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

NEWELL, J., delivered the opinion of the Court in which MEYERS, JOHNSON, HERVEY, ALCALA, AND RICHARDSON, JJ., joined. RICHARDSON, J., filed a concurring opinion in which JOHNSON, J., joined. YEARY, J., filed an opinion concurring in part and dissenting in part, in which KEASLER, J., joined. KELLER, P.J., dissents.

O P I N I O N

In this case, a jury convicted Appellant of both burglary of a habitation and aggravated assault in two separate counts. The jury found Appellant guilty of both counts, but the State abandoned the aggravated assault conviction prior to the punishment phase of the trial. We are asked to determine whether the court of

appeals erred by 1) upholding the conviction on the aggravated assault charge even though the State had abandoned that charge prior to punishment; and 2) upholding the trial court's modification to the judgment to include a deadly-weapon finding.

We reverse. The court of appeals should have vacated the conviction for aggravated assault because the State unequivocally abandoned the charge in the middle of trial and after jeopardy had attached. Moreover, the court of appeals improperly held that the deadly-weapon finding was proper based upon the jury's finding of guilt on the burglary charge. Finally, we disagree with the State that the trial court could rely upon the abandoned jury verdict in the aggravated assault case to support the entry of a deadly weapon finding in Appellant's burglary case.

Facts

In this case, the victim, Gonzalo Gonzalez, threw something at Appellant and his friends. Later that same day, Appellant and his friends retaliated by breaking into Gonzalo's apartment and throwing a DVD player at him. The State indicted Appellant for the offenses of burglary of a habitation and aggravated assault in two separate counts. In Count I, the State charged Appellant with burglary of a habitation, alleging that Appellant had entered the victim's residence without consent and either committed or attempted to commit the felony offense of aggravated assault. TEX. PENAL CODE ANN. § 30.02 (a)(3) (West 2011). In Count II,

the State charged Appellant with the separate offense of aggravated assault with a deadly weapon, alleging that Appellant had intentionally, knowingly, or recklessly caused bodily injury to Gonzalo Gonzalez by striking him in the head and using or exhibiting a deadly weapon in the process. TEX. PENAL CODE ANN. § 22.02(a)(2) (West 2011). The indictment also included an enhancement count.

The jury charge properly tracked the language of the indictment. Neither the indictment nor the jury charge contained language concerning the use of a deadly weapon in the burglary charge. It did, however, ask the jury to determine whether Appellant had committed or attempted to commit an aggravated assault as part of the burglary. And, the jury charge also instructed the jury to find Appellant guilty of aggravated assault if it found that Appellant used or exhibited a deadly weapon.

The jury found Appellant guilty on both counts. Before proceeding to punishment, the State abandoned the aggravated assault conviction out of concern that imposing punishment for it would violate the Double Jeopardy Clause by subjecting Appellant to two punishments for the same offense. At the beginning of the punishment phase, the State's attorney rose and announced, "At this time the State is abandoning the second charge of aggravated assault with a deadly weapon due to the fact that the Defendant cannot be punished on both charges. It is double jeopardy, so we are going forward solely on the burglary of a habitation [charge]."

The jury found the enhancement allegation of a prior felony to be true, and assessed punishment on the first count at twenty-five years' imprisonment.[1]

Despite the State's abandonment of the aggravated assault charge, the judgment reflected that the jury convicted Appellant of both burglary of a habitation and aggravated assault with a deadly weapon, with a sentence of 25 years. It did not contain a deadly-weapon finding. The State later moved to modify the judgment to have the trial court enter a deadly-weapon finding. The State argued that the jury had necessarily made a finding that a deadly weapon was used in the commission of the crime by finding Appellant guilty of aggravated assault, even though the State had voluntarily abandoned that count after the jury returned the verdict. The trial court granted the motion over Appellant's objections and modified the judgment to include the following: "Finding on Special Issue: Affirmative Finding that a deadly weapon was used or exhibited during the commission of this offense was made by the Jury."

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[1] Appellant also argues that his sentence is illegal because he was convicted only of the second-degree-felony offense of burglary yet he was sentenced to twenty-five years in prison. Section 30.02(d)(2) elevates the offense of burglary of a habitation to a first-degree felony if any party to the offense entered the habitation and committed or attempted to commit a felony offense. TEX. PENAL CODE ANN. § 30.02(d)(2) (West 2010). Under the facts of this case the jury found Appellant guilty of a first degree felony offense, and the court of appeals properly reformed the judgment to reflect that. *Duran v. State*, No. 13-12-00344-CR, 2013 WL 3378327 at *10 (Tex. App.–Corpus Christi July 3, 2013) (not designated for publication). Additionally, the State alleged that Appellant had previously been convicted of the felony offense of sexual assault of a child and the jury found that enhancement allegation true. The jury assessed Appellant's punishment at twenty-five years in prison, well within the applicable punishment range. TEX. PENAL CODE ANN. § 12.32(a) (West 2010); TEX. PENAL CODE ANN. § 12.42(c)(1) (West 2010).

