the car and left. Appellant said, "[W]e're murderers." They drove to appellant's apartment complex. Williamson and Porter went to appellant's apartment, but appellant walked somewhere else in the complex. He came inside his apartment about ten minutes later and did not have the gun with him. Jenkins, Grant, and Cork came over. Porter was later arrested and took detectives to find Gulley's body.

On cross-examination, defense counsel pointed out differences between Porter's testimony and statements he made to the police in 2017. For example, after his arrest, Porter said he did not know if Gulley was dead and did not know where "they" took Gulley. He also said he got out of the vehicle before they got to the park. Porter admitted that he showed police the body in response to their offer for him to become a witness instead of a suspect.

Dr. Beth Frost, with the Dallas County Medical Examiner's Office, performed the autopsy of Gulley. Gulley was fully clothed when he came into the medical examiner's office. Dr. Frost removed a thick jacket he was wearing. There was a lot of blood in the coat; it had soaked up a lot of the blood Gulley had hemorrhaged. He had three gunshot wounds, each with a corresponding exit wound. One gunshot

was to the middle of his chest, one to the left side of his neck, and one was to his right shoulder. The doctor was not able to determine which wound occurred first. Gulley died as a result of the gunshot wounds. Due to characteristics of the entrance wounds, she thought it was likely Gulley was alive when he received all three wounds.

Grant gave police consent to search the Denley house on March 30, 2017. Police found a bullet and a shell casing in the junk room. There was no blood splatter in the room. No DNA was collected at the scene.

Angela Thomas, a biologist with the Southwest Institute of Forensic Sciences (SWIFS), did DNA testing in this case. She had DNA samples from appellant, Williamson, and Porter and swabs from the grip and trigger of the gun recovered from Johnson. Thomas also had information from Gulley's autopsy. There was no DNA profile from the gun grip, and the swab of the trigger was incomplete, meaning it did not provide a full DNA profile. Gulley was not a contributor to the DNA sample. She could not exclude the others as contributors. But due to the incomplete DNA profile, Thomas was not able to narrow down whose DNA was on the gun. Half of the people in the world would be possible contributors.

Charles Clow, a forensic firearm examiner with the DPD, compared the gun recovered from Johnson to the fired cartridge and fired bullet recovered at the Denley house. He concluded the fired cartridge case and fired bullet were fired from the semi-automatic pistol turned over to police.

Dr. Waleska Castro, trace evidence supervisor at SWIFS, performed gunshot residue analysis in this case. Gunshot residue was found on the back of appellant's right hand. Castro testified it could mean that appellant either fired the firearm, handled the firearm, or was in the proximity of the firearm when it was fired. Gunshot residue was also confirmed on the front upper right of shorts worn by Williamson. Gulley too had particles of gunshot residue on the backs of his hands. Castro testified that victims often have gunshot residue on their hands.

Detective Kevin Burkleo with the City of Irving Police Department analyzed appellant's cell phone records. Between the hours of 11:11 p.m. on March 28, 2017, and 5:04 a.m. on March 29, 2017, there was no cell phone tower data. It was possible that appellant turned off his phone between those hours. A call at about 9:23 a.m. the morning of March 29 was hitting off the tower that was in the general vicinity of where the body was located.

Appellant did not call any witnesses.

The trial court's charge included instructions on the lesser included offenses of murder and aggravated kidnapping, the law of parties, and on the defense of insanity. The charge gave the jury the option to find appellant: 1) not guilty, 2) guilty of capital murder as charged in the indictment, 3) guilty of murder as included in the indictment, 4) guilty of aggravated kidnapping as included in the indictment, or 5) not guilty by reason of insanity. The jury found appellant guilty of capital murder as charged in the indictment. The State did not seek the death penalty, and the trial

court imposed the mandatory sentence of life without the possibility of parole. *See* TEX. PENAL CODE ANN. § 12.31(a). This appeal followed.

Sufficiency of the Evidence

In his first four issues, appellant challenges the legal sufficiency of the evidence under the *Jackson v. Virginia* standard. He contends the State did not prove beyond a reasonable doubt that he: (1) was the person who committed the murder, (2) acted with specific intent to kill Gulley, (3) solicited, encouraged, directed, aided, or attempted to aid another person who committed the murder, or (4) committed murder while in the course of kidnapping.

A person commits murder if he intentionally or knowingly causes the death of an individual. TEX. PENAL CODE ANN. § 19.02(b)(1). As is relevant in this case, a person commits capital murder if he commits murder as defined in § 19.02, and he intentionally commits the murder in the course of committing or attempting to commit kidnapping. *Id.* § 19.03(a)(2). A person commits the offense of kidnapping if he intentionally or knowingly abducts another person. *Id.* § 20.03(a). "Abduct" means to restrain a person with intent to prevent his liberation by secreting him or holding him in a place where he is not likely to be found or by using or threatening to use deadly force. *Id.* § 20.01(2). "Restrain" means to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person. *Id.* §

20.01(1). Restraint is without consent if it is accomplished by force, intimidation or deception. *Id.* § 20.01(1)(A).

