**Affirmed and Memorandum Opinion filed August 22, 2017.**


**In The**

# Fourteenth Court of Appeals

**NO. 14-16-00272-CR**

**LEAH A. MATHENA, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

**On Appeal from the 174th District Court**
**Harris County, Texas**
**Trial Court Cause No. 1441400**

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

Appellant Leah A. Mathena appeals her conviction for aggravated assault with a deadly weapon. *See* Tex. Penal Code § 22.02(a) (West 2015). Appellant presents two issues: (1) the trial court abused its discretion by excluding evidence, namely complainant's prior convictions for trespass and terroristic threat, and how many alcoholic drinks he consumed the night of the offense; and (2) she was denied her right to a fair trial when the trial court impermissibly commented on the weight of

the evidence. Appellant requests a new trial. We affirm.

## BACKGROUND

This offense occurred at a taco stand located on Jones Road in Harris County, Texas. Complainant Irving Anzora was visiting the taco stand at 5:00 a.m. on a Sunday morning in September 2014. Appellant and a group of her friends were fifteen to twenty feet away from complainant at the taco stand. This group included appellant's boyfriend David Nonmacher, her boyfriend's brother Timothy Nonmacher, and her best friend Whitney Hodnett. William Carillo, a taco stand employee, was also present.

Appellant and her friends arrived in two cars and were socializing near complainant's car, which was parked in the parking lot adjacent to the taco stand. They were intoxicated. After hearing appellant and her friends arguing loudly, complainant became concerned that they were going to back one of their cars into his. Complainant then approached the group.

Complainant told the group which car was his and requested that they not strike it. He testified that the group took offense to his request. Complainant returned to the taco stand to wait for his food. Meanwhile, Hodnett struck complainant's parked car. Complainant confronted Hodnett and the group started "talking crazy" to him. Complainant scuffled and fought with the Nonmacher brothers. According to complainant and Carillo, the brothers were the first aggressors.

During the fight, complainant and Carillo saw appellant brandishing a knife. Appellant threatened to kill him. Appellant moved so that she was always standing behind complainant. At this point, complainant withdrew from the melee but the Nonmacher brothers proceeded to "come at" him. Appellant subsequently stabbed complainant in his back shoulder. Complainant suffered a collapsed lung as a result

of the stabbing.

Carillo placed himself between complainant and appellant to shield complainant. Appellant asked Carillo to move out of her way. According to Carillo, appellant was unapologetic, even pleased, about having stabbed complainant. Carillo called the police. During this call, members of the group threw complainant to the ground and continued to beat him. As sirens approached, the group attempted to flee by car, but Carillo prevented them. The group then fled on foot and complainant drove himself to the hospital. A lab report showed complainant had a blood-alcohol concentration of .20. The police apprehended the group a mile away from the taco stand and recovered the knife.

At the guilt/innocence phase of trial, the defense's theory was that complainant was the first aggressor and appellant used reasonable force to defend herself and her group of friends. The defense elicited testimony from appellant and her group of friends indicating that complainant was the aggressor in each of their encounters. Complainant testified that he consumed alcohol before arriving at the taco stand. The defense sought to ask how many alcoholic drinks complainant had consumed. The State objected on grounds that it was irrelevant and the trial court sustained the objection.

The defense also sought to question complainant about his prior convictions for trespassing and terroristic threat because, on direct examination, the State asked "So, what do you do to get away from this situation?" Complainant responded:

> [W]hen I [saw] the knife, I was like: All right. . . . I lost, I'm going to take this loss, . . . . the girl was coming at me. I'm like: Look, you know what**, I don't hit women, I don't want to go to jail for hitting a woman.** You know, I'm good. That's it. I'm backing away.

(emphasis added). The State objected to the defense's request to question complainant about his prior convictions, and the trial court excluded the testimony.

Later, and outside the presence of the jury, the defense questioned complainant. Complainant testified that, in 2011, he pleaded guilty to charges of trespass and terroristic threat. When questioned about the specifics of the offenses, complainant stated that he went to his then-girlfriend's house and exchanged words with her, but never threatened her. In making his offer of proof, the defense stated that the prior convictions would have been used to show that appellant is the "kind of person who is violent, who has a history of violence. And I would have also argued to the jury that because he denied it on the stand, we would have drawn a connection to his reluctance to be honest with the Court about his—about other things. So, we would have used it to impeach his credibility."

The jury found appellant guilty as charged in the indictment, which alleged a felony assault for stabbing complainant with a deadly weapon, namely a knife. Appellant was sentenced to ten years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant filed a timely notice of appeal.

