Affirmed and Memorandum Opinion filed June 30, 2009.

In The

Fourteenth Court of Appeals

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NO. 14-08-00476-CR

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JUSTIN GLEN McTIER, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 1126387

M E M O R A N D U M O P I N I O N

A jury found appellant, Justin Glen McTier, guilty of murder and assessed punishment at imprisonment for life in the Texas Department of Criminal Justice, Institutional Division. On appeal, appellant argues that the trial court erred by entering an affirmative deadly weapon finding. Because we find no reversible error, we affirm.

BACKGROUND

On July 14, 2007, appellant and another person, Brandon Butler, shot and killed the complainant, Melissa Flores. Appellant was indicted for murder and, after pleading "not guilty," was tried before a jury. The charge authorized the jury to convict appellant either as a principal or as a party to the offense. The jury found appellant "guilty of murder, as charged in the indictment."[1] The jury sentenced appellant to life imprisonment and the trial court made an affirmative finding that a deadly weapon was used during commission of the offense. Appellant now appeals.

ANALYSIS

In the sole issue presented on appeal, appellant asks us to reform the trial court's judgment to delete the affirmative finding that a deadly weapon was used during the commission of the offense. He argues that the trial court was not authorized to enter the affirmative finding in the judgment because the jury did not make an express deadly-weapon finding that appellant either used a deadly weapon or knew that a weapon would be used in the commission of the offense. In response, the State contends the jury *necessarily* made an express deadly weapon finding inasmuch as use of a deadly weapon was included in the

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[1] The indictment alleged as follows:

> The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, JUSTIN GLEN MCTIER, hereafter styled the Defendant, heretofore on or about JULY 14, 2007, did then and there unlawfully, intentionally and knowingly cause the death of MELISSA FLORES, hereinafter called the Complainant, by SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY A FIREARM.
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> It is further presented that in Harris County, Texas, JUSTIN GLEN MCTIER, hereinafter styled the Defendant, heretofore on or about JULY 14, 2007, did then and there unlawfully intend to cause serious bodily injury to MELISSA FLORES, hereinafter called the Complainant, and did cause the death of the Complainant by intentionally and knowingly committing an act clearly dangerous to human life, namely BY SHOOTING THE COMPLAINANT WITH A DEADLY WEAPON, NAMELY A FIREARM.

indictment as an element of the offense and the jury found appellant "guilty of murder, as charged in the indictment."

Appellant's argument relies upon *Travelstead v. State*, in which the Court of Criminal Appeals held that there must be a specific finding by the trier of fact that the defendant personally used or exhibited a weapon if the defendant is charged as a party. 693 S.W.2d 400, 402 (Tex. Crim. App. 1985). However, in 1991, the legislature effectively overruled *Travelstead* when it amended Article 42.12 to provide for an affirmative finding of a deadly weapon if "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." Act of May 25, 1991, 72nd Leg., R.S., ch. 541, 1991 Tex. Gen. Laws 1876 (current version at Tex. Code Crim. Proc art. 42.12 § 3g(a)(2) (Vernon Supp. 2008)) (emphasis added); *see Sarmiento v. State*, 93 S.W.3d 566, 568 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd) (en banc). A trial court may enter a deadly-weapon finding if the jury, by its verdict, necessarily made a factual conclusion to support the finding. *See Sarmiento*, 93 S.W.3d at 569.

In *Sarmiento*, a jury convicted the defendant of aggravated robbery. *See id*. at 567. The jury did not make an affirmative finding that appellant used a weapon or knew a weapon would be used. *Id*. However, because the use of a deadly weapon was an element of the offense charged, the court held that the State carried its burden of proving the defendant knew a weapon would be used or exhibited in the commission of the offense. *Id*. at 570. Thus, the jury necessarily made a *de facto* finding, because the indictment specifically alleged that the use or exhibition of a deadly weapon was an element of the offense and the jury found the defendant "guilty as charged in the indictment." *Id*. at 569.

Here, the indictment charged appellant with murder and specifically alleged the use of a deadly weapon. Therefore, the jury could not have convicted appellant of murder, even as a party, unless it found his participation in the offense was accompanied by the intent to promote or assist the commission of the offense. *See* Tex. Penal Code Ann. § 7.02(a)(2)

(Vernon 2003). Because use of a deadly weapon was an element of the offense, before the jury could have convicted appellant, it also must have believed beyond a reasonable doubt that he knew that a deadly weapon would be used in the commission of the offense. *See Sarmiento*, 93 S.W.3d at 570. Therefore, by its verdict, the jury necessarily made a factual finding to support the entry of an affirmative finding of the use of a deadly weapon in the judgment. *See id*. We overrule the sole issue presented on appeal.

CONCLUSION

Finding no error in the appellate record, we affirm.

/s/ Kent C. Sullivan
Justice

Panel consists of Justices Yates, Guzman, and Sullivan.

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