



COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

DALTON JAMES BENNETT, JR. A/K/A	§	
DALTON JAMES BENNETT,		No. 08-13-00138-CR
	§	
Appellant,		Appeal from the
	§	
v.		372nd District Court
	§	
THE STATE OF TEXAS,		of Tarrant County, Texas
	§	
Appellee.		(TC# 1244131D)

OPINION

Appellant Dalton James Bennett was found guilty by a jury of one count of capital murder of his wife and his sister-in-law, and received an automatic life sentence. On appeal, Appellant contends the trial court violated his right to be free from double jeopardy, his right to a unanimous verdict, and his Sixth Amendment right to confront witnesses. We conclude Appellant's rights were not violated and affirm the trial court's judgment.¹

FACTUAL BACKGROUND

Appellant separated from his wife, Sheryl Bennett, approximately six months before the killings that formed the basis of his capital murder conviction. Appellant and Sheryl had a

¹ This case was transferred from our sister court in Fort Worth, and we decide it in accordance with the precedent of that Court to the extent required by TEX. R. APP. P. 41.3.

somewhat rocky relationship. While separated, Sheryl became involved with Jose Reyes, and the two began living together in Sheryl's apartment on a part-time basis. According to friends, Appellant appeared to be upset about his wife's new relationship and believed she was "cheating" on him. Approximately two weeks before the killings, Appellant met with a mutual friend, advised her that he was upset with Sheryl because of her new relationship, and stated: "You don't know how bad I want to give her an extra hole to breathe out of."

Around 10:30 p.m. the night before the killings, Sheryl and Jose walked from her apartment to a nearby bar, along with Sheryl's brother, Johnny Todd, and Johnny's wife, Tana Todd, who lived in the apartment adjacent to Sheryl. Sheryl's brother, James Todd, remained at the apartment to babysit Sheryl's five children, as well as Johnny and Tana's three children.

Appellant arrived at the same bar to meet mutual friends. When Appellant learned that Sheryl was at the bar with Jose, he advised his friends he intended to leave because of their presence. After Appellant left the bar, he exchanged several negative text messages with both Sheryl and his sister-in-law Tana in the hours leading up to the killings.

Sheryl, Tana, Jose, and Johnny left the bar together, arriving back at Sheryl's apartment at approximately 12:30 a.m. The four of them went into Sheryl's bedroom located in the back of the apartment, and began drinking "Jager shots," while at least three of their children were in the living room playing video games.

Shortly thereafter, Appellant walked into the apartment through an unlocked door and entered Sheryl's bedroom. According to Johnny Todd, who survived the shootings, when Appellant walked in, he told Sheryl, "Here's your divorce," and proceeded to shoot Sheryl in the arm. Immediately thereafter, Appellant shot Johnny Todd in the neck, causing him to collapse to

the ground. Johnny Todd recalled that Appellant also shot his wife, Tana, at the same time, causing her to fall to the ground as well. Johnny Todd testified that he recalled hearing three or four additional shots after he and Tana were shot.

Although unable to move for several minutes, Johnny was eventually able to check on the other victims. He determined they were all dead and then went next door to his apartment to call 911. During that call, Johnny identified Appellant as the shooter to the 911 operator.

Sheryl's son, Jason Todd, who was ten years old at the time of the shootings, testified that he was in the living room of Sheryl's apartment playing a video game when he heard someone enter the apartment and walk into his mother's bedroom. Jason thereafter heard at least two gunshots and then saw Appellant leave his mother's bedroom with a gun in his hand. After entering the bedroom and seeing the three bodies on the floor, Jason ran to the apartment next door and told his uncle, James Todd, to call 911. At that same time, Jason observed his other uncle, Johnny Todd, bleeding from a hole in his neck and trying to call 911 as well.

