Affirmed and Opinion Filed November 3, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00485-CR

AREON TREVON MCDADE, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 195th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F-1735368-N

OPINION

Before Chief Justice Burns, Justice Pedersen, III, and Justice Evans
Opinion by Justice Pedersen, III[1]

Appellant Areon Trevon McDade pleaded guilty to a charge of murder and made a judicial confession. Appellant elected to have a jury determine his punishment. The jury heard evidence and assessed punishment at confinement for thirty years. Appellant raises five issues in this Court. He challenges the trial court's admission of four of the State's exhibits. He also contends the judgment should be reformed to correctly show that he was convicted of murder under Texas Penal Code section 19.02(b)(1). We affirm the trial court's judgment as modified.

[1] The Honorable David Bridges, Justice, participated in the submission of this case; however, he did not participate in the issuance of this opinion due to his death on July 25, 2020.

I. BACKGROUND

A. December 24, 2017

On December 24, 2017, Brett Adkins and his girlfriend, Lily Cooper, drove from Plano, Texas, to a school parking lot in Irving, Texas. Adkins intended to complete a marijuana sale, and he parked his four-door truck near the back of the school to wait for the buyers to arrive.

Appellant and Damarcus Williams walked up to the truck and began talking to Adkins about the sale. Williams, wanting a better view of the marijuana, entered the back seat of the truck.[2] Adkins, Cooper, and Williams inspected the marijuana, which was in the middle console of the truck.

Appellant, standing outside of the truck, raised a handgun and commanded Adkins and Cooper to "give it all to me." Adkins attempted to calm appellant down by talking to him. Williams, seated in the back of the truck, attempted to exit the truck, but the child-locked door would not open. Williams panicked. Appellant opened the rear truck door and pulled Williams out of the truck. During Williams's exit, Williams pulled Adkins out of the truck.

Appellant, Williams, and Adkins struggled out of the truck and fought. During the fight, Adkins tried to calm appellant and Williams down, telling them to take the weed and not to shoot him. As Cooper watched from the truck, she heard a gunshot,

[2] Appellant and Williams were tried jointly before the trial court.

and the men abruptly stopped fighting. Cooper saw Adkins was shot as he began walking back toward the driver's side of the truck. Cooper saw appellant and Williams ducked, grabbed something from the ground, and ran away.

Cooper called police and tried to stop Adkins's bleeding. Adkins was transported to the hospital where he died during surgery to repair the gunshot wound to his chest.

B. Motion in Limine and Expert Testimony

A grand jury indicted appellant on a charge of capital murder. On March 21, 2019, appellant filed a motion in limine, seeking to prevent the prosecuting attorney and witnesses from alluding to or introducing "several videos of rap songs posted on YouTube by . . . [appellant]." Appellant agreed to an open plea of guilty to the reduced charge of murder. A jury trial was conducted to consider punishment. The four-day trial began on March 22, 2019. After voir dire, the trial court denied appellant's motion in limine "being that this [was] the punishment phase of the trial."

Outside the presence of the jury, the trial court conducted a hearing on the anticipated expert testimony from Dallas Police Officer Barrett Nelson pursuant to Texas Rule of Evidence 702. *See* TEX. R. EVID. 702.[3] The trial court ruled:

> The expert, if he is going to testify, shall not go into his employment in the Gang Unit, shall not go into his gang expert qualifications.

[3] "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." TEX. R. EVID. 702; *see also* TEX. R. EVID. 403.

> He would simply testify as a police officer. He cannot mention that he -- in his opinion, these defendants are -- or he cannot mention that, in his opinion, the Glock Boy Gang is an actual criminal street gang, as well as he cannot mention that he believes, in his opinion, that the defendants are criminal street gang members.
>
> State, you are allowed to get into photographs that these defendants posted and the videos that they have posted.

The trial court further prohibited Nelson from testifying that he has "particular gang expertise."