Direct Appeal

On appeal, Appellant first argued that the trial court had improperly included the aggravated assault conviction in the judgment because the State had abandoned the allegation prior to punishment. The State agreed that the judgment should not reflect that the jury convicted Appellant of aggravated assault. However, the court of appeals held that it was unnecessary to completely delete the aggravated assault conviction from the judgment because Appellant was, in fact, convicted of it. *Duran v. State*, No. 13-12-00344-CR, 2013 WL 3378327 at *4 (Tex. App.–Corpus Christi July 3, 2013) (not designated for publication). Instead, the court of appeals held that the judgment should be modified to reflect the State's abandonment of the aggravated assault allegation prior to punishment and affirmatively state that punishment was assessed only on Appellant's burglary conviction. *Id.*

Appellant also argued that the trial court erred in modifying the judgment to include a deadly-weapon finding because the jury verdict on the burglary of a habitation allegation did not amount to an affirmative finding that Appellant had used or exhibited a deadly weapon during the offense. The State responded that the deadly-weapon finding was appropriate because the jury had convicted Appellant of aggravated assault with a deadly weapon. According to the State, that verdict reflected an affirmative finding by the jury on the deadly-weapon issue even though

the State had voluntarily and unequivocally abandoned the entire allegation. The court of appeals held that the jury's conviction in Appellant's burglary case was sufficient to authorize the entry of a deadly-weapon finding, obviating any need to address the State's argument.[2]

The Judgment Should Not Include a Conviction for an Abandoned Allegation

The State may, with the consent of the trial court, dismiss, waive, or abandon a portion of the indictment. *Ex parte Preston*, 833 S.W.2d 515, 517 (Tex. Crim. App. 1992). However, if the State dismisses, waives, or abandons a charge after a jeopardy has attached (after a jury is impaneled and sworn in a jury trial), it is tantamount to an acquittal, as the State is barred from later litigating those allegations. *Id.*; *see also Lewis v. State*, 889 S.W.2d 403, 406 (Tex. App.–Austin 1994, pet. ref'd) (citing *Black v. State*, 158 S.W.2d 795, 796 (Tex. Crim. App. 1942)). Moreover, a defendant may not be punished for both a burglary with the commission of a felony during the burglary and the underlying felony itself. *Langs v. State*, 183 S.W.3d 680, 686 (Tex. Crim. App. 2006). And the appropriate remedy when a defendant is subjected to multiple punishments for the same conduct is to

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[2] Appellant also challenged the deadly-weapon finding based upon notice, sufficiency, and the recitation in the judgment to reflect that the jury made a deadly-weapon finding pursuant to a special issue. The court of appeals properly removed the language in the judgment reciting that the jury made a deadly-weapon finding pursuant to a special issue and rejected Appellant's claims regarding notice and sufficiency. *Duran*, slip op. at *5-6. Appellant does not take issue with the court of appeals resolution of these issues.

affirm the conviction on the most serious offense and vacate the other convictions. *Bigon v. State*, 252 S.W.3d 360, 372 (Tex. Crim. App. 2008). We agree with both the State and Appellant that the court of appeals should have vacated the aggravated-assault conviction that the State unequivocally abandoned to avoid running afoul of the constitutional prohibition against multiple punishments. We reverse the court of appeals holding in this regard and vacate Appellant's conviction for aggravated assault contained in the judgment.

When Is It Appropriate to Enter a Deadly-Weapon Finding?

The entry of a deadly weapon in a judgment not only curtails a trial court's ability to order community supervision, it also affects a defendant's eligibility for parole. Section 508.145(d) of the Texas Government Code states that "an inmate serving a sentence...for an offense for which the judgment contains an affirmative finding under Section 3g(a)(2) of [Article 42.12, Code of Criminal Procedure]" must serve a longer period, without consideration of good conduct time, before he may be released on parole. TEX. GOV'T. CODE ANN. § 508.145(d) (West 2010). For a trial court to enter a deadly-weapon finding in the judgment, the trier of fact must first make an "affirmative finding" to that effect. TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g (a)(2) (West 2010). Under the text of the statute, a trial court is authorized to enter a deadly-weapon finding in the following circumstances:

> [W]hen it is shown that a deadly weapon as defined in Section 1.07, Penal Code, was used or exhibited during the commission of a felony offense or during immediate flight therefrom, and that the defendant used or exhibited the deadly weapon or was a party to the offense and knew that a deadly weapon would be used or exhibited. On an affirmative finding under this subdivision, the trial court shall enter the finding in the judgment of the court.

