IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0429-15

FRANCISCO DURAN, JR., Appellant

v.

THE STATE OF TEXAS

ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW FROM THE THIRTEENTH COURT OF APPEALS CAMERON COUNTY

YEARY, J., filed an opinion concurring in part and dissenting in part in which KEASLER, J., joined.

CONCURRING AND DISSENTING OPINION

I agree with the Court's first two conclusions: the court of appeals (1) should have vacated the aggravated assault conviction and (2) should not have held that the deadly weapon finding was proper based on the jury's verdict with respect to the burglary charge. Majority Opinion at 2. I take issue, however, with the Court's characterization of much of our previous case law with respect to deadly weapon findings. Most particularly, I question the Court's suggestion that the second rationale supplied in *Crumpton v. State*, 301 S.W.3d

663, 664 (Tex. Crim. App. 2009), is nothing more than dicta. Majority Opinion at 12. This suggestion strikes me as questionable, at best,[1] and in any event, unnecessary to the Court's purpose. For these reasons, I concur only in the result the Majority reaches with respect to these issues.

Regarding the Majority's rejection of the State's final argument, that a deadly weapon finding may still be predicated on the abandoned jury verdict of guilty of aggravated assault, I believe it is premature for the Court to reach this issue. The Court concedes that the court of appeals never reached this alternative argument. Majority Opinion at 16. It is usually our practice that, when our resolution of a particular issue on discretionary review operates to raise or revive an alternative argument or issue in the lower appellate court, our recourse is to remand the cause to allow the court of appeals to address the alternative argument or issue in the first instance. *See McClintock v. State*, 444 S.W.3d 15, 20-21 (Tex. Crim. App. 2014) (it is "[t]ypically" the Court's practice to remand for resolution of issues not yet addressed in the lower appellate court unless "the proper disposition of an outstanding issue is clear," in part because "our resolution of the issue (if any should even be necessary after a remand) would benefit from a carefully wrought decision from the court of appeals").

Instead, the Court today resolves the issue itself, and does so in a perfunctory manner

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[1] *See, e.g.*, *United States v. Potts*, 644 F.3d 233, 237 & n.3 (5th Cir. 2011) ("This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum.") (quoting *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991)). So far as I know, this Court has yet to fashion a rule—one way or the other—with respect to the precedential value of alternative holdings.

that does not seem to me to give adequate consideration to the potential merits of the State's argument. It seems to me that there may be good arguments to support the Court's conclusion that deadly weapon findings are offense-specific. But I do not think the issue is beyond debate, and I would give the court of appeals a chance to address it in the first instance. I would remand the cause to the court of appeals for a fuller treatment. We may or may not subsequently find it necessary to address the argument/issue ourselves in a later petition for discretionary review. Because the Court does not remand the cause, I dissent to that facet of its opinion.

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