C. Character Evidence

Both appellant and the State offered evidence of appellant's character. The State offered four rap song recordings that were posted on the internet and featured appellant, in State's Exhibits 45, 46, 47, and 48 (collectively, the "recordings"). The trial court admitted these four recordings over appellant's and Williams's objections. The State also offered copies of social media photos depicting appellant in State's Exhibits 37 through 44 and 49, and the trial court admitted these nine exhibits over appellant's objections.

The trial court published the recordings and photos to the jury. The State played exhibits 45, 46, and 48 during the evidentiary phase of punishment and played portions of the recordings during its closing. Nelson described the photos and recordings in his testimony to the jury, indicating that the photos showed appellant

and others "throwing up a universal sign for Bloods" and defining various terms used in the recordings.[4]

Although appellant chose not to testify, he called three witnesses who testified as to his good character. Appellant's school registrar testified that appellant "was a good kid up at school" and was "a good role model at [the] school." The registrar testified that she was shocked by and in disbelief of the allegations in the case. Appellant's teacher was "astounded" when learning of the murder charge. Appellant's mother testified that he "was a good boy to raise" and did not cause her trouble.

After two days of evidence—including testimony from a total of seventeen witnesses—the jury assessed appellant's punishment at thirty years. This appeal followed.

II. ISSUES RAISED ON APPEAL

Appellant raises five issues on appeal. Issues one through four contest whether the trial court abused its discretion in admitting State's Exhibits 45, 46, 47, and 48, recordings of rap songs—arguing that the recordings were substantially more prejudicial than probative. Appellant's fifth issue asks the Court to reform the judgment to reflect that the proper offense statute is Texas Penal Code Section 19.02(b)(1).

[4] Nelson testified that the photos were from Instagram and indicated that "4g.mac" posted the photos. The photos included text referring to "Glockboys." Nelson testified that "a Glock is a semi-automatic handgun."

III. STANDARD OF REVIEW

We examine a trial court's decision to admit or exclude evidence for an abuse of discretion. *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 656 (Tex. App.—Dallas 2009, no pet.); *White v. State*, No. 05-18-01247-CR, 2019 WL 3406621, at *1 (Tex. App.—Dallas July 29, 2019, no pet.) (mem. op., not designated for publication) (citing *Henley v. State*, 493 S.W.3d 77, 82–83 (Tex. Crim. App. 2016)). A trial court abuses its discretion when its decision falls outside the zone of reasonable disagreement. *Id.* "Trial courts have broad discretion in their evidentiary rulings and . . . trial courts are usually in the best position to make the call on whether certain evidence should be admitted or excluded." *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We uphold the trial court's ruling if it is reasonably supported by the evidence and is correct under any theory of law applicable to the case. *State v. Ross*, 32 S.W.3d 853, 856 (Tex. Crim. App. 2000); *White*, 2019 WL 3406621, at *1.

IV. DISCUSSION

i. Admission of Evidence During Punishment Phase

Texas Code of Criminal Procedure article 37.07 section 3(a)(1) provides in relevant part:

> *[E]vidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing*, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried . . .

TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(a)(1) (emphasis added); *see also, e.g.*, *Harper v. State*, No. 05-15-01211-CR, 2017 WL 541537, at *2 (Tex. App.—Dallas Feb. 10, 2017, no pet.) (mem. op., not designated for publication).

Appellant contends that the trial court abused its discretion in admitting the recordings into evidence during the punishment phase. Appellant argues his first four issues jointly, and we address them in the same manner. Appellant claims that the trial court should have excluded the recordings pursuant to Texas Rule of Evidence 403, which provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, or needlessly presenting cumulative evidence." TEX. R. EVID. 403.

> A Rule 403 analysis generally balances the following four factors, though they are not exclusive: (1) how probative the evidence is; (2) the potential of the evidence to impress the jury in some irrational, but nevertheless indelible way; (3) the time the proponent needs to develop the evidence; and (4) the proponent's need for the evidence.

