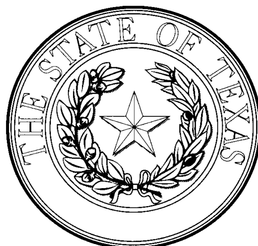
Opinion issued December 29, 2016



In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00393-CR

CHRISTOPHER ERNEST BRAUGHTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1389139

DISSENTING OPINION

The majority affirms the trial court's judgment convicting appellant, Christopher Ernest Braughton, of the offense of murder, implicitly affirming the jury's rejection of appellant's defenses of self-defense and defense of a third person. I believe both the majority's application of the standard of review of the jury's rejection of these defenses and its judgment are erroneous. I also believe the

issue is one of fundamental importance to the criminal law of this state. Accordingly, I respectfully dissent.

To my knowledge, the Texas Court of Criminal Appeals has not addressed the standard of review of the sufficiency of the evidence for rejecting the defenses of self-defense and defense of a third person since it adopted the single standard of review for legal and factual sufficiency set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979), and in 2010 in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.). I believe the standard for making this determination remains that set out prior to *Brooks* in *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim. App. 2003) and *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991). I further believe no reasonable jury could rationally have rejected appellant's defenses on that standard. The majority, however, opines that it is not allowed to sit as a "thirteenth juror." Thus, it refuses to evaluate the reasonableness of the jury's rejection of these defenses, and it affirms appellant's murder conviction. I would acquit.

Background

The majority opinion provides an extensive statement of the facts of this case. However, I repeat the facts pertinent to appellant's claims of self-defense and defense of a third person in order to put those facts in their proper perspective in light of all of the evidence adduced at trial.

On May 24, 2013, the complainant, Emmanuel Dominguez, who was a United States Marine preparing to retire from the Marine Corps, fought with his fiancée while they were out drinking. Dominguez—who was intoxicated with a blood alcohol concentration more than twice the legal limit—left the bar alone on his motorcycle.[1]

That same evening, appellant's father ("Braughton Sr."), mother ("Mrs. Braughton"), and younger brother Devin were dining out while appellant, age twenty-one, stayed home at his parents' house. The Braughtons, like Dominguez, lived on Greenland Oak Court, but appellant had never met Dominguez. At approximately 10:00 p.m., Braughton Sr. began driving home, with Mrs. Braughton and Devin riding in the family vehicle. As they neared their home, Braughton Sr. was driving approximately fifteen to eighteen miles per hour in an area with a twenty-mile-per-hour speed limit. Braughton Sr. saw a "big bright light" immediately behind the vehicle. He then heard "a really loud revving sound," and a vehicle alarm alerted that there was an object very close to the vehicle's rear bumper. Braughton Sr. determined from the light, the engine sound, and the vehicle's alarm that a motorcycle was very close to his car.

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[1] At the time of his death, Dominguez had a blood alcohol concentration of 0.17 grams per deciliter, which is more than twice the statutory limit of 0.08 grams per deciliter for driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.01(1)(A), (2)(B) (West 2011). A test of his urine showed an even higher blood alcohol concentration of 0.22 grams per deciliter.

According to Braughton Sr., Dominguez, who was driving the motorcycle, drove around the side of the Braughton's car, "tried to swerve into the side of the car," then drove around in front of the Braughtons and "slam[med] on his brakes." The vehicle's proximity sensors again alarmed. Braughton Sr. had to "slam" on his own brakes to avoid hitting the motorcycle. He then passed the motorcycle and continued home. Dominguez followed the Braughton family onto Greenland Oak Court.

As this was occurring, Mrs. Braughton called appellant and told him they were being chased. According to Braughton Sr., as he approached his driveway, Dominguez "start[ed] coming around the car" again and blocked the Braughtons' driveway. Braughton Sr. drove around the cul-de-sac at the end of Greenland Oak Court, stopping on the opposite side of the street from the Braughton home. Dominguez stopped the motorcycle near the driveway to the home of Robert Bannon, who lived in the house between the Braughton residence and the house rented by Dominguez and his fiancée. Bannon, who was sitting in his driveway at the time, noticed that the motorcycle was only one or two feet away from the Braughtons' car and "thought [Dominguez] didn't know how to drive a motorcycle because he looked like he was kind of wobbling."

Dominguez dismounted the motorcycle and "rather quickly" approached the car, and Braughton Sr. got out of his vehicle. The men began yelling at each other,

with Braughton Sr. demanding to know, "Why the [expletive] you following me so close for?," and Dominguez yelling back and "cussing" at Braughton Sr. Dominguez began punching Braughton Sr. in his face and "beating him up," while Braughton Sr. attempted to defend himself. Dominguez knocked Braughton Sr. to the ground. This altercation occurred near the motorcycle.

Meanwhile, appellant had gone to his parents' bedroom, where he kept a 9-millimeter handgun that he had purchased approximately three months earlier. He retrieved the gun and loaded it. During the altercation between Dominguez and Braughton Sr., appellant came out of his parents' house with the loaded gun, saw Dominguez beating Braughton Sr., and said several times, "Stop, I have a gun."