TEX. CODE CRIM. PROC. ANN. art. 42.12 § 3g (a)(2) (West 2010). As we explained in *Polk v. State,* the term "affirmative finding" means the trier of fact's *express* determination that a deadly weapon or firearm was actually used or exhibited during the commission of the offense. 693 S.W.2d 391 (Tex. Crim. App. 1985). Courts do not look to the facts of the case to "imply" an affirmative deadly-weapon finding; we look to the charging instrument, the jury charge, and the jury verdict to evaluate the propriety of an entry of a deadly-weapon finding in the judgment. *Id.* at 393-96.

In *Polk*, we listed three different ways in which a court can determine that the trier of fact actually made an affirmative finding of a deadly weapon.

> (1) the indictment specifically alleged a "deadly weapon" was used (using the words "deadly weapon") and the defendant was found guilty "as charged in the indictment;"
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> (2) the indictment did not use the words "deadly weapon" but alleged use of a deadly weapon *per se* (such as a firearm); or
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> (3) the jury made an express finding of fact of use of a deadly weapon in response to submission of a special issue during the punishment stage of trial.

693 S.W.2d at 396. Notably, in *Polk*, we held that the trial court's entry of a deadly-weapon finding was not express even though the jury could have determined that the defendant had used a deadly weapon by committing an attempted murder. The State argued that the finding of guilt meant the jury necessarily made an affirmative finding of use or exhibition of a deadly weapon or firearm, but we rejected those arguments because they amounted to implied findings. *Id.* To avoid such implied findings, we stated unequivocally that a trial court could not properly enter an affirmative finding concerning the defendant's use or exhibition of a deadly weapon or firearm during the commission of the offense unless the case fit into one of the listed scenarios. *Id.* ("No longer will a verdict 'amount to' or 'necessarily imply' an affirmative finding of use or exhibition of a deadly weapon or firearm.").

Of course, we did not completely put a stopper in the inference-genie's bottle. *Polk* itself allows courts to make an inferential leap, albeit a tiny and completely logical one, to hold that the jury's verdict that a defendant is guilty "as charged in the indictment" authorizes entry of a deadly-weapon finding. Under that scenario, the trial court must still make deductive inferences ("necessary" ones to be sure, but inferences none the less) to reach the conclusion that the jury necessarily thought about, and affirmatively found, that a deadly weapon was used or exhibited even though the jury's answer in its verdict does not expressly state that it did so. By way

of contrast, no inferences are required when the trial court submits a question to the jury as a special issue in punishment: the trial court specifically asks the jury in the jury charge whether a deadly weapon was used or exhibited during the commission of the offense by the defendant or by a party to the offense, and the jury answers that question directly in a separate verdict form. And while we explained in *Polk*, that a finding must be "express," we nevertheless allowed for entry of a deadly-weapon finding in scenarios where the trier of fact does not directly express that it has determined that a deadly weapon was used or exhibited in commission of a felony offense or during immediate flight therefrom. *Polk*, 693 S.W.2d at 396. This is consistent with the plain terms of the statute itself which only refers to the need for an "affirmative" finding rather than an "express" one. TEX. CODE CRIM. PROC. ANN., art. 42.12 § 3g (a)(2) (West 2010).[3]

So, it is not surprising that, in *Lafleur v. State*, we added another circumstance where the trial court was authorized to enter a deadly-weapon finding. 106 S.W.3d 91, 92 (Tex. Crim. App. 2003). We held that a jury makes an express finding that a deadly weapon was used or exhibited when:

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

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[3] Indeed, we have noted that submitting a special issue at punishment may be the better practice, but we have never held that a purely "express" finding though a special issue at punishment is the only scenario that authorizes the trial court's entry of a deadly-weapon finding. *See e.g. Polk*, 693 S.W.2d at 394 n.3.

> 2) the jury charge's application paragraph on a lesser-included offense requires a finding from the jury beyond a reasonable doubt that the defendant committed an offense using the alleged "deadly weapon;" and
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> 3) the jury finds the defendant guilty of that lesser-included offense.