In assessing the sufficiency of the evidence to support a criminal conviction, we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational factfinder could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Alfaro-Jimenez v. State*, 577 S.W.3d 240, 243, 243–44 (Tex. Crim. App. 2019). This standard requires that we defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Zuniga v. State*, 551 S.W.3d 729, 732 (Tex. Crim. App. 2018). Circumstantial evidence is as probative as direct evidence in establishing a defendant's guilt. *Nisbett v. State*, 552 S.W.3d 244, 262 (Tex. Crim. App. 2018). Proof of mental state will almost always depend upon circumstantial evidence. *Duntsch v. State*, 568 S.W.3d 193, 216 (Tex. App.—Dallas 2018, pet. ref'd).

Appellant contends for several reasons that the State failed to prove beyond a reasonable doubt he was the person who shot Gulley at the Denley house or at the park. He argues that no one saw him fire a gun at the Denley house, and Porter, who provided eyewitness testimony that appellant shot Gulley at the park, was not credible. Appellant further asserts the forensic and physical evidence did not provide additional evidence he was the shooter.

Although Cork, Jenkins, and Grant did not see the shooting at the Denley house, they provided strong circumstantial evidence that appellant pulled the trigger. They each saw appellant saw appellant with a gun in the house and heard a gunshot. Cork saw him raise the gun. Appellant emphasizes the fact that no blood was found at the house, but the jury was free to believe that the heavy coat Gulley was wearing absorbed his blood. Porter testified he saw appellant shoot Gulley two more times in the park. While appellant takes issue with the credibility of the witnesses, particularly Porter, the jury was the sole judge of their credibility and the weight to be given their testimony. *See Hammack v. State*, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021). Further, the gun appellant asked his neighbor Johnson to hide was the gun that fired the bullet recovered at the house, and appellant had gunshot residue on his hand.

Appellant next argues he could not have been the shooter because expert testimony placed him in police custody at the time of Gulley's death. For this argument, he relies on testimony from the medical examiner about rigor mortis. In her autopsy report, Dr. Frost noted that "rigor is fully developed." Dr. Frost testified that the general rule of thumb is that rigor mortis starts setting in within seconds after a person dies and that it takes about 12 hours to achieve full rigor mortis, which means the body is fully stiff at 12 hours. The body stays fully stiff for about 12 hours and then after 12 more hours, the body is completely relaxed again. She testified, however, that the rigor mortis cycle is "very variable" due to factors such

as the size of the body, the temperature of the environment around the body, whether the person was sick when they died, and whether the body was moved from a cool location to a warm location or vice versa. Dr. Frost performed the autopsy at 8:00 a.m. on March 31, more than 48 hours after the approximate time of death at 3:00 a.m. on March 29. Appellant argues that because Gulley's body was fully stiff during the autopsy, Gulley must have died when appellant was already in police custody.

The testimony showed that full rigor mortis setting in 12 hours after the time of death was only a general rule. Dr. Frost indicated that many variables could affect that timeline. Whether the timeline was consistent with appellant murdering Gulley was an issue for the jury to decide. Evidence that Gulley was in full rigor mortis at the time of the autopsy does not render the evidence legally insufficient to support appellant's conviction.

Appellant also argues that a jury note indicates the jury did not believe he shot Gulley. During deliberations, the jury had the following question: "If we believe that Don Hardge is not the actual shooter in the park, is Don still guilty of murder?" The judge instructed the jury that they had all the law and evidence in the case. Whether the jury's verdict is supported by legally sufficient evidence is measured by the evidence presented at trial, not by jury notes. *Kindle v. State*, No. 05-19-01268-CR, 2021 WL 2281665, at *4 n.4 (Tex. App.—Dallas June 4, 2021, pet. ref'd) (mem. op., not designated for publication). The note is immaterial for purposes of

determining the sufficiency of the evidence. *See id.* The evidence is legally sufficient to prove appellant shot Gulley at both locations. We overrule appellant's first issue.

In his second issue, appellant contends the State failed to prove beyond a reasonable doubt he acted with specific intent to kill Gulley either in the house or in the park. Appellant repeats his arguments that the evidence was insufficient to show Gulley was shot inside the house and that Porter's testimony about the shooting at the park is not credible. He contends these facts negate the element of intent.