Witnesses at trial gave conflicting accounts of what happened next. Appellant, Braughton Sr., Mrs. Braughton, and Glen Irving (a neighbor) all testified that Dominguez then threatened that he had either a gun or "something for" appellant. Specifically, appellant testified that Dominguez said, "Oh, you have a gun, m_____f_____. I have a gun for you," then reached into a saddlebag on the motorcycle. Other witnesses corroborated that Dominguez threatened appellant. For example, Irving, the neighbor, testified that Dominguez "turned and started back towards the motorcycle, and [Irving] heard a voice say, 'Yeah, I got a gun, too, m_____f_____,'" or possibly, "I've got something for you, m_____f_____." Another neighbor, Bannon, saw Braughton Sr. being followed

closely by Dominguez, an argument between the two, appellant coming out with a gun, and Dominguez lying on the ground after being shot.

Appellant testified that Dominguez, who was positioned with the saddlebag to his left, reached across his body with his right arm, turning as he did so, and began to straighten up. Similarly, Braughton Sr. testified that Dominguez reached toward a saddlebag on the motorcycle, "just grab[bed] the box and open[ed] it," then reached into it.

Gina,[2] a high-school junior who also lived on Greenland Oak Court, testified and gave a very different account. Gina watched events unfold from her second-story bedroom in a house across the street. Gina testified that she did not have a relationship with or know the names of any of the individuals involved in the fight and subsequent shooting, although she recognized them as her neighbors and was able to associate them with their respective homes. She identified the participants by the color of the clothing that they wore on the night in question and their respective genders. She testified that she could not see a gun, faces, or many details of the scene "clearly" because a light-blocking screen on her window made her view of the street "blurry."

Nonetheless, Gina testified that she saw Braughton Sr. and Dominguez arguing when appellant came from the direction of the Braughtons' house "with

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[2] For purposes of consistency, I use the same pseudonym assigned to this witness by the majority.

his right arm stretched out with a gun in his hand." She testified that appellant "just walk[ed] straight to [Dominguez] and then he stop[ped]." Gina stated that Dominguez was backing up with his arms raised when appellant shot him. Gina testified that she heard Mrs. Braughton tell appellant to put his gun down and go back in the house. Gina further testified that, instead of complying, appellant replied, "No, I got a gun now," and walked toward Dominguez, who "stopped and put his hands up" and "slowly back[ed] up." Gina testified that she did not see Dominguez approach the motorcycle, open a saddlebag, or reach for anything.

However, on cross-examination, appellant's attorney questioned Gina regarding portions of her trial testimony that were contradicted by her statement to police on the day of the shooting. In that statement, Gina told police that she saw appellant and Dominguez—rather than Braughton Sr. and Dominguez—arguing and engaging in a shoving match prior to the shooting. Gina further told police, in her statement on the night of the shooting, that after appellant and Dominguez engaged in their shoving match, appellant pulled out a gun and shot Dominguez. Gina testified on cross-examination that her memory of events "would be better whenever [she] made the statement" to police on the night of the shooting than at trial, and she reiterated that everything she had said in her statement on the night of the shooting was true and correct despite the contradictions between that statement and her testimony at trial.

The remaining sequence of events is undisputed. Appellant testified that he "pointed [the gun] towards [Dominguez's] arm," without "aiming at a specific area on him," and pulled the trigger, shooting Dominguez one time. The bullet hit Dominguez under his right armpit, toward the back of his body. The bullet traveled right to left, "very slightly upward," and "slightly back to front," puncturing both of Dominguez's lungs and damaging his "aorta, the major artery coming out from the heart," resulting in the loss of at least three liters of blood. The medical examiner who later examined Dominguez, Dr. Morna Gonsoulin, testified that such injuries can kill a person "within seconds."

Additional evidence, in the form of testimony by investigating officers, physical evidence collected at the scene, and evidence admitted through the medical examiner, is pertinent here. Specifically, one of the officers, Corporal J. Talbert of the Constable's Office, Precinct 4, authenticated several photographs as fair and accurate representations of the scene as it appeared when he arrived. Several of these photographs show one of the two saddlebags on Dominguez's motorcycle open. Another officer, Deputy Medina, testified that she found no weapons on Dominguez's person or in his saddlebags, but that one of the saddlebags was open when she arrived on the scene.

Dr. Gonsoulin, the assistant medical examiner who conducted the autopsy of Dominguez, testified that Dominguez died from a single gunshot wound and that

the path of the bullet went "basically from the right armpit to the left armpit." For the bullet to follow its trajectory required Dominguez to expose his right armpit and have his left side slightly lower than the right when he was shot. According to Dr. Gonsoulin, this meant that Dominguez could have been shot while bending, reaching, or extending his right arm across his body toward his left side. She testified that the gun could not have been "straight ahead pointing at the chest of the deceased, Emmanuel Dominguez." According to Dr. Gonsoulin, Dominguez could have been shot while turning, but it was "impossible" for Dominguez to be "shot facing the shooter with his arms up." She later clarified that a claim that Dominguez "was shot [while] facing the shooter with his hands in the air" would be physically impossible and "inconsistent with the gunshot wound." Dr. Gonsoulin's testimony was supported by photographic evidence showing that the gunshot wound was under Dominguez's right arm, an X-ray image showing the bullet inside the left side of Dominguez's chest, and the autopsy report describing the bullet's trajectory.