When Arlington police officers arrived at the scene, they determined that Sheryl, Tana, and Jose had been shot, and showed no signs of life. Upon learning from witnesses that Appellant was a suspect in the killings, police officers were dispatched to Appellant's home, where they found Appellant in the garage bleeding from apparently self-inflicted wounds, unresponsive to their verbal commands. It appeared to the officers that Appellant had cut himself on the arms and neck with a box cutter that was found nearby on the garage floor. The officers also found a possible suicide note on a desk in Appellant's bedroom, in which Appellant apologized to his mother and son, saying he could not "handle the pain anymore" and that he could not "let her get away with this."

The officers found a Llama .45 caliber, semi-automatic handgun and holster under Appellant's bed, as well as a gun box with "two empty magazines" in a nearby closet. The police later tested bullets and .45 auto-caliber shell casings found at the crime scene, and concluded they were all fired from the .45 Llama gun found at Appellant's residence.

Immediately after the shootings, Appellant was transported to the hospital for treatment for his wounds, but was released shortly thereafter and taken to the jail where detectives interviewed him. After waiving his rights and voluntarily agreeing to speak to the detectives, Appellant made a full recorded confession, admitting that he had shot all four victims in Sheryl's apartment. During this interview, Appellant advised detectives that he would have shot himself after the killings, but he had no bullets left.

At trial, Dr. Lloyd White, a physician contracted with the Tarrant County Medical Examiner's Office, testified that he personally conducted an autopsy on Tana Todd's body, and concluded that she had died from a gunshot wound that went through her head and brain, exiting through the other side. Dr. White further concluded that the shot was fired just a few inches from Tana's head, causing her instantaneous death, and that Tana's death was a homicide.

Dr. White testified that he also personally performed an autopsy on Sheryl's body and concluded that Sheryl suffered three gunshot wounds to her shoulder, eye, and collarbone area, all of which went through her body. According to Dr. White, shots were fired a few inches away from Sheryl's body, but the only fatal wound was the one in her collarbone area. Dr. White concluded that Sheryl's death was a homicide.

Dr. White, however, did not perform the autopsy on Jose Reyes' body, and the doctor who performed the autopsy, Dr. Gary Sisler, had retired prior to trial and was not called as a witness.

Over Appellant’s continuing objection, Dr. White was allowed to testify that he had reviewed Dr. Sisler’s autopsy report and medical file, and on that basis had formed an opinion that the cause of Jose’s death was a homicide, resulting from a “perforating gunshot wound of the head and brain.” The jury found Appellant guilty of capital murder, expressly finding that Appellant had intentionally killed Sheryl Bennett and Tana Todd in a single criminal transaction. The trial court imposed an automatic life sentence as required by statute.

DISCUSSION

The Trial Court’s Denial of the Motion to Quash the Indictment

In his first two issues, Appellant contends that the trial court erred when it denied his motion to quash the indictment, contending that the indictment violated both his right to be free from double jeopardy and his right to a unanimous verdict.

Background

The indictment charged Appellant with a single count of capital murder, based on the theory that he had intentionally killed multiple victims in a single transaction in violation of TEX.PENAL CODE ANN. § 19.03(a)(7)(A) (West Supp. 2014).² However, the indictment contained three separate paragraphs, each setting forth an alternative theory of prosecution. The first paragraph alleged Appellant had intentionally caused the death of Sheryl Bennett and Jose Reyes in the same transaction; the second paragraph alleged Appellant had intentionally caused the death of Sheryl Bennett and Tana Todd in the same transaction; and the third paragraph alleged Appellant had intentionally caused the death of Tana Todd and Jose Reyes in the same transaction.

Appellant filed a pretrial motion to quash the indictment, contending the indictment in

² TEX.PENAL CODE ANN. § 19.03(a) provides that an individual commits the offense of capital murder if “(7) the person murders more than one person: (A) during the same criminal transaction....”

effect accused him of committing three separate capital murder offenses involving the same three victims, and that he therefore faced the possibility of being convicted of three separate capital murder charges in violation of his double jeopardy rights. Appellant also argued that the indictment improperly raised the possibility that a jury could reach a non-unanimous verdict, as some jurors could base a guilty verdict on a finding that Appellant had killed Sheryl Bennett and Jose Reyes in a single transaction; while others could base their verdict on a finding that he had killed Sheryl Bennett and Tana Todd in a single transaction; while yet others could base their verdict on a finding that he had killed Tana Todd and Jose Reyes in a single transaction.