Colone v. State, 573 S.W.3d 249, 266 (Tex. Crim. App. 2019); *see also Montgomery v. State*, 810 S.W.2d 372, 389–90 (Tex. Crim. App. 1991) (op. on reh'g). Before our Rule 403 analysis, we discuss each recording.

ii. Recordings Admitted During Punishment Phase

State's Exhibit 45 is a five-minute, twenty-three-second song recording taken from the website SoundCloud. The recording is a video, which indicates the name "GlockBoy Mac" at the top, along with the song title "Bag It Up ft Lul Marcu$."

The recording features an image of a "leafy green substance." The lyrics describe appellant packaging and selling drugs by mail; bragging about the sale of drugs; and threatening both violence and murder with firearms. The lyrics further describe sex, refer to the Bloods gang, and make general references to "my gang."

State's Exhibit 46 is a four-minute song recording taken from the website SoundCloud. This recording is a video, which indicates the name "GlockBoy Mac" at the top, along with the song title "Gang S*** (Freestyle)." The lyrics describe exchange of firearms, threats of violence and murder with firearms, stalking in combination with firearm violence, sexual encounters, selling drugs, and allegiance to the Bloods gang—specifying "not a Crip."

State's Exhibit 47 is a three-minute, four-second song recording taken from the website SoundCloud.[5] This recording is a video, which indicates the name "GlockBoy Mac" at the top, along with the song title "Bout a Jug." This video also contains the complete uniform resource locator (URL) of the SoundCloud page, which includes appellant's full name in the URL. The lyrics describe appellant's threats of violence involving beatings and firearms. The lyrics specifically mention "Glockboy four gang."

State's Exhibit 48 is a two-minute, fifty-three-second song recording taken from the website YouTube. This recording is a video that depicts both photos and

[5] The record does not indicate that State's Exhibit 47 was played for the jury.

video of appellant. The beginning of the video shows that "Mister Mac" posted the song to YouTube and that the name of the song is "Count Up" by "4g Mac." The video shows appellant making the same "gang" hand signs as seen in the social media photos, rapping, and dancing with a firearm alongside co-defendant Williams. Throughout the video, superimposed text features appellant's social media handles, his email, the phrase "GLOCKBOYGANG," and the name "GlockBoy Mac." The lyrics describe sex, selling drugs, smoking drugs, possession of firearms. The lyrics describe appellant's threats of kidnapping, murder, and violence with firearms.

iii. Analysis of Admitted Exhibits

Appellant seeks to minimize the relevance of the recordings by arguing there is "no evidence that the content of each recording was specifically related to the offense in the case at bar." However, article 37.07 section 3(a)(1) does not require evidence to be specifically related to the case at bar. *See* CRIM. PROC. art. 37.07, § 3(a)(1). In *Sims v. State*, the court of criminal appeals discussed the relevance of evidence during the punishment phase:

> The Legislature has expressly provided that "relevant" punishment evidence includes, but is not limited to, both character evidence in the form of opinion testimony as well as extraneous-offense evidence. Because there are no discrete fact issues at the punishment phase of a non-capital trial, we have ruled that the definition of "relevant," as stated in Rule 401 of the Texas Rules of Evidence, does not readily apply to Article 37.07. What is "relevant" to the punishment determination is simply that which will assist the fact finder in deciding the appropriate sentence in a particular case. When the jury assesses punishment, it must be able to tailor the sentence to the particular defendant, and relevance is simply "a question of what is helpful to the

> jury in determining the appropriate sentence for a particular defendant in a particular case."

Sims v. State, 273 S.W.3d 291, 295 (Tex. Crim. App. 2008) (internal footnotes and citations omitted); *see also Hooks v. State*, No. 05-15-00186-CR, 2016 WL 3541542, at *2 (Tex. App.—Dallas June 21, 2016, no pet.) (mem. op., not designated for publication); *Jackson v. State*, No. 05-11-00799-CR, 2012 WL 2445052, at *2 (Tex. App.—Dallas June 28, 2012, no pet.) (not designated for publication). In *Jimenez v. State*, our sister court held that an "[a]ppellant's rap lyrics were relevant evidence of his character and propensity for future violence." No. 07-13-00061-CR, 2015 WL 75025, at *3 (Tex. App.—Amarillo Jan. 6, 2015, no pet.) (mem. op., not designated for publication).

