Affirmed as Modified and Opinion Filed May 10, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00421-CR

DENNIS JAMES BLACKWELL, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1632572-P

MEMORANDUM OPINION

Before Justices Bridges, Brown, and Boatright
Opinion by Justice Bridges

Appellant Dennis James Blackwell originally pleaded not guilty to burglary of a habitation with intent to commit aggravated assault, but changed his plea to guilty during the State's case-in-chief. A jury then sentenced him to forty years' imprisonment.

In a single issue, appellant argues the judgment should be reformed to accurately reflect there was no deadly weapon finding, not "N/A." The State agrees the judgment should be reformed; however, it contends the judgment should be reformed to reflect an affirmative finding appellant used a deadly weapon, a firearm, during the commission of the offense. We agree with the State. As modified, the judgment of the trial court is affirmed.

Background

After episodes of marital discord, appellant's wife (Wife) took their children and moved in with complainant, her cousin. On October 25, 2016, appellant went to complainant's apartment to see the children and try to get Wife back. Appellant pushed his way inside, and Wife noticed a gun in his hand. When complainant threatened to call 9-1-1, appellant shot complainant in the shoulder and twice in the stomach.

The State's indictment alleged that appellant:

> did unlawfully, intentionally and knowingly enter a habitation without the effective consent of JOSHUA WALTON, the owner thereof, with the intent to commit a felony other than theft, namely, AGGRAVATED ASSAULT,
>
> And further, said Defendant did unlawfully, intentionally and knowingly enter a habitation without the effective consent of JOSHUA WALTON, the owner thereof, and did then and there commit and attempt to commit a felony other than theft, namely, AGGRAVATED ASSAULT, by intentionally, knowingly and recklessly causing bodily injury to JOSHUA WALTON, hereinafter called complainant, by SHOOTING SAID COMPLAINANT WITH A FIREARM, and said defendant did use and exhibit a deadly weapon, to-wit: a FIREARM, during the commission of the assault[.]

During a pretrial hearing, appellant rejected a twenty-year plea deal that included a deadly weapon finding. When he rejected the deal, the trial court reminded him he would "have to serve half of any sentence that you do receive" before he would be eligible for probation. The case then proceeded to trial. When the State read the indictment, including the deadly weapon allegation, appellant pleaded not guilty to the jury.

After the State presented several witnesses, appellant freely and voluntarily changed his plea to guilty. The punishment phase of trial commenced before the jury. Appellant testified and

agreed he was taking responsibility for "the charges that have been filed against [him]," and he committed the actions the State alleged. He admitted he shot complainant.

The jury charge stated appellant "stands charged by indictment with the offense of Burglary of a Habitation with intent to commit other felony" and instructed the jury to find appellant "guilty of the offense of Burglary of a Habitation with intent to commit other felony as charged in the indictment. . . ." The charge further instructed the jury:

> Under the law of this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn.

Attached were two verdict forms: one for a term of imprisonment and a second for community supervision. There were no objections to the jury charge. The jury returned the verdict finding "defendant guilty of the offense of Burglary of a Habitation with intent to commit other felony as charged in the indictment" and assessed forty years' imprisonment.

The judgment indicates appellant (1) pleaded guilty to "burglary habitation intent/felony," (2) the jury found him guilty, and (3) the jury sentenced him to "40 years institutional division, TDCJ." The parties disagree on the "Findings on Deadly Weapon," which states "N/A." Appellant argues the judgment should be modified to delete "N/A" with "NO" deadly weapon finding. The State contends the judgment should be modified to delete "N/A" with "YES, A FIREARM."

Discussion

A court has the power to modify a judgment to make the record speak the truth when it has the necessary information to do so. TEX. R. APP. P. 43.2(b). However, when asked to modify a judgment to include a deadly weapon finding, we proceed cautiously given the ramifications of such a finding. The entry of a deadly weapon finding in a judgment affects a defendant's eligibility for parole. *See Duran v. State*, 492 S.W.3d 741, 745 (Tex. Crim. App. 2016). Section

508.145(d)(2) of the government code states an inmate serving a sentence for an offense which includes an affirmative deadly weapon finding, "is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less." *See* TEX. GOV'T CODE ANN. § 508.145(d)(1)–(2) (West Supp. 2017). Because of these repercussions, it is well-settled that "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." *Duran*, 492 S.W.3d at 746; *see also Brown v. State*, No. 05-15-00857-CR, 2016 WL 7473899, at *2 (Tex. App.—Dallas Dec. 29, 2016, no pet.) (mem. op., not designated for publication).

A jury may make the required affirmative finding when it finds the defendant used or exhibited a deadly weapon during the commission of the felony offense. *Brown*, 2016 WL 7473899, at *2. When the jury makes this affirmative finding, the trial court must include the finding in the judgment entered. *Id*. However, courts do not look to the facts of the case to "imply" an affirmative deadly weapon finding but 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. *Duran*, 492 S.W.3d at 746.

In *Polk v. State*, the court of criminal appeals listed three formal ways a jury makes this affirmative finding: (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"; (2) the indictment did not use the words "deadly weapon" but alleged use of a deadly weapon per se (such as a firearm); or (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 391, 396 (Tex. Crim. App. 1985). Recently, the *Duran* court reaffirmed these requirements. *Duran*, 492 S.W.3d at 743; *see also Guthrie-Nail v. State*, 506 S.W.3d 1, 4 (Tex. Crim. App. 2015)

(acknowledging "less explicit language—such as words, in a verdict or judgment, referring to portions of the charging instrument that includes a deadly weapon allegation—can also constitute an express finding" of a deadly weapon).

Here, the charging instrument included a deadly weapon allegation. Appellant pleaded guilty to this indictment. Although the indictment was not read again prior to appellant's guilty plea, there is no indication in the record that the State abandoned the deadly weapon allegation as previously read to the jury. The jury was instructed to find appellant guilty "as charged in the indictment." There was no objection to the plea or the submission. This scenario falls within the first *Polk* category in which the indictment alleges a deadly weapon was used, and the jury finds appellant guilty "as charged in the indictment." *Polk*, 693 S.W.2d at 396; *Brown*, 2016 WL 7473899, at *5. As such, the record indicates the jury made an affirmative finding, based on its finding of guilt, that appellant used or exhibited a deadly weapon.

This Court has the power to modify a judgment to make the record speak the truth when we have the necessary information to do so. TEX. R. APP. P. 43.2(b); *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd); *Thornton v. State*, No. 05-16-00565-CR, 2017 WL 1908629, at *8 (Tex. App.—Dallas May 9, 2017, pet. ref'd) (reforming judgment to include deadly weapon finding) (mem. op., not designated for publication). Accordingly, we modify the trial court's judgment by deleting "N/A" and replacing with "YES, A FIREARM" under "Findings on Deadly Weapon[.]"

Conclusion

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

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DENNIS JAMES BLACKWELL,
Appellant

No. 05-17-00421-CR V.

THE STATE OF TEXAS, Appellee

On Appeal from the 203rd Judicial District Court, Dallas County, Texas
Trial Court Cause No. F-1632572-P.
Opinion delivered by Justice Bridges.
Justices Brown and Boatright participating.

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

Under Findings on a Deadly Weapon, we **DELETE** "N/A" and **REPLACE** with "Yes, A FIREARM.

As modified, the judgment of the trial court is **AFFIRMED**.

Judgment entered May 10, 2018