Id. at 98-99. We explained that this holding served the underlying purpose in *Polk* by ensuring that the jury actually made an affirmative deadly-weapon finding because the jury necessarily decided whether a deadly weapon was used or exhibited in light of the application paragraph. *Id.* Furthermore, this conclusion did not run afoul of *Polk* because *Polk* simply did not address a situation in which a defendant is indicted for using a deadly weapon in one offense and found guilty of a lesser-included offense also using a deadly weapon. *Id.* at 98. Any other decision, according to the Court, would exalt form over substance to no discernible jurisprudential purpose. *Id.*

In *Crumpton v. State,* we seem to have extended the degree to which courts can rely upon deductive reasoning to determine whether the jury entered an affirmative deadly-weapon finding. There, we considered the situation in which: 1) the indictment for voluntary manslaughter included a deadly-weapon allegation; 2) the jury found the defendant guilty of the lesser-included offense of criminally negligent homicide; 3) the application paragraph regarding the lesser-included offense did not include a reference to the use or exhibition of a deadly weapon; but 4) the verdict

form indicated the jury found the defendant guilty of criminally negligent homicide, "as included in the indictment." *Crumpton v. State*, 301 S.W.3d 663, 664 (Tex. Crim. App. 2009). We held that the jury had determined, as a matter of law, that a deadly weapon had been used in the commission of criminally negligent homicide because there is no logical way to commit the offense of criminally negligent homicide by act rather than omission without using a deadly weapon. *Id.* ("Having found that the defendant was guilty of homicide, the jury necessarily found that the defendant used something that in the manner of its use was capable of causing–and did cause–death.").

Arguably, however, this rationale for our holding could be viewed as dicta given that we first observed in *Crumpton* that the State had specifically alleged the use of a deadly weapon in the indictment and the jury had found the defendant guilty "as included in the indictment." *Id.* As we stated in *Crumpton*:

> The jury's verdict was a finding that the defendant used a deadly weapon. One reason is that the verdict expressly found the defendant guilty of the offense "as included in the indictment." The indictment expressly alleged that the defendant committed the offense with "a deadly weapon." The verdict's reference to the indictment therefore constituted a finding that the allegation was true.

301 S.W.3d at 664. Under a strict application of *Polk*, the affirmative finding was proper in *Crumpton* not only because it was impossible to commit the offense without using a deadly weapon, but also because it fit within the first of *Polk*'s listed

scenarios. Additionally, we have not yet relied on the deductive-reasoning aspect of *Crumpton* to require the entry of a deadly weapon in an aggravated assault case, let alone a burglary case, though some courts of appeals have relied upon it in the context of criminally negligent homicide or to decide the issue of notice. *See e.g. McCallum v. State*, 311 S.W.3d 9, 18 (Tex. App.–San Antonio 2010, no pet.) (holding entry of deadly-weapon finding was proper where jury found the defendant guilty of criminally negligent homicide); *see also Vickers v. State*, 467 S.W.3d 90, 96 (Tex. App.–Texarkana 2015, pet. ref'd.) (holding that indictment alleging that defendant had committed or attempted to commit an aggravated assault during a burglary of a habitation provided sufficient notice that the State would seek a deadly-weapon finding). Regardless of the logical force of the deductive-reasoning approach in *Crumpton*, this Court appears to have provided more than one reason for reaching its conclusion in that case. *Crumpton,* 301 S.W.3d at 664 ("Another reason is that a verdict of homicide necessarily is a finding that a deadly weapon was used.").

Did The Jury Make An Affirmative Deadly-Weapon Finding When It Found Appellant Guilty of Burglary?

With regard to the jury's verdict in Count I, we cannot say under either the formalism of *Polk* or the deductive reasoning of *Crumpton* that the jury made an affirmative deadly-weapon finding when it found Appellant guilty of burglary of a habitation. Count I of the indictment did not contain any specific deadly-weapon

language, but rather, charged Appellant with "intentionally or knowingly enter[ing] a habitation, without the effective consent of Gonzalo Gonzalez, the owner thereof, and attempt[ing] to commit or committ[ing] the felony offense of Aggravated Assault." Thus, although Appellant was found guilty "as charged in the indictment,"the indictment for Count I did not allege the use of a deadly weapon, so it would not fall within the first scenario listed in *Polk*.

Moreover, this does not satisfy the second *Polk* scenario because a DVD player is not a deadly weapon *per se*. *See* TEX. PENAL CODE ANN. § 1.07(a)(17)(A); *see also Thomas v. State*, 821 S.W.2d 616, 620 (Tex. Crim. App. 1991). To constitute a deadly weapon *per se*, an object must be "deadly by design, rather than by usage," which a DVD player is certainly not. *Id*. Additionally, although the trial court modified the judgment to include a "special issue," the jury was never asked to respond to a special issue submitted during punishment. Not only does this fail to support a deadly-weapon finding on the third *Polk* scenario, but it also reinforces the court of appeals' decision to delete the reference in the judgment to a "special issue" that the jury never considered. Finally, Appellant was not found guilty of a lesser-included offense, so the specific holding of *LaFleur* cannot be applied in this case.