As we have stated, the evidence was sufficient to show appellant shot Gulley at both locations. His actions reflected his intent to kill Gulley. *See Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996) (jury may infer intent to kill from use of deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result). Appellant was looking for Gulley because he believed Gulley broke into his car and stole his gun. Witnesses saw appellant with a gun in the Denley house and heard a gunshot. Appellant instructed others to help him load Gulley into his car. Appellant found a wooded area in which to hide Gulley's body. He shot Gulley two more times before leaving him in the woods. Further, appellant attempted to hide his gun. Appellant's words were also evidence of his intent to kill. After the shooting in the house, appellant said to Cork, "I told you I was a killer." And after leaving Gulley in the woods, appellant said, "[W]e're murderers." There

was sufficient evidence from which the jury could have determined appellant had the intent to kill Gulley. We overrule appellant's second issue.

In his fourth issue, appellant asserts that even if the evidence is sufficient to prove he murdered Gulley, it does not support a capital murder conviction because the State did not prove beyond a reasonable doubt that he committed the murder while in the course of committing kidnapping. He argues there is no evidence he restrained Gulley. He credits Porter's testimony that Porter thought Gulley needed help leaving the Denley house because of a drug overdose, while ignoring evidence that appellant removed Gulley from the house after shooting him. There was evidence Gulley was alive when he was carried out of the house. Cork heard appellant ask for help putting Gulley into the PT Cruiser. Jenkins saw appellant and Williamson holding Gulley up and putting him in the car. Gulley was wiggling, and the others struggled to put him in the car. Appellant drove Gulley to another location. The jury could have reasonably concluded that appellant restrained Gulley with intent to prevent his liberation. The evidence is legally sufficient to show appellant committed murder while in the course of committing kidnapping. We overrule appellant's fourth issue.

In his third issue, appellant contends the State did not prove beyond a reasonable doubt that he solicited, encouraged, directed, aided, or attempted to aid another person who committed the charged offense. Because we have concluded that the evidence is legally sufficient under the *Jackson v. Virginia* standard to prove

appellant's guilt as the primary actor, we need not consider whether the evidence is sufficient to establish his guilt as a party. *See* TEX. R. APP. P. 47.1.

Accomplice Witness Corroboration

In his fifth issue, appellant contends the State failed to present sufficient evidence to corroborate accomplice witness testimony from Porter. Before a conviction can be obtained based upon the testimony of an accomplice witness, there must be some corroborating evidence tending to connect the defendant with the offense committed and the corroboration is not sufficient if it merely shows the commission of the offense. TEX. CODE CRIM. PROC. ANN. art. 38.14. The accomplice witness rule is a statutorily imposed sufficiency review and is not derived from federal or state constitutional principles that define legal sufficiency standards. *Cathey v. State*, 992 S.W.2d 460, 462–63 (Tex. Crim. App. 1999). To test the sufficiency of the corroborating evidence, the reviewing court must eliminate from consideration the evidence of the accomplice witness and then examine the other evidence to ascertain if it is of an incriminating character which tends to connect the defendant with the commission of the offense. *Castaneda v. State*, 682 S.W.2d 535, 537 (Tex. Crim. App. 1984). If there is such evidence, the corroboration is sufficient. *Id.* The corroborative evidence need not directly link the accused to the crime or be sufficient in itself to establish guilt. *Id.* A conviction cannot stand, however, if the corroborative evidence does no more than point the finger of suspicion towards an accused. *Id.* at 538.

Here, three witnesses—Cork, Jenkins, and Grant—saw appellant with a gun in his hand at the Denley house on the night of the offense and heard the gun go off. Cork testified that appellant was at the house looking for Gulley and had a gun in his hand. She heard appellant say something to Gulley about the car break in. Cork saw appellant raise his gun. Appellant said to her, "I told you I was a killer." She also heard him ask for help putting Gulley in his car. Cork saw Porter get out of appellant's PT Cruiser. Jenkins said appellant went from room to room looking for Gulley. After he found him, Jenkins heard one gunshot and then saw appellant and Williamson put Gulley in the back of the PT Cruiser. Grant testified Gulley was hiding because he broke into appellant's car. Grant heard a gunshot and then saw appellant holding a gun in front of the junk room door. Grant heard appellant tell Porter and Williamson to get Gulley. He saw them pull Gulley out of the junk room, carry him outside, and put him in appellant's PT Cruiser. In addition, Johnson testified appellant gave her a gun to hide that morning. We conclude the testimony from these non-accomplice witnesses tends to connect appellant to the commission of the offense. We overrule appellant's fifth issue.