At a pretrial hearing, another judge sitting in place of the trial court denied the motion to quash. Appellant thereafter renewed his motion at various times during the trial, but the trial court denied his motion on each occasion.

Standard of Review

The standard of review for assessing a trial court's ruling on a motion to quash turns on which judicial actor is in the best position to determine the issue in controversy. *See Guzman v. State*, 955 S.W.2d 85, 87 (Tex.Crim.App. 1997). Questions of law – such as the sufficiency of an indictment – are reviewed de novo because neither the trial court nor the reviewing court occupies an appreciably better position than the other to decide the issue. *See State v. Moff*, 154 S.W.3d 599, 601 (Tex.Crim.App. 2004); *Guzman*, 955 S.W.2d at 89; *Ahmad v. State*, 295 S.W.3d 731, 739 (Tex.App. – Fort Worth 2009, pet. ref'd) (op. on reh'g). Appellant is challenging the legal sufficiency of the indictment, and we therefore review Appellant's challenges to the indictment de novo.

Appellant's Double Jeopardy Rights were not Violated

In Issue One, Appellant contends the trial court's failure to quash the indictment violated his double jeopardy rights, as it potentially subjected Appellant to three separate convictions for capital murder when only one such conviction was permissible. In support of his argument, Appellant relies almost exclusively on *Saenz v. State*, 166 S.W.3d 270 (Tex.Crim.App. 2005). In *Saenz*, the defendant was charged with capital murder in a three-count indictment involving three murders alleged to have occurred in a single criminal transaction. Each count alleged the murder of a different victim, and each count alleged the murder of two other victims in the same criminal transaction as aggravating circumstances. The jury convicted the defendant of all three counts of capital murder, but the San Antonio Court of Appeals concluded that double jeopardy prohibited the defendant from being convicted of multiple counts of capital murder involving the same three victims. *Id.* at 271. The court of appeals therefore vacated two of the defendant's convictions and allowed only one to stand.

On the State's petition for discretionary review, the Texas Court of Criminal Appeals agreed with the appellate court, holding that the capital murder statute, TEX.PENAL CODE ANN. § 19.03(a)(7)(A), allowed only a single conviction under these circumstances. The Court explained that the Penal Code provides that a defendant may commit capital murder in several different ways, including situations in which the defendant commits a predicate murder, with the commission of one or more additional murders in a single transaction as an aggravating circumstance. The Court pointed out that when the State is prosecuting a defendant for capital murder on this basis, its prosecution necessarily rests on the theory that the defendant killed "more than one person" in a single transaction, making this the "allowable unit of prosecution[.]" *Saenz*, 166 S.W.3d at 273-74.

The Court explained that in a non-capital murder case, the murder itself is the “allowable unit of prosecution,” and a defendant may therefore be convicted of more than one count of murder when charged individually with the deaths of multiple victims. However, in capital murder cases in which the multiple murder itself is considered to be the “allowable unit of prosecution,” the defendant may not be charged or convicted of three separate counts of capital murder utilizing the same three victims for each count, and may instead only be charged and convicted of a single count of capital murder. The Court therefore upheld the court of appeals’ decision to vacate two of the defendant’s convictions and to allow only one conviction to stand. *Id.* at 274.

Appellant acknowledges that unlike the defendant in *Saenz*, he was not convicted of multiple counts of capital murder; however, he believes that simply being charged in an indictment that allowed for the possibility of multiple convictions violated his right to be free from double jeopardy. Appellant points out that in its holding in *Saenz*, the Court of Criminal Appeals expressly stated that the defendant’s double jeopardy rights had been violated when he was “charged” with three separate counts of capital murder. *Id.* Appellant believes this is the “operative” language in the opinion, and that the Court intended to hold that the double jeopardy violation occurred at the time the defendant was charged with multiple counts of capital murder, rather than at the time he was convicted. Appellant reasons that his double jeopardy rights were also violated at the time that he was charged with what he describes as a “facially unconstitutional[]” indictment, improperly accusing him of committing three separate acts of capital murder. Appellant asserts that this allegedly fundamental error in the indictment somehow “tainted” the entire proceedings, and requires us to reverse the trial court’s judgment and order a new trial. Appellant’s argument fails for several reasons.