Resort to deductive reasoning does not justify the entry of an affirmative finding either. The application paragraph authorized the jury to find Appellant

guilty of burglary of a habitation even if it believed that Appellant merely attempted to commit the aggravated assault. We have previously observed that there is no logical way to commit the offense of aggravated assault without using a deadly weapon. *See Landrian v. State*, 268 S.W.3d 532, 538 (Tex. Crim. App. 2008) (noting that both statutory aggravators of simple assault involve the use of a deadly weapon); *see also Blount v. State*, 257 S.W.3d 712, 714 (Tex. Crim. App. 2008) (holding that the defendant received adequate notice that there would be a deadly-weapon issue in a burglary of a habitation case because there is no way to commit aggravated assault without using a deadly weapon). But the jury charge authorized a finding of guilt without requiring the jury to decide whether Appellant had actually committed the offense of aggravated assault. *See Polk*, 693 S.W.2d at 396 (holding that affirmative deadly-weapon finding was improper where jury convicted the defendant of attempted murder and no deadly weapon was included in the indictment). Conceptually, it may be very difficult to imagine how one might attempt to commit an aggravated assault without using something that in its use or intended use was capable of causing serious bodily injury or death, but it is at least theoretically possible. *See e.g. Lawhorn v. State*, 898 S.W.2d 886, 891 (Tex. Crim. App. 1995) (explaining the concept of factual impossibility and noting various examples such as attempting to kill with poison that was not capable of producing death).

Relying upon the facts of the case to infer that the jury was clearly not dealing with an "attempt" or a "factual impossibility" situation is exactly the type of "implied finding" prohibited by *Polk* and the statute itself. *Polk*, 693 S.W.2d at 396 ("We believe the Legislature, by adding the words 'affirmative finding' . . . meant to save all of us from sinking even deeper into the quagmire of whether differing indictment/verdict/fact situations amounted to 'implied' findings or not."). Thus, we cannot agree with the court of appeals that the jury necessarily decided the deadly-weapon issue when it found Appellant guilty of burglary of a habitation.

Did the Trial Court Properly Rely Upon the Jury's Finding of Guilt in the Aggravated Assault Case After the State Unequivocally Abandoned That Count?

The State argued to the trial court and the court of appeals that the entry of a deadly-weapon finding was appropriate based upon the jury's verdict in the abandoned aggravated assault charge. Having determined that the jury's verdict on the burglary charge was sufficient by itself to justify the entry of a deadly-weapon finding, the court of appeals understandably chose not to address the State's argument regarding the jury's verdict in the aggravated assault case. However, as discussed above, the State agrees that entry of the aggravated assault conviction in the judgment is improper because the State unequivocally abandoned the jury's verdict in that case. *Preston*, 833 S.W.2d at 517. And, as discussed, above, the jury's verdict in the burglary of a habitation case did not authorize the trial

court's entry of a deadly weapon in that case. Having unequivocally abandoned the jury's verdict in the aggravated assault case without submitting a special issue instruction at punishment, the trial court had nothing upon which it could base the entry of a deadly-weapon finding. *Polk*, 693 S.W.2d at 396 (listing the scenarios where a trial court is authorized to enter a deadly-weapon finding); *see also Bennett v. State,* 235 S.W.3d 241, 243-44 (Tex. Crim. App. 2007) ("Although the court of appeals did not address the defense of property aspect of appellant's point of error, a remand is unnecessary in this case because our holding forecloses any relief on her only remaining complaint."). Consequently, we reform the judgment to delete any reference to a deadly-weapon finding in Appellant's burglary of a habitation conviction.

Conclusion

We reverse the court of appeals' holdings that it was not necessary to vacate the conviction for aggravated assault from the trial court's judgment, and that the trial court's deadly-weapon finding was authorized by the jury's verdict in Appellant's burglary case. We also hold that the trial court was not authorized to enter a deadly-weapon finding in the burglary of habitation case based upon the abandoned aggravated assault conviction. We affirm Appellant's burglary of habitation conviction, but modify the judgment to vacate the aggravated assault

conviction and delete the deadly-weapon finding in the judgment on Appellant's burglary of a habitation conviction.

Delivered: June 22, 2016

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