Finally, the DNA analyst, Z. Phillips, testified that she found DNA consistent with Braughton Sr.'s DNA on a knuckle on Dominguez's right hand but did not find any DNA consistent with appellant's DNA on Dominguez.

The defense presented testimony from Glen Irving, Braughton Sr., and Mrs. Braughton that Dominguez was chasing the Braughtons erratically down the street

and riding "almost on [their] bumper." The Braughtons all testified that Mrs. Braughton frantically called appellant while Dominguez was chasing them. Irving and the Braughtons testified that Dominguez was "punching and beating up" Braughton Sr. The Braughtons each testified that at that time they were afraid for their lives. Irving and the Braughtons testified that appellant warned Dominguez as the latter was attacking Braughton Sr., "Stop, I have a gun." They all testified that Dominguez then knocked down Braughton Sr. and went toward his motorcycle, cursing and threatening that he had a gun or "something for" appellant. Each of these witnesses also testified, however, that they never saw a gun or other weapon in Dominguez's possession. They also testified that appellant fired only one shot, and Dominguez fell.

The defense also presented Gary Gross, who installed many of the solar screens in the neighborhood, including the screen in Gina's bedroom window. He testified to the increased difficulty of seeing through these windows at night, stating that the screen was a "90 percent Suntex solar screen," meaning that it would "block 90 percent of visible light," was designed to provide privacy, and would be difficult to see through at night. According to Gross, at 10:00 p.m., it would be possible to see "some visible light" through the screen and to "see something," but not to "make out what it is." He confirmed that it would

"probably not" be possible for anyone looking through the screen at that time to "make out what they are seeing."

Appellant testified that he "was just pointing [the gun] at [Dominguez's] arm" and "just wanted to stop him." He confirmed, under cross-examination, that he pointed the gun at Dominguez, pulled the trigger, and thought "that a bullet was going to hit Manny Dominguez."

The trial court charged the jury, instructing it on the offense of murder and the lesser-included offense of manslaughter. Additionally, the trial court instructed the jury on the law of self-defense, defense of a third person, and defense of property. Appellant requested that the trial court also include an instruction on the lesser offense of felony deadly conduct, but the trial court declined that request.

The jury convicted appellant of murder and assessed his punishment at twenty years' confinement. This appeal followed.

Legal Sufficiency of the Evidence Supporting the Jury's Rejection of Defenses of Self-Defense and Defense of a Third Person

A. Standard of review of sufficiency of the evidence to support conviction beyond a reasonable doubt

The standard of review of the sufficiency of the evidence to support a murder conviction was established by the United States Supreme Court in *Jackson*, 443 U.S. 307, 99 S. Ct. 2781, and adopted by the Texas Court of Criminal Appeals in *Brooks*, 323 S.W.3d 893, and *Adames v. State*, 353 S.W.3d 854 (Tex. Crim.

App. 2011). When reviewing the sufficiency of the evidence under the *Jackson* and *Adames* standard, we must view all of the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859 (holding that "the *Jackson* standard is the 'only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt'") (quoting *Brooks*, 323 S.W.3d at 912).

In *Brooks*, the Court of Criminal Appeals abolished the distinction between legal sufficiency review and factual sufficiency review for evidentiary issues that must be decided beyond a reasonable doubt. It held that, in finding guilt beyond a reasonable doubt, the reviewing court must not sit as a "thirteenth juror," "disagree with a jury's resolution of conflicting evidence," or disagree "with a jury's weighing of the evidence." *Brooks*, 323 S.W.3d at 899 (internal quotations omitted) (contrasting legal sufficiency review—done in light most favorable to verdict—with factual sufficiency review—done in neutral light—and quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S. Ct. 2211, 2218 (1982)). It opined,

> [T]he difference between a factual-sufficiency standard and a legal-sufficiency standard is that the reviewing court is required to defer to the jury's credibility and weight determinations (i.e., it must view the evidence in the light most favorable to the verdict) under a legal-

> sufficiency standard while it is not required to defer to a jury's credibility and weight determinations (i.e., it must view the evidence in a "neutral light") under a factual-sufficiency standard.

Id. at 899–900.