Appellant contends that the State did not present evidence to connect the recordings to appellant.[6] However, the record shows that appellant's name, contact information, and online handles—including "4g.mac" and "GlockBoy Mac"—were common between the recordings and photos. The record establishes that the song recordings were written, performed, and posted onto the internet by appellant.[7] In light of the content of the recordings, we further agree with the *Jimenez* court that

[6] Tellingly, appellant did not object to the authenticity of the photos or recordings. Appellant did not object to the veracity of Nelson's descriptions and opinion on the content of the photos or recordings. Appellant's motion in limine included no objection to authenticity of the recordings.

[7] We further note that in appellant's motion in limine, appellant specifically conceded that "Mr. McDade certainly has a First Amendment right to express himself through music and rap. Using *his rap lyrics* against him would violate this right as well and unconstitutionally chill legitimate artistic expression." (emphasis added).

the song recordings were relevant evidence of appellant's character and purported opinion regarding violence—therefore relevant to punishment. *See Jimenez*, 2015 WL 75025, at *3.

We next determine whether the probative value of the recordings is substantially outweighed by the danger of unfair prejudice. Rule 403 favors the admission of relevant evidence and carries a presumption that relevant evidence will be more probative than prejudicial. TEX. R. EVID. 403; *see also Lara v. State*, No. 05-17-00467-CR, 2018 WL 3434547, at *8 (Tex. App.—Dallas July 17, 2018, pet. ref'd) (mem. op.) (citing *Young v. State*, 283 S.W.3d 854, 876 (Tex. Crim. App. 2009)). The term "unfair prejudice" refers to a tendency to suggest a decision on an improper basis such as an emotional one. *Garcia v. State*, No. 05-19-01165-CR, 2020 WL 4381770, at *4 (Tex. App.—Dallas July 31, 2020, no pet. h.) (mem. op., not designated for publication) (citing *Green v. State*, No. 05-14–01264-CR, 2015 WL 6690216, at *5 (Tex. App.—Dallas November 3, 2015, no pet.) (mem. op., not designated for publication)). However, it is only where a clear disparity exists between the degree of unfair prejudice of the offered evidence and its probative value that Rule 403 is applicable. *Id.*

1) Probative Value

"The first factor looks to the evidence's probativeness or how compellingly the evidence serves to make a fact of consequence more or less probable." *State v. Mechler*, 153 S.W.3d 435, 440 (Tex. Crim. App. 2005). Here, the recordings feature

appellant rapping his own lyrics. In addition to threats of violence and murder, the recordings include evidence of appellant's referring to involvement in gang activity, sale of drugs, and use of drugs.[8] Thus, the recordings are evidence of appellant's character—specifically his attitude towards violence and lawbreaking. The recordings further rebut the testimony from three live witnesses who testified as to their firsthand experiences of appellant's good character. As evidence of appellant's character is relevant to sentencing, this first factor under our Rule 403 analysis weighs in favor of admissibility. *See* CRIM. PROC. art. 37.07, § 3(a)(1).

2) The Ability to Impress Jury in Some Irrational Yet Indelible Way

Appellant contends that the recordings had great potential to lead the jury to decide punishment on the wrong basis—impressing the jury in some irrational, indelible way. Appellant specifically argues that the gang references in the recordings were introduced without sufficient support by expert testimony. There is no requirement that evidence admitted during the punishment phase be supported by expert testimony. *See generally* CRIM. PROC. art. 37.07, § 3(a)(1). There is no direct evidence in the record that appellant was an active member of a gang.[9] However, the

[8] For context, we include a small selection of lyrics from the recordings as follows: (i) "I am a gang [expletive]"; (ii) "all of my [expletive] gonna shoot. . . . I empty the clip at your crew"; (iii) "play with me and [expletive] gonna come and there'll be a man down . . . you gon' get the [expletive] beat out you"; (iv) "come catch these hands they [are] like a lethal weapon"; (v) "unplug you [expletive] like a [expletive] aux cord"; (vi) "find out where you laying and pull up [like] a glock storm"; (vii) "if a [expletive] run up on [this] I'm gonna shoot"; (viii) "I'm trying [to] trap"; (ix) "had a problem let it be known, 100 rounds I don't gotta reload."