First, unlike the defendant in *Saenz*, Appellant was not charged in a three-count indictment, and was instead charged with only a single count of capital murder. As explained in more detail below, the three paragraphs contained in the indictment alleged the alternative means by which the one count of capital murder was committed. Further, the trial court expressly instructed the jury that it could only convict Appellant of one count of capital murder as set forth in the indictment, and the jury form given to the jury allowed for only one conviction of capital murder. In contrast to *Saenz* in which the defendant was charged and convicted of three separate offenses, there was no possibility that Appellant could have been convicted of more than one count of capital murder, and in fact, he was not.

Second, we note that even though the Court in *Saenz* stated that the defendant's double jeopardy rights had been violated when he was "charged" with three separate counts of capital murder, the Court nevertheless made it clear that the double jeopardy violation did not actually occur until the defendant was *convicted* of three separate charges. As the Court in *Saenz* noted, the Fifth Amendment's "Double Jeopardy Clause protects against multiple *punishments* for the same offense." *Saenz*, 166 S.W.3d at 272 (emphasis added). It is only violated when a defendant "is *convicted* of more offenses than the legislature intended." *Id.* (emphasis added) (quoting *Ex parte Ervin*, 991 S.W.2d 804, 807 (Tex.Crim.App. 1999)); see also *Ex parte Milner*, 394 S.W.3d 502, 506 (Tex.Crim.App. 2013) ("The Double Jeopardy Clause protects criminal defendants from ... multiple punishments for the same offense.").

Further, we find it significant that the Court in *Saenz* did not find it necessary to remand the defendant's case for a new trial, despite its conclusion that the defendant had been improperly charged and convicted of three separate counts of capital murder. Instead, the Court believed that

any such error could be remedied by vacating two of the capital murder convictions, and allowing only one conviction to stand. *Saenz*, 166 S.W.3d at 274. Therefore, even if the Court in *Saenz* believed that a constitutional violation had existed at the *charging* stage of the proceedings, it clearly believed that any such violation did not completely taint the proceedings, and that the violation could be remedied by ensuring that only one conviction stood in the defendant's case.

In the present case, Appellant suffered only one conviction for capital murder, and we therefore reject Appellant's argument that his double jeopardy rights were violated.

The Jury Returned a Unanimous Verdict

In a somewhat related argument, Appellant contends in his second issue that the trial court's failure to quash the indictment violated his right to a unanimous verdict. Appellant correctly points out that a jury in a criminal case must reach a unanimous verdict. *See* TEX.CODE CRIM.PROC.ANN. art. 36.29(a) (West Supp. 2014) (not less than twelve jurors can render and return a verdict in a felony case). Most recently, the Court of Criminal Appeals addressed this issue in *Saenz v. State*, 451 S.W.3d 388 (Tex.Crim.App. 2014), when it stated: "Texas law requires a unanimous jury verdict in all criminal cases. More specifically, 'the jury must be unanimous in finding every constituent element of the charged offense in all criminal cases.'" *Id.* at 390 (quoting *Jourdan v. State*, 428 S.W.3d 86, 94 (Tex.Crim.App. 2014)).

Appellant argues that the indictment improperly raised the possibility that a jury could have reached a non-unanimous verdict, as some jurors could have based a guilty verdict on a finding that he had killed Sheryl Bennett and Jose Reyes in a single transaction; while others could have based their verdict on a finding that he had killed Sheryl Bennett and Tana Todd in a single transaction; while yet others could have based their verdict on a finding that he had killed Tana

Todd and Jose Reyes in a single transaction. Appellant contends that because of the possibility of a non-unanimous verdict, the State should not have been permitted to proceed on the alternative theories set forth in the indictment, and should have instead been required to elect only one theory of prosecution to submit to the jury.