In *Adames*, the Court of Criminal Appeals further explained the standard of review of sufficiency of the evidence. That standard requires that a reviewing court view *all of the evidence* in the light most favorable to the verdict—*not* just the evidence supporting the verdict. *Adames*, 353 S.W.3d at 860. It opined that "[t]his standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing *reasonable* inferences from the evidence." *Id.* (emphasis added). The reviewing court then "determines whether the necessary inferences made by the trier of fact are reasonable, based upon the cumulative force of all of the evidence." *Id.* (emphasis added). This determination is made "by measuring the evidentiary sufficiency with 'explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Id.* (quoting *Jackson*, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16). The jury's ultimate conclusion must be *rational* in light of all of the evidence. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 860; *Nelson v. State*, 405 S.W.3d 113, 122–23 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

When an appellate court reverses a conviction for legally insufficient evidence, this has the same effect as an acquittal by a jury. *Tibbs*, 457 U.S. at 41,

102 S. Ct. at 2218; *Brooks*, 323 S.W.3d at 903 & n.21 (citing *Burks v. United States*, 437 U.S. 1, 17–18, 98 S. Ct. 2141, 2150–51 (1978), and *Greene v. Massey*, 437 U.S. 19, 24, 98 S. Ct. 2151, 2154 (1978)); *McGuire v. State*, 493 S.W.3d 177, 204 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (if evidence is insufficient under *Jackson* standard, we must reverse and enter judgment of acquittal). Accordingly, "[i]f, based on all the evidence, a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt, due process requires that we reverse and order a judgment of acquittal." *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App. 1993) (quoting *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992)); *see Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Although we must presume that the jury resolved conflicts in the evidence in favor of its verdict, that dictate applies only when the record supports conflicting inferences. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). A fact-finder is permitted "to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). However, "[t]he jury is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Temple*, 390

S.W.3d at 360; *Hooper*, 214 S.W.3d at 16 ("Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented.").

The Court of Criminal Appeals has explained the proper analysis for evidentiary sufficiency and the requirement of a rational outcome using a hypothetical example. In *Brooks*, that court discussed a hypothetical "robbery-at-a-convenience-store case." 323 S.W.3d at 906–07 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)). The court explained the hypothetical as follows:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

Id. at 907 (internal citation omitted). The court identified this example as "a proper application of the *Jackson v. Virginia* legal-sufficiency standard." *Id.*

In reviewing the sufficiency of the evidence when a jury has rejected claims of self-defense or defense of a third person, the court must "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 murder beyond a reasonable doubt *and also would have found against appellant on the self-defense issue beyond a reasonable doubt*." *Saxton*, 804 S.W.2d at 914 (emphasis added).

B. Application of standard of review by the majority

In determining the sufficiency of the evidence supporting the jury's rejection of appellant's claims of self-defense and defense of a third person, the majority states that it is compelled to "review the evidence in the light most favorable to the prosecution" and that it may not "act as a 'thirteenth juror' by overturning a jury's duly-delivered verdict simply because [it] disagree[s] with that verdict." Slip Op. at 39 (citing *Saxton*, 804 S.W.2d at 914 and *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (internal quotations omitted)). And it stops its analysis there.

The majority, however, ignores the principle that the jury's ultimate conclusion *must be rational* in light of all of the evidence. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. And it ignores the mandate that the reviewing court must determine *both* that such a rational trier of fact "would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914. It does not even try to determine whether it was rational for the jury to reject appellant's defenses of self-defense and defense of a third person after reviewing all the evidence—including the evidence in support of appellant's defenses. *See Adames*, 353 S.W.3d at 860. Worse, as shown below, it indulges in its own speculation as to how the jury might have reached its

conclusion by going outside the record, by irrationally crediting testimony, and by disregarding unrebutted physical evidence. It thus provides itself no rational basis for determining that a rational jury would have found against appellant on the defenses of self-defense and defense of a third person. Instead, it approves the jury's irrational evaluation of the evidence supporting appellant's defenses and, accordingly, irrationally affirms the judgment of the trial court. But the error goes even beyond that.

The majority's reasoning undermines the purpose behind a court of appeals' review of the evidence. Although we defer to a jury's determinations "when the record evidence paints conflicting pictures of innocence and guilt," an appellate court must still "act as a procedural failsafe against irrational verdicts." *Dawkins v. State*, —S.W.3d—, No. 08-13-00012-CR, 2016 WL 5957311, at *7 (Tex. App.—El Paso Oct. 14, 2016, no pet. h.) (citing *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010), and *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). We may reverse a conviction on legal sufficiency grounds when "no rational juror could find guilt beyond a reasonable doubt based on the evidence presented at trial," including in situations "in which some evidence exists on every element, but no reasonable person could convict in light of the state of evidence was a whole, even when viewed most favorably to the prosecution." *Id.* (citing *Jackson*, 443 U.S. at 320, 99 S. Ct. at 2789 (holding that constitutional legal

sufficiency standard in criminal cases is higher than "mere modicum" of evidence standard), and *Brooks*, 323 S.W.3d at 906–07 (explaining that jury is not permitted to irrationally disregard evidence under *Jackson* standard)). The majority disregards that mandate.

C. Review of reasonableness of jury's finding of murder and rejection of self-defense and defense of a third person

A person commits the offense of 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. *See* TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (West 2011). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (West 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). "Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death." *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003).

Intent may be proven by circumstantial evidence. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (holding that direct evidence of requisite intent is not required). "A jury may infer intent from any facts which tend to prove

its existence, including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999).

Both self-defense and defense of a third person are statutorily defined and provide a defense to prosecution when the conduct in question is "justified." TEX. PENAL CODE ANN. §§ 9.02, 9.31, 9.33 (West 2011). Under Penal Code Chapter 9, "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).