[9] We have previously held that the probative value of evidence showing gang affiliation may outweigh concerns of unfair prejudice. *Green*, 2015 WL 6690216, at *5.

social media photos and recordings suggest an affiliation with the Bloods gang, and the recordings refer to gang activity. "As a general rule, evidence of a defendant's gang affiliation and the violent activities of that gang are relevant and admissible at the punishment phase to show the defendant's character." *Lara*, 2018 WL 3434547, at *8; *see also Beham v. State*, 559 S.W.3d 474, 484 (Tex. Crim. App. 2018) ("[E]vidence that a person portrays himself as a member of a criminal association may, in some cases, be relevant to the person's character in sentencing even if the State cannot show that he is actually a member of any such association.").

Given that the contested exhibits are rap songs, the jury could have believed that the purpose of these songs was to gain attention and provide entertainment as a rapper. For example, State's Exhibit 48 advertises appellant's social media handles and email, which the jury could have believed were featured to increase appellant's following as an entertainer. Officer Nelson testified to the jury that people use SoundCloud to post "just a lot of songs that people produce and put out so they can get—get noticed." During co-defendant Williams's closing to the jury, his attorney further contextualized the recordings:

> We live in a day and age when anybody with a computer can be a rock star. Back in the old days, it used to be the hairbrush in front of the bathroom mirror, and that was as far as it went.
>
> Now, anybody can be an aspiring rock star with a little bit of software and post it out on the Internet to be able to sell it, and that is a popular thing to do with young kids. There are a lot of aspiring rappers out there. If they post their stuff on social media, somebody is going to see it and say, you are the next big thing.

> It doesn't make what they sing about true. Nobody thinks for a minute that Bob Marley shot the sheriff or that Freddy Mercury really killed a man. It's art. People sing about that kind of thing. It doesn't make it true. It doesn't make it part of your character just because they are aspiring rap stars, and they think that's the thing to do.

Appellant's attorney expanded on that sentiment in his closing to the jury:

> You know, Willie Nelson sang -- wrote a song -- or Johnny Cash wrote a song, I shot a man in Reno just to watch him die. Willie Nelson was part of a band called the Highwaymen. Those are robbers.
>
> Ice-T -- and this is another facet of this case. Ice-T was a true gang member. Okay? But look what he's doing today. He is a member of society making movies and a good citizen. So[,] if you-all do think these guys are no good, you know, then think about, well, Ice-T, when he was young, he was in South Central, I think, in a gang. And look what he became. So consider that in your verdict . . .

Although the recordings describe appellant's professed attitude towards lawbreaking and violence, given the context in which they were presented to the jury, the recordings are not so inflammatory as to tempt the jury into assessing punishment based solely on them in lieu of the appellant's guilty plea and the remaining evidence before the jury.[10] We conclude that the recordings did not tend to impress the jury in an irrational, indelible way. This second factor under our Rule 403 analysis weighs in favor of admissibility.

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[10] The Court of Criminal Appeals has addressed this factor in the context of guilt.

> Rule 403 does not exclude all prejudicial evidence. It focuses only on the danger of "unfair" prejudice. "Unfair prejudice" refers only to relevant evidence's tendency to tempt the jury into finding guilt on grounds apart from proof of the offense charged.

Mechler, 153 S.W.3d at 440 (footnotes omitted).

3) Time Needed to Develop the Evidence

The record shows that the total playtime of the songs during the evidentiary part of the punishment phase was twelve minutes and eighteen seconds. Only one witness—Nelson—testified about the song recordings. During the two days of evidence presented to the jury, a total of seventeen witnesses testified. Compared to the State's other evidence, little time was taken to admit the song recordings. In the context of the entire trial and the little time taken to address this evidence, we conclude this third factor under our Rule 403 analysis weighs in favor of admissibility.