We initially note that the State is permitted to charge a defendant with a single offense, and to use multiple paragraphs to assert alternative means of committing the crime alleged. In *Martinez v. State*, 225 S.W.3d 550, 554 (Tex.Crim.App. 2007), the Court of Criminal Appeals explained that when the State elects to charge multiple offenses in a single indictment, it is required by statute to set out each separate offense in a separate “count.” However, the State may include separate “paragraphs” within a single count, alleging different methods of committing the same offense, in accordance with TEX.CODE CRIM.PROC.ANN. art. 21.24(b).³ *Id.*; see also *Landrian v. State*, 268 S.W.3d 532, 535 (Tex.Crim.App. 2008) (State is permitted to plead alternative “manner and means” of committing the same offense).

In capital murder cases in particular, the State is permitted to charge a defendant with committing capital murder by alternative means in a single-count indictment. See *Gamboa v. State*, 296 S.W.3d 574, 582-84 (Tex.Crim.App. 2009) (State properly charged defendant with one count of capital murder in a two-paragraph indictment, alleging that the defendant caused the death of the same victim while robbing him, or alternatively, while murdering another victim during the same criminal transaction); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex.Crim.App. 1991) (alternative pleading of differing methods of committing capital murder may be charged in one indictment). In fact, in light of the Court of Criminal Appeals’ opinion in the 2005 *Saenz* case, it

³ TEX.CODE CRIM.PROC.ANN. art. 21.24(b) (West 2009) provides that: “A count may contain as many separate paragraphs charging the same offense as necessary, but no paragraph may charge more than one offense.”

appears that the State had little choice but to allege capital murder in a one-count indictment based on its theory that Appellant had intentionally killed three victims in a single criminal transaction. *Saenz*, 166 S.W.3d at 273-74 (State must avoid charging a defendant with multiple counts of capital murder involving the same victims to ensure that the defendant’s double jeopardy rights are not violated by the possibility of multiple convictions). If the State had charged Appellant with separate capital murder counts, naming the same victims in each count, it would have subjected Appellant to a possible double jeopardy violation – the very thing that concerned Appellant in his first point of error. We therefore conclude that the State properly charged Appellant in a single-count indictment, utilizing multiple paragraphs for each alternative theory in support of its prosecution.

Further, we note that when a defendant is charged with capital murder involving multiple victims killed in a single criminal transaction, a defendant’s right to a unanimous verdict is only violated if the record reflects a possibility that the jury did not agree on which victims were killed in the transaction. The 2014 *Saenz* case is illustrative of this point. In that case, the defendant had been indicted, among other things, on one count of capital murder, based on the allegation that she had intentionally killed five different victims pursuant to the same scheme or course of conduct in violation of TEX.PENAL CODE ANN. § 19.03(a)(7)(B).⁴ *Saenz*, 451 S.W.3d 388. In the indictment, the State had simply listed the names of each individual victim, and the jury charge instructed the jurors to determine if the defendant had caused the death of “more than one” of the five named individuals during the same scheme or course of conduct.

The Court held that the jury charge was defective, as it did not specify the “killing of any

⁴ TEX.PENAL CODE ANN. § 19.03(a) provides that a person commits capital murder if “(7) the person murders more than one person: . . . (B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct[.]”

one victim as the predicate murder, and the jury was not required to specify which two or more of the five alleged victims that they agreed the appellant had murdered.” *Id.* at 391. In particular, the Court noted that the language used in the jury charge “made it possible for the jurors to convict without agreeing that any one particular person was murdered by the appellant,” and there was no requirement that the jurors had to agree on which of the various victims were killed; thus, as the Court pointed out, some jurors could have agreed that the defendant “killed victims A, B, and C, while the other six agreed she killed victims D and E.” The Court therefore concluded that defendant’s right to a unanimous verdict had been violated. *Id.* at 391-92; *see also Ngo v. State*, 175 S.W.3d 738, 749 (Tex.Crim.App. 2005) (trial court erred in failing to instruct jury that it must be unanimous in deciding which one of the three disjunctively submitted offenses it found appellant committed).