Likewise, "[a] person is justified in using deadly 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 deadly force." *Id.* § 9.32 (West 2011) (emphasis added); *see Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). A person is justified in exercising deadly force in defense of a third person "[s]o long as the accused reasonably believes that the third person would be justified in using [force] to protect himself." *Smith*, 355 S.W.3d at 145; *see* TEX. PENAL CODE ANN. § 9.33. Both of these defenses—self-defense and defense of a third person—may be raised as justifications for a defendant's actions and in support of an acquittal against a charge of murder or manslaughter. *See, e.g.*, TEX. PENAL CODE ANN.

§§ 9.31–.33; *Alonzo v. State*, 353 S.W.3d 778, 781–82 (Tex. Crim. App. 2011) (self-defense is defense to both murder and manslaughter charges); *Smith*, 355 S.W.3d at 145 (defense of third person is defense to murder).

In a claim of self-defense or defense of a third person, "a defendant bears the burden of production," while "the State then bears the burden of persuasion to disprove the raised defense." *Zuliani*, 97 S.W.3d at 594 (citing *Saxton*, 804 S.W.2d at 913–914). The defendant's burden of production requires the defendant to adduce some evidence that would support a rational jury finding as to the defense. *See* TEX. PENAL CODE ANN. § 2.03(c) (West 2011) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."); *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

"[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic*, 393 S.W.3d at 286 (citing *Shaw*, 243 S.W.3d at 657–58). "[A] defense is supported (or 'raised') if there is evidence in the record making a prima facie case for the defense." *Shaw*, 243 S.W.3d at 657. "A prima facie case is that 'minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.'" *Id.* (quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987)).

If the defendant meets his burden of production, the burden of persuasion shifts back to the State. *Zuliani*, 97 S.W.3d at 594. The State's "burden of persuasion is not one that requires the production of evidence, rather it requires only that the State prove its case beyond a reasonable doubt." *Id.* (citing *Saxton*, 804 S.W.2d at 913).

In light of these burdens of production and proof, "[w]hen a jury finds the defendant guilty, there is an implicit finding against the defensive theory." *Id.* A jury, however, is not permitted to reach a speculative conclusion. *Elizondo v. State*, 487 S.W.3d 185, 203 (Tex. Crim. App. 2016). Nor is it permitted to disregard undisputed facts that allow only one logical inference. *Evans v. State*, 202 S.W.3d 158, 162–63 (Tex. Crim. App. 2006); *Satchell v. State*, 321 S.W.3d 127, 132 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

The problem for a reviewing court is how to determine whether the jury *rationally* found the defendant guilty of the offense beyond a *reasonable* doubt and *rationally* rejected the defendant's evidence in support of his defenses of self-defense and defense of a third person. This problem is exacerbated by the legal principles providing that the defendant's burden of production is an *evidentiary* burden, while the State's burden of persuasion is a *non*-evidentiary burden. And in light of these burdens, the reviewing court's task is to "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 murder beyond a reasonable doubt *and also* would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914 (emphasis added).

No post-*Adames* case, to my knowledge, has instructed the appellate courts on how to determine whether a reasonable jury would have found against the defendant on the issue of self-defense beyond a reasonable doubt or whether, to the contrary, the jury's rejection of the appellant's defense of self-defense or defense of a third person was irrational without conducting an analysis of the evidence supporting the defense and the evidence rebutting that evidence. In other words, no post-*Adames* Texas Court of Criminal Appeals case appears to have instructed the appellate courts how to weigh all the evidence to determine the strength of a defense on which the defendant bore the burden of production but the State bore the ultimate burden of persuasion. It did, however, instruct the appellate courts on how to make this determination *prior* to *Adames*, in *Zuliani*.

In *Zuliani*, the Court of Criminal Appeals held that when reviewing the sufficiency of the evidence supporting the rejection of a defense, "the reviewing court reviews all of the evidence in a *neutral* light and asks whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence." *Zuliani*, 97 S.W.3d at 595. There is no indication

in the case law that this standard of review for the defenses of self-defense and defense of a third person was overturned by the Court of Criminal Appeals's adoption of the *Jackson* standard as the sole sufficiency of evidence standard in *Brooks* and *Adames*. Rather, the holdings of the Court of Criminal Appeals in the analogous situation of affirmative defenses is to the contrary. *See Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013) (discussing standard for reviewing affirmative defenses).

Thus, I would apply the standard for reviewing the sufficiency of the evidence as set out in *Jackson*, *Brooks*, *Saxton*, and *Zuliani*. I believe this Court must review all of the evidence that a *reasonable* jury would credit and must determine whether, in light of the state of evidence as a whole, a reasonable jury could have found the essential elements of murder beyond a reasonable doubt and also could have found against appellant on his defensive issues beyond a reasonable doubt. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914; *Dawkins*, 2016 WL 5957311, at *7.