## ANALYSIS

### I. Exclusion of evidence

In her first issue, appellant contends that the trial court abused its discretion by excluding impeachment evidence, specifically, complainant's prior convictions for trespass and terroristic threat. Appellant asserts that complainant's testimony "opened the door" to this evidence because he created a "misimpression that [complainant] was not the kind of person who would be violent toward women." Appellant next asserts that the trial court erred in sustaining the State's relevance objection and limiting cross-examination on how many drinks complainant consumed the night of the offense. Appellant argues that such evidence was necessary because the case hinged on credibility and the jury needed the information

to make inferences about complainant's ability to recall events. Finally, appellant asserts that the cumulative effect of the two errors violated her constitutional right to present a defense.

### A. Standard of review

We review a trial court's ruling to exclude evidence for an abuse of discretion. *See Winegarner v. State*, 235 S.W.3d 787, 790 (Tex. Crim. App. 2007). The ruling must be upheld as long as it falls within the zone of reasonable disagreement and is correct under any theory of law applicable to the case. *See id*. This is so because trial courts are usually in the best position to determine whether certain evidence should be admitted or excluded. *Id.*

When error is non-constitutional, we disregard the error unless a substantial right has been affected. *See* Tex. R. App. P. 44.2(a),(b). Substantial rights are not affected if, after examining the record as whole, we have "fair assurance that the error did not influence the jury, or had but a slight effect." *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *see Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002). In assessing harm, we consider the entire record. *Motilla*, 78 S.W.3d at 355. This includes "any testimony or physical evidence admitted for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and how it might be considered in connection with other evidence in the case. The reviewing court may also consider the State's theory and any defensive theories, closing arguments, and even voir dire, if applicable." *Id*. at 356.

### B. The trial court did not abuse its discretion in excluding complainant's prior convictions.

Prior criminal convictions are admissible under rule 609(a) to attack a witness's character for truthfulness only if: "(1) the crime was a felony or involved

moral turpitude, regardless of punishment; (2) the probative value of the evidence outweighs its prejudicial effect to a party; and (3) it is elicited from the witness or established by public record." Tex. R. Evid. 609(a).

An exception to this rule applies "when a witness makes statements concerning his past conduct that suggests he has never been arrested, charged, or convicted of any offense." *Delk v. State*, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). "Where the witness creates a false impression of law abiding behavior, he 'opens the door' on his otherwise irrelevant past criminal history and opposing counsel may expose the falsehood." *Id*. Courts construe the false impression exception narrowly. *See James v. State*, 102 S.W.3d 162, 181 (Tex. App.—Fort Worth 2003, pet. ref'd); *Lopez v. State*, 990 S.W.2d 770, 777 (Tex. App.—Austin 1999, no pet.). In order to open the door to use of prior crimes for impeachment, the witness must do more than simply imply that he abides by the law; he must in some way convey the impression that he has never committed a crime. *Theus v. State*, 845 S.W.2d 874, 879 (Tex. Crim. App. 1992); *compare Trippell v. State*, 535 S.W.2d 178, 180–81 (Tex. Crim. App. 1976) (witness's statement that he had "never" been convicted and was aiding police investigation "simply" to help community created false impression of being a law-abiding citizen, opening door to cross-examination of witness's prior convictions), *and Grant v. State*, 247 S.W.3d 360, 368–69 (Tex. App.—Austin 2008, pet. ref'd) (holding that statements made in support of defendant's self-defense theory that "I've never hit a man like that," and, in reference to the injuries inflicted upon victim, "I'll have to live knowing that I done that to somebody, because I've never done that to anybody," "amounted to a specific denial of having ever committed assault, the same offense for which he was being tried."), *with Lewis v. State*, 933 S.W.2d 172, 179 (Tex. App.—Corpus Christi 1996, pet. ref'd) (holding declaration, by DWI defendant, that he "will not" drink and drive

"does not amount to an assertion, or even an implication, that he never *had* drunk and drove"). In determining whether this false-impression exception applies, reviewing courts consider the witness's statement in relation to the question asked, examine how broadly the question asked could be interpreted, and analyze the relationship between the question asked and the major substantive issues in the trial. *Delk*, 855 S.W.2d at 704–05.

We first consider complainant's response to the question asked. *See id.* Before complainant's statement at issue, the State elicited testimony from complainant about the circumstances that weighed against his ability to defend himself. For instance, he saw appellant holding a knife, he was outnumbered, and he suffered from a nerve injury that affected his balance. Then the prosecutor asked, "[W]hat do you do to get away from this situation?" Complainant indicated that he tried to avoid the fight: "I'm like: Look, you know what, I don't hit women, I don't want to go to jail for hitting a woman. You know, I'm good. That's it. I'm backing away." In this context, complainant's statement was not so broad that it implied to the jury that he had no criminal history. *See id.*

Next, the question was not likely to be interpreted so broadly as to elicit complainant's criminal history or frame his response as to imply that complainant is law-abiding. Given the defensive theory, the ultimate issue of whether appellant acted in self-defense, and the preceding questions, the question at issue could be viewed as an inquiry into whether complainant actively withdrew from the fight.