In contrast, in the present case the indictment alleged three separate, alternative paragraphs naming two of the victims in each paragraph. The jury charge made it abundantly clear that the jury was required to consider each of the three paragraphs set forth in the indictment separately, and to unanimously select only one of those paragraphs as a basis for its verdict.⁵ Read in

⁵ In particular, the jury was instructed to initially consider the first paragraph of the indictment, and to determine whether it found beyond a reasonable doubt that Appellant had intentionally caused the deaths of both Sheryl Bennett and Jose Reyes during the same criminal transaction. The charge then instructed the jury that if it found the allegations set forth in the first paragraph to be true beyond a reasonable doubt, it was required to find Appellant guilty of the offense of capital murder. At that point, the jury’s task would be complete. However, the charge went on to instruct the jury that if it did not find the allegations in paragraph one to be true beyond a reasonable doubt, then it would be required to consider the allegations set forth in the second paragraph, and determine whether it found beyond a reasonable doubt that Appellant had intentionally caused the deaths of both Sheryl Bennett and Tana Todd in the same criminal transaction. If the jury answered in the affirmative, it was instructed to find Appellant guilty of capital murder, and once again, the jury’s task would be complete. If, however, the jury did not find the allegations in paragraph two to be true beyond a reasonable doubt, it was then instructed to consider the third paragraph in the indictment, and determine whether Appellant had intentionally caused the deaths of both Tana Todd and Jose Reyes in the same criminal transaction. Once again, if the jury answered in the affirmative, it was instructed to convict Appellant of capital murder, and if not, it was to instructed to consider the lesser included offenses of murder with regard to each of the three victims.

conjunction with the trial court's instruction to the jury that its verdict had to be unanimous, the jury was clearly instructed that it was required to unanimously agree on one theory of prosecution, and to expressly decide which victims it believed were intentionally killed by Appellant, before it could find Appellant guilty of capital murder.

Further, the Verdict Form also made it clear to the jury that it was required to select and agree upon only one of the State's three theories of prosecution in reaching its verdict. In particular, the Verdict Form gave the jury three alternatives for finding Appellant guilty of capital murder:

We, the Jury, find the Defendant, Dalton James Bennett, Jr., guilty of the offense of capital murder, as charged in the first paragraph of the indictment.

OR

We, the Jury, find the Defendant, Dalton James Bennett, Jr., guilty of the offense of capital murder, as charged in the second paragraph of the indictment.

OR

We, the Jury, find the Defendant, Dalton James Bennett, Jr., guilty of the offense of capital murder, as charged in the third paragraph of the indictment.

The presiding juror signed his name under the second option for finding Appellant guilty of capital murder as charged in the second paragraph of the indictment (*i.e.*, the killings of Sheryl Bennett and Tana Todd). Further, after the jury's verdict was read in court, specifically stating that the jury had found Appellant guilty of capital murder as alleged in the second paragraph of the indictment, the jury was polled, and all of the jurors affirmed that this was their unanimous decision. As such, it is clear that the jury did in fact reach a unanimous verdict finding that Appellant was guilty of capital murder in Sheryl Bennett's death, based on the aggravating circumstance that Appellant also intentionally killed Tana Todd in this same criminal transaction.

The Jury Charge did not Allow the Jury to Acquit Appellant and then Reconsider its Decision

Also in his second issue, Appellant makes one last argument criticizing the jury charge, asserting that the jury charge allowed the jury to “acquit” Appellant of murdering Sheryl Bennett when it found there was reasonable doubt as to the allegations in the first paragraph in the indictment (*i.e.*, that Appellant had intentionally killed Sheryl Bennett and Jose Reyes in the same transaction), and then improperly allowed the jury to “reconsider” its “acquittal” in Sheryl Bennett’s death, when the jury was asked to consider the allegations set forth in the second paragraph of the indictment (*i.e.*, that Appellant had intentionally killed Sheryl Bennett and Tana Todd in the same transaction). Appellant asserts that the jury charge allowed not only for “double jeopardy problems, but also the possibility of a conviction on less than a unanimous verdict.” We disagree.