To apply any other test for the sufficiency of the evidence on appellant's defenses, on which he had the burden of making a prima facie case and the State had the burden of persuasion, or the burden of overcoming that prima facie case, would be to ignore the State's burden of persuading a reasonable jury that its rejection of the defenses of self-defense and defense of a third person would be

rational in light of all the evidence, as required by *Saxton*, *Zuliani*, and *Adames*. And it would make the jury's determination of the sufficiency of the evidence to reject appellant's defenses of self-defense and defense of a third person impervious to review by this appellate court. No matter how irrational the jury's rejection of the defense, its conclusion would be *ipso facto* correct so long as evidence supported the murder conviction once the defenses were irrationally discounted. That is what I think the majority has disregarded here.

The proper standard of review does require that we defer to the jury's credibility determinations. However, that standard does not require that a reviewing court accept both the jury's determination of the sufficiency of the evidence supporting the conviction and its determination finding the evidence supporting the defense insufficient beyond a reasonable doubt without asking whether the jury's rejection of the defense was rational in light of the evidentiary burdens of both the defendant and the State with respect to that defense. This Court's job is to review the evidence that a *rational* jury could have credited in rejecting the defense as insufficiently supported by the evidence beyond a reasonable doubt and to determine whether that evidence was, in fact, sufficient to support rejection of the defense—not to rubber-stamp the findings of juries or trial courts.

Thus, for the jury's verdict to be rational, it must have been rational *both* for the jury to have found appellant guilty of murder, looking at the evidence in the light most favorable to the verdict, *and* for it to have rejected the defenses of self-defense and defense of a third person. In this case, that means that we must examine the evidence as a whole in the light most favorable to the verdict, and we must reverse the judgment of conviction if the State failed to meet its burden (1) of presenting sufficient evidence that appellant was guilty of murder beyond a reasonable doubt, including evidence that he acted with the requisite intent, or (2) of persuading the jury that appellant did not act in self-defense or defense of a third person beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914.

As set out below, I would hold that the only credible evidence establishes that appellant acted in self-defense and defense of a third person, which necessitates a conclusion that the State failed to establish beyond a reasonable doubt that appellant was guilty of murder. It was irrational of the jury to conclude otherwise, even when viewing the evidence in the light most favorable to its verdict. And it is irrational for the majority to conclude that a rational jury would have rejected appellant's defenses beyond a reasonable doubt on the facts of this case. Consequently, the majority opinion is contrary to both *Jackson* and *Adames*.

See Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859; *Saxton*, 804 S.W.2d at 914.

D. Application of the standard of review to facts of this case

I agree with the majority that appellant carried his burden of producing evidence that he acted in self-defense or in defense of his family. But I would hold that the jury's verdict implicitly rejecting appellant's defenses and convicting him of murder is based entirely on its drawing irrational inferences. Therefore, both the finding that appellant murdered Dominguez and the implied finding rejecting appellant's defenses must be rejected as unreasonable in light of all of the evidence. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859.

Appellant received a frantic phone call from Mrs. Braughton that Dominguez was chasing his family on his motorcycle. When appellant came out of the house, Dominguez was punching appellant's father in the face. Braughton Sr. had a bloody lip after being punched in the face by Dominguez. Appellant relies on his own testimony and testimony by his family members and Irving that when appellant came out of the house with a gun and told Dominguez, "Stop, I have a gun," Dominguez responded by acknowledging that "you have a gun" and by stating that he had "a gun" or "something for" appellant and reaching towards his motorcycle, which prompted appellant to shoot him. In addition, Bannon testified

that the overall situation was one in which appellant was "just trying to defend his dad."

This testimony was consistent with the physical evidence presented. As Dr. Gonsoulin testified, the bullet trajectory was consistent with a shot fired while Dominguez was bending or reaching downward with his right hand, as that would expose his armpit. The physical evidence was inconsistent with Dominguez being shot with his hands in the air and his body facing appellant, as Gina—the only witness who contradicted appellant's version of events—had described the scene. Gina was not explicit about the orientation of Dominguez's body relative to appellant; rather, her testimony was that Dominguez was backing away from appellant. The State, however, concedes in its appellate briefing that Dominguez was initially facing appellant and argues that the jury could have believed that Dominguez turned just as he was shot. However, this argument does not change the fact that the physical evidence demonstrates that Dominguez was turning when appellant shot him, consistent with appellant's testimony.

In light of the above testimony, appellant met his burden of production. *See* TEX. PENAL CODE ANN. § 2.03(c); *Krajcovic*, 393 S.W.3d at 286; *Shaw*, 243 S.W.3d at 657–58. That is, as the majority acknowledges, the evidence supports a rational jury finding that appellant was not guilty of murder because "(1) he justifiably acted in self-defense in response to the statement 'I got a gun for you,'

and Dominguez's subsequent motions; (2) he justifiably acted in defense of others, in particular in defense of his father, mother, and younger brother; or (3) both defenses applied." *See* Slip Op. at 31.

Because appellant met his burden of production, the State was required to carry the burden of persuasion by proving beyond a reasonable doubt that appellant's actions were not justified under either defensive theory. And, "after viewing all the evidence in the light most favorable to the prosecution," this Court was required to determine whether "any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and *also* would have found *against appellant* on the self-defense [or defense of a third person] issue *beyond a reasonable doubt*." *Saxton*, 804 S.W.2d at 914 (emphasis added); *see Zuliani*, 97 S.W.3d at 594. I disagree with the majority's conclusion that the State met its burden.