Further, we reject appellant's argument that the statement at issue created a "misimpression that [complainant] was not the kind of person who would be violent toward women." *See James*, 102 S.W.3d at 181 (observing that courts construe the false-impression exception narrowly). Complainant stated that he "does not hit women." He has not previously been convicted of assault, which is an offense that

may involve physical contact, or in his words, "hit[ting]." *See* Tex. Penal Code § 22.01 (West 2015) (Assault).[1] Although complainant was convicted of terroristic threat in 2011,[2] his assertion that he does not hit women did not create a false impression that he has never been convicted of terroristic threat.

Therefore, we cannot say that the trial court abused its discretion in excluding complainant's prior convictions because it could have reasonably concluded that complainant did not "open the door," for impeachment purposes, to his past criminal history. We overrule appellant's first sub-issue.

**C. Limitation on cross-examination was harmless.**

Appellant next argues that the trial court erred in sustaining the State's relevance objection to the defense's inquiry into the number of alcoholic drinks complainant consumed the night of the offense. Assuming the trial court abused its discretion, the error was harmless.

Appellant agrees that the harm analysis under rule 44.2(b) is applicable here. *See* Tex. R. App. P. 44.2(b) (providing that any other error that is not a constitutional error and does not affect substantial rights must be disregarded). Appellant contends that this case turned on a "credibility battle," and therefore the absence of evidence about the number of drinks complainant consumed the night of the offense was influential on the jury's verdict. We disagree. Had the jury heard evidence on the number of beverages complainant consumed, such evidence would have been only

[1] A person commits an assault if the person: "(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; (2) intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative." Tex. Penal Code § 22.01.

[2] A person commits the offense of terroristic threat if "he threatens to commit any offense involving violence to any person or property with intent to . . . place any person in fear of imminent serious bodily injury." *See* Tex. Penal Code § 22.07 (West 2015).

slightly influential, at best, given the evidence supporting the conviction and other evidence about complainant's alcohol consumption.

The jury heard evidence that, on the night of the offense, complainant was intoxicated and that his blood-alcohol concentration was .20. With regard to the overall evidence, both Carillo and complainant testified that appellant stabbed complainant, not as an act of self-defense, but as an aggressor. While Carillo was an impartial witness, the competing version of the night's events came from appellant and her friends. Further, there was evidence indicating a consciousness of guilt. Carillo testified that when sirens approached, the group fled. Corporal Amayo observed the group fleeing from the scene on foot less than a mile away from the taco stand. Considering the entire record, any error limiting cross-examination that sought to inquire about the number of alcoholic drinks complainant consumed was harmless. *See Motilla*, 78 S.W.3d at 355, 360. We overrule appellant's second sub-issue.

### D. No cumulative error

Appellant asserts that the combined effect of the trial court's erroneous exclusions of evidence infringed on her constitutional right to present a defense. However, because we held that the trial court did not abuse its discretion in excluding complainant's prior convictions for trespass and terroristic threat, we assumed that only one error occurred. Appellant has not argued that any sole error merits a constitutional harm analysis. Accordingly, we overrule appellant's third sub-issue.

## II. Trial court's comments

In her second issue, appellant contends that the trial judge improperly commented on the weight of the evidence, and committed fundamental error, by: (1) telling defense counsel to "make an objection, not an explanation" during a ruling; (2) telling defense counsel to "wait for a ruling" before sustaining the State's

objection; (3) yelling at defense counsel during a ruling; (4) telling defense counsel during the State's closing argument that counsel did not understand that they were in closing argument; (5) nodding his head and mouthing "yes" during the State's closing argument; (6) yelling at defense counsel, during the punishment phase, to "Sit down. You've been coming up here all this time and have said nothing. Now, come on." Appellant further contends that these comments influenced the jury and deprived her of her right to a fair trial.

**A. Applicable law**

"In ruling upon the admissibility of evidence, the judge shall not discuss or comment upon the weight of the same or its bearing in the case, but shall simply decide whether or not it is admissible; nor shall he, at any stage of the proceeding previous to the return of the verdict, make any remark calculated to convey to the jury his opinion of the case." Tex. Code Crim. Proc. Ann. art. 38.05 (West 2015). "The trial court improperly comments on the weight of the evidence if it makes a statement that implies approval of the State's argument, indicates disbelief in the defense's position, or diminishes the credibility of the defense's approach to the case." *In re Commitment of Wirtz*, 451 S.W.3d 462, 470 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (quoting *Simon v. State*, 203 S.W.3d 581, 590 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).

To preserve an issue for appellate review, a party must present to the trial court a timely request, objection, or motion stating the specific grounds for the ruling desired. Tex. R. App. P. 33.1(a). Even constitutional errors may be waived by failure to timely complain in the trial court. *See Broxton v. State*, 909 S.W.2d 912, 918 (Tex. Crim. App. 1995). We may, however, take notice of a