Constitutionality of Automatic Life without Parole

In issues six, seven, eight and nine, appellant challenges the constitutionality of his mandatory, automatic sentence of life without parole. *See* TEX. PENAL CODE ANN. § 12.31(a). He contends his sentence violates the Eighth Amendment's and the Texas Constitution's prohibitions against cruel and unusual punishment and

contends it violated federal and State due process. He argues it is cruel and unusual punishment to impose an automatic sentence of life without parole without applying an individualized sentencing hearing. *See* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13. He also argues the sentence violates his right to due process and due course of law by denying him the opportunity to present mitigating evidence at a sentencing hearing. *See* U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19.

These issues are well settled. The United States Supreme Court has concluded that an automatic life sentence without parole does not violate the Eighth Amendment. *See Harmelin v. Michigan*, 501 U.S. 957, 994–96 (1991). *Harmelin*'s holding that the Eighth Amendment does not guarantee adult defendants an individualized punishment hearing when sentenced to life in prison without the possibility of parole for capital murder is controlling. *Phifer v. State*, No. 05-18-01232-CR, 2020 WL 1149916, at *13 (Tex. App.—Dallas Mar. 10, 2020, pet. ref'd) (mem. op., not designated for publication); *Arevalo v. State*, No. 05-18-00126-CR, 2019 WL 3886650, at *8 (Tex. App.—Dallas Aug. 19, 2019, pet. ref'd) (mem. op., not designated for publication); *Straughter v. State*, No. 05-10-00163-CR, 2011 WL 2028234, at *3 (Tex. App.—Dallas May 25, 2011, no pet.) (mem. op., not designated for publication). And, noting that the Texas Court of Criminal Appeals has found no distinction between the protections offered under the Eighth Amendment and article I, section 13 of the Texas Constitution, we have held that a mandatory life

sentence for an adult defendant does not violate Texas constitutional protections against cruel and unusual punishment. *Phifer*, 2020 WL 1149916, at *13.

In addition, we have rejected the claim that an automatic life sentence violates both the Due Process Clause of the Fourteenth Amendment and the due course of law guarantee found in article I, section 19 of the Texas Constitution. *Id.*; *Speers v. State*, No. 05-14-00179-CR, 2016 WL 929223, at *5 (Tex. App.—Dallas Mar. 10, 2016, no pet.) (mem. op., not designated for publication). We overrule appellant's sixth, seventh, eighth, and ninth issues.

Modification of the Judgment

Both appellant and the State ask this Court to make certain modifications to the judgment. In his tenth issue, appellant asks us to reform the judgment to reflect the correct degree of offense. The State agrees with appellant's request. The judgment states that the degree of the offense is "Capital Murder." The offense of capital murder is a capital felony. TEX. PENAL CODE ANN. § 19.03(b). Appellant correctly argues the degree of the offense in the judgment should be "Capital Felony." *See Morgan v. State*, No. 05-15-01367-CR, 2017 WL 491258, at *3 (Tex. App.—Dallas Feb. 7, 2017, no pet.) (mem. op., not designated for publication). We have the authority to modify the trial court's judgment to make the record speak the truth. TEX. R. APP. P. 43.2(b); *Morgan*, 2017 WL 491258, at *3. We sustain appellant's tenth issue and modify the judgment to specify the correct degree of the offense.

The State raises cross-issues in which it asks us to further modify the judgment. First, it argues the judgment should include a deadly weapon finding. The trial court's judgment states "N/A" in a space for "Findings on Deadly Weapon." The jury made the express determination that a deadly weapon was actually used or exhibited during the commission of the offense because the indictment specifically alleged a "deadly weapon" was used and appellant was found guilty "as charged in the indictment." *See Duran v. State*, 492 S.W.3d 741, 746 (Tex. Crim. App. 2016) (citing *Polk v. State*, 693 S.W.2d 391, 396 (Tex. Crim. App. 1985)). We modify the judgment to reflect that finding.

Next, the State asks us to correct the amount of costs included in the judgment. The Texas Code of Criminal Procedure requires that a judgment of conviction order the defendant to pay court costs. *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *see* TEX. CODE CRIM. PROC. ANN. art. 42.16. The trial court assessed costs in the amount of $286, but the bill of costs shows a balance of $336. We agree with the State that the judgment should be modified to reflect the amount of costs listed in the certified bill of costs. We sustain the State's cross-issues.

As modified, we affirm the trial court's judgment.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

220317F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DONALD EVERETTE HARDGE, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas Trial Court Cause No. F-1775493-H.
No. 05-22-00317-CR V.	Opinion delivered by Justice Reichek. Justices Partida-Kipness and Miskel participating.
THE STATE OF TEXAS, Appellee	

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** as follows:

"Degree of Offense" is modified to state "Capital Felony,"

"Findings on Deadly Weapon" is modified to state "Yes, a Firearm," and

"Court Costs" is modified to state "$336."

As **MODIFIED**, the judgment is **AFFIRMED**.

Judgment entered this 18th day of July, 2023.