4) The Proponent's Need for the Evidence

To determine whether the proponent had a substantial need for the evidence, we consider (1) whether the proponent had other available evidence to establish the fact of consequence that the evidence was relevant to show; (2) if so, how strong that other evidence was; and (3) whether the fact of consequence was related to a disputed issue. *Bentley v. State*, No. 05-11-01441-CR, 2013 WL 1701920, at *5 (Tex. App.—Dallas Apr. 19, 2013, no pet.) (mem. op., not designated for publication) (citing *Erazo v. State*, 144 S.W.3d 487, 495–96 (Tex. Crim. App. 2004)). The State argues that the exhibits were evidence of appellant's character and probative as to the issue of punishment. The State further argues that the song recordings were necessary evidence because, although appellant pleaded guilty, the

jury needed a complete view of appellant's character so it could properly weigh all the evidence and assess an appropriate punishment.

While Nelson described the social media photos as containing evidence of appellant's making a gang sign, the photos are not as strong as the recordings, which contain more tangible evidence of appellant's rapping about affiliation with the Bloods and "[his] gang."[11] Given our conclusions that (1) the recordings are evidence of appellant's character and (2) appellant's character is disputed and consequential to punishment, we agree with the State that the recordings were evidence needed to address appellant's character adequately during the punishment phase. This fourth factor under our Rule 403 analysis weighs in favor of admissibility.

In light of our review, we cannot say there is a "clear disparity" between the danger of unfair prejudice posed by the recordings and its probative value. *See Hammer v. State*, 296 S.W.3d 555, 568 (Tex. Crim. App. 2009). We conclude that the trial court's admission of State's Exhibits 45, 46, 47, and 48 was not outside the zone of reasonable disagreement. The trial court did not abuse its discretion in admitting the recordings. We overrule appellant's first four issues.

[11] "Evidence of gang membership is admissible as character evidence at punishment under Rule 404(c) and Article 37.07 § (3)(a)." *Anderson v. State*, 901 S.W.2d 946, 952 (Tex. Crim. App. 1995).

V. REFORM OF JUDGMENT

We have the power to correct and reform the judgment of the court below to make the record speak the truth when we have the necessary data and information to do so, or to make any appropriate order as the law and the nature of the case may require. *Asberry v. State*, 813 S.W.2d 526, 529 (Tex. App.—Dallas 1991, pet. ref'd) (en banc); *see also* TEX. R. APP. P. 43.2(b). Should a judgment and sentence improperly reflect the findings of the trial court, "the proper remedy is the reformation of the judgment." *Asberry*, 813 S.W.2d at 529 (citing *Aguirre v. State*, 732 S.W.2d 320, 327 (Tex. Crim. App. [Panel Op.] 1982)).

Both appellant and the State acknowledge that the trial court's judgment erroneously identifies the statute under which appellant was convicted as Texas Penal Code section 19.02(c).[12] Appellant pleaded guilty to murder under Penal Code section 19.02(b)(1). PENAL § 19.02(b)(1) ("A person commits an offense if he . . . intentionally or knowingly causes the death of an individual[.]"). Accordingly, we sustain appellant's fifth issue. We modify the judgment to reflect the following: "Statute for Offense: 19.02(b)(1) Penal Code."

[12] Texas Penal Code section 19.02(c) shows the degree of a murder offense, not the elements of the offense. *See* PENAL § 19.02(c) ("Except as provided by Subsection (d), an offense under this section is a felony of the first degree.").

VI. CONCLUSION

As modified, the judgment of the trial court is affirmed.

/Bill Pedersen, III//
BILL PEDERSEN, III
JUSTICE

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TEX. R. APP. P. 47

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

AREON TREVON MCDADE, Appellant	On Appeal from the 195th Judicial District Court, Dallas County, Texas Trial Court Cause No. F-1735368-N.
No. 05-19-00485-CR V.	Opinion delivered by Justice Pedersen, III. Chief Justice Burns and
THE STATE OF TEXAS, Appellee	Justice Evans participating.

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

"Statute for Offense: 19.02(b)(1) Penal Code."

As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 3rd day of November, 2020.