Although the State was not required to produce evidence specifically refuting appellant's theories, it still had the obligation to present evidence sufficient to permit the jury to reach its verdict of guilty, implicitly rejecting those defensive theories beyond a reasonable doubt. *See, e.g.*, *Alonzo*, 353 S.W.3d at 781 ("If there is some evidence that a defendant's actions were justified under one of the provisions of Chapter 9 [of the Penal Code], the State has the burden of persuasion to disprove the justification beyond a reasonable doubt."); *Zuliani*, 97

S.W.3d at 594–95; *Saxton*, 804 S.W.2d at 914. And the State's evidence had to establish all of the elements of murder beyond a reasonable doubt.

The only evidence that is inconsistent with the defensive theories is Gina's testimony that Dominguez put his hands up and backed away without making threats, while appellant refused to lower his weapon, saying, "No, I got a gun now." Her testimony is the only evidence as to what happened between the moment when Dominguez became aware that appellant had a gun and the moment when he was shot that does not support the defensive theory that appellant shot Dominguez because of the perceived threat that Dominguez was reaching for a gun.

But the jury could not rationally have believed Gina's testimony in light of the other evidence. Most importantly, her testimony was irreconcilable with the physical evidence. Gina was adamant in her trial testimony that appellant "just walk[ed] straight to [Dominguez] and then he stop[ped]," that Dominguez was backing away from appellant with his hands up when he was shot, and that appellant remained stationary. But, as Dr. Gonsoulin testified, the gun could not have been "straight ahead pointing at [Dominguez's] chest," nor was it possible for Dominguez to be "shot facing the shooter with his arms up." Such a shot was "impossible" and "inconsistent with the gunshot wound." Dr. Gonsoulin's testimony was supported by photographic evidence showing the bullet wound, a

post-mortem X-ray image of Dominguez showing the bullet inside the left side of his chest, and the autopsy report. The jury could not rationally have concluded, given this evidence, that Dominguez was shot while facing appellant, rather than while turned relative to appellant. *See Evans*, 202 S.W.3d at 163 & n.16 (evidence "becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied") (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005)); *Satchell*, 321 S.W.3d at 132. And this evidence supporting appellant's defenses could not rationally be rebutted by the inconsistent testimony of a bystander at a distance viewing what happened through a solar panel at night, as the expert testimony showed.

Gina's testimony also contained numerous internal contradictions and conflicted with her witness statement that she gave to investigating law enforcement officers the night of the shooting. For example, she testified that she had seen a gun before she heard Mrs. Braughton say, "Put the gun down." She later testified, however, that she could not actually see that appellant had a gun and "didn't know what kind of weapon it was exactly, but when [she] heard the shot, [she] knew it was a gun." She testified that she saw Braughton Sr. and Dominguez fighting, but later testified that she did not see any physical fight at all and simply "assume[d] they were fighting because they were just yelling at each other." She also testified that she told investigating officers that the initial verbal altercation

and subsequent physical fight were between appellant and Dominguez, even though the undisputed physical evidence and the testimony of every other witness showed that the physical fight was between Braughton Sr. and Dominguez. Gina told the officers on the night of the shooting that appellant and Dominguez argued regarding the amount of noise made by the motorcycle at night and began shoving each other, at which point appellant "pulled out a gun." That scenario conflicts with not only her own testimony but also with that of every other witness to the shooting.

Moreover, all of Gina's testimony is overshadowed by the fact that she viewed all the events through a screen on her window, a screen that she testified made everything "blurry" and obscured details to the point that one could not determine whether a person on the other side was wearing glasses. Gary Gross, who installed the screen, testified that the screen was designed to "block 90 percent of visible light" and that it would not be possible to "make out what [one was] seeing" through it at night. Even Gina initially agreed that Defendant's Exhibit 8—a photograph taken through her window that is nearly entirely black, with only intermittent areas of dark gray—fairly and accurately depicted what she could see on the night of the shooting, though she later stated that her view was better than that shown in the exhibit.

Considering all of the evidence in the light most favorable to the verdict, the jury could not rationally have believed Gina's testimony that Dominguez was shot while backing away with his hands up. Even assuming that it was possible for Gina to see whether Dominguez had his hands up, the physical evidence shows that it would have been impossible for appellant to shoot Dominguez in the manner that Gina described. While it is hypothetically possible that Dominguez faced appellant but turned his body in the moment immediately before he was shot, there is no evidence that he did so, and juries are not permitted to reach speculative conclusions unsupported by the evidence. *See Elizondo*, 487 S.W.3d at 203 ("[J]uries are not permitted to reach speculative conclusions" or engage in speculation regarding essential facts not in evidence).