As explained above, each of the three paragraphs in the indictment properly alleged an alternative theory of prosecution for capital murder, and each paragraph in effect charged a separate “allowable unit of prosecution” for capital murder, *i.e.*, the killing of more than one individual in a single criminal transaction. *See Saenz*, 451 S.W.3d 388; *Ex parte Milner*, 394 S.W.3d at 507. Thus, with respect to the first paragraph in the indictment, the jury was not asked to determine if Appellant had intentionally killed Sheryl Bennett, without any aggravating circumstances, as it would have done in a simple murder case; instead, the jury was asked if Appellant had intentionally killed *both* Sheryl Bennett and Jose Reyes in a single criminal transaction, in support of the State’s first theory of prosecution in its capital murder case.

When the jury declined to enter a verdict based on that particular theory of prosecution, it did not acquit Appellant of Sheryl Bennett’s murder; instead, it simply determined that there was

insufficient evidence to find that Appellant had intentionally killed *both* Sheryl and Jose in a single criminal transaction, and therefore insufficient evidence to support a capital murder conviction on the State's first theory of prosecution. The jury was then instructed to proceed to the State's next theory of prosecution, as set forth in paragraph two of the indictment, and determine whether it believed beyond a reasonable doubt that Appellant had intentionally caused the deaths of *both* Sheryl Bennett and Tana Todd in a single criminal transaction.

As the State's alternative theories of prosecution related solely to the capital murder charge that Appellant had murdered multiple victims in a single transaction, the jury's rejection of one of those theories did not amount to an implied or express acquittal of Appellant on the lesser included charge of simple murder as to each individual victim. We therefore find no defect in the jury's charge, and we reject Appellant's argument on this point.

Appellant's Right to Confront Witnesses

In his third issue, Appellant contends the trial court violated his Sixth Amendment right to confront witnesses by allowing the county's medical examiner, Dr. Lloyd White, to provide his opinion on the cause of Jose Reyes' death based on his review of an autopsy report that was prepared by a now-retired medical examiner, Dr. Gary Sisler, who was not present in court to testify. The jury, however, did not find that Appellant had intentionally killed Jose Reyes, and instead based its verdict solely on the deaths of Sheryl Bennett and Tana Todd. Further, we have concluded there was no error in the jury's verdict in this regard. Consequently, Appellant's third issue is irrelevant and moot. We overrule all of Appellant's issues.

Reformation of Error in the Judgment

In its brief, the State points out that the trial court's written judgment mistakenly recorded

that the jury assessed the punishment in Appellant's case. The reporter's record, however, reveals that the trial court actually imposed the life sentence on Appellant, recognizing that capital murder carries an automatic life sentence in cases in which the death penalty has been waived. *See* TEX.PENAL CODE ANN. § 12.31(a)(2) (West 2011).

The Texas Court of Criminal Appeals has held that when there is a variation between the oral pronouncement of sentence and the written memorialization of the sentence, the oral pronouncement controls. *Coffey v. State*, 979 S.W.2d 326, 328 (Tex.Crim.App. 1998). In such cases, an appellate court is authorized to reform or modify the judgment to conform to the record of the proceedings and to render an appropriate judgment, in accordance with its authority under TEX.R.APP.P. 43.2. *See French v. State*, 830 S.W.2d 607, 609 (Tex.Crim.App. 1992) (appellate court has authority to reform a judgment to include an affirmative finding to make the record speak the truth when the matter has been called to its attention by any source); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex.Crim.App. 1993) (appellate court has the power to modify incorrect judgments when the necessary data and information are available to do so).

We therefore believe it is appropriate to modify the trial court's judgment to reflect that the trial court, and not the jury, assessed the sentence in this case, in accordance with the trial court's oral pronouncement at trial.

CONCLUSION

The trial court's judgment is affirmed as modified to reflect that the trial court assessed the punishment in Appellant's case.

STEVEN L. HUGHES, Justice

June 30, 2015

Before McClure, C.J., Rodriguez, and Hughes, JJ.

(Publish)