Given that the jury could not have believed Gina's account of the shooting and could not contrive its own version untethered from the trial evidence, I would conclude that all of the credible evidence as to how the shooting transpired supports appellant's defensive theories. There was only one scenario given that explains how appellant shot Dominguez that was supported by the evidence and not rendered impossible by the physical evidence: that is the account given by appellant, Braughton Sr., Mrs. Braughton, and neighbor Glen Irving that appellant shot Dominguez as Dominguez purported to reach for a gun. While the jury was free to reject some or all of any witness's testimony, it was not free to speculate or

to reach a conclusion that is irrational in light of all of the evidence. *See id.*; *see also Jackson*, 443 U.S. at 319–20, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859; *Nelson*, 405 S.W.3d at 122–23.

The majority, however, explains away the credible witness evidence and physical evidence by indulging in its own speculation as to how the jury's verdict might be justified by what was *not* in evidence. It holds that "the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony that was undermined by the absence of any phone records demonstrating that it occurred or any data retrieved from any phone found at the scene." Slip Op. at 32. However, the jury was required to consider the evidence that was presented at trial in determining whether the State met its burden of persuasion—the jury was *not* entitled to draw inferences *not* supported by the evidence to support the jury's verdict. Here, the uncontradicted evidence—including testimony from appellant and Mrs. Braughton—indicated that Mrs. Braughton called appellant during the road-rage incident. And regardless of how appellant learned of the conflict, the undisputed evidence demonstrates that appellant did not know Dominguez prior to the confrontation, that appellant came out of the house in close proximity to his family's arrival near their home, and that appellant observed Dominguez physically harming his father at that time.

Likewise, the majority asserts, based on the nature of Braughton Sr.'s injuries, the DNA evidence "indicat[ing] only that Dominguez punched Braughton Sr. once," and Braughton Sr.'s own testimony "that he was punched three times," that the jury could have rationally determined that appellant's use of deadly force was not immediately necessary. *See* Slip Op. at 32–33. But this view of the evidence disregards the fact that appellant saw Dominguez—a man who had military training and was very intoxicated—assault his father outside the family home and in the presence of the rest of the Braughton family. Multiple witnesses testified to the altercation between Braughton Sr. and Dominguez, the DNA evidence showed that Dominguez had struck Braughton Sr., and photographs showed Braughton Sr.'s injuries. The fact that these injuries might have been worse, as the majority argues, is again speculative, contrary to fact, and irrelevant. The fact that appellant saw the assault occur supports his assertion that he acted in defense of a third person.

And the fact that Dominguez did not ultimately have a weapon in his possession is not relevant here. The jury, and this Court, were required to consider whether appellant "reasonably believe[d] the force [wa]s immediately necessary to protect [himself] against the other's use or attempted use of unlawful deadly force"—not whether the threat turned out to be supported or unsupported after the fact. *See* TEX. PENAL CODE ANN. § 9.32; *Smith*, 355 S.W.3d at 145. The only

credible evidence adduced at trial established that Dominguez struck Braughton Sr., verbally threatened appellant when he stepped in to protect his father, and reached for his motorcycle as if reaching for a weapon. Thus, in light of this evidence, the only rational inference supported by the evidence is that appellant believed it was immediately necessary for him to use force against Dominguez. *See* TEX. PENAL CODE ANN. § 9.32; *Smith*, 355 S.W.3d at 145.

By contrast, the State offered no credible evidence that appellant acted with the requisite intent to commit murder. *See* TEX. PENAL CODE ANN. § 19.02(b) (providing that intent is element of murder); *Schroeder*, 123 S.W.3d at 400 ("Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death."). The evidence here all demonstrates that appellant acted with the intent to protect himself and his family. Appellant did not know Dominguez or have any interactions with him prior to the confrontation between Dominguez and the Braughtons. Dominguez, and not appellant, was the initial aggressor in the confrontation between Dominguez and the Braughton family. Appellant warned Dominguez prior to shooting, but Dominguez responded with a threat, and appellant fired a single shot. Appellant testified that he aimed at Dominguez's arm, and the physical evidence demonstrates that the bullet in fact hit Dominguez in his armpit. Bannon testified that appellant was "just trying to defend his dad." After

the shooting, appellant remained at the scene and cooperated with the law enforcement investigation. Considering appellant's acts and words, the circumstances surrounding the commission of the crime, and the nature of the wound inflicted on Dominguez, even when viewed in the light most favorable to the jury's finding, the evidence does not support an inference beyond a reasonable doubt that appellant acted with the requisite criminal intent to cause Dominguez's death and that, beyond a reasonable doubt, appellant did *not* act with the intent to defend himself or his family. *See Manrique*, 994 S.W.2d at 649.

In light of all of the evidence, I would hold that no rational juror could have found all essential elements of murder beyond a reasonable doubt *and* also have found against appellant on his defensive theories beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914. I would hold that it is irrational to conclude beyond a reasonable doubt based on the totality of the evidence in this case that appellant did not shoot Dominguez in self-defense or in defense of a third person. Therefore, I would hold that legally insufficient evidence supported the jury's rejection of appellant's justification theories.

I would sustain appellant's second issue, and I would render a judgment of acquittal without reaching his first or third issues.

Conclusion

I would reverse the judgment of the trial court, render a judgment of acquittal, and order that appellant be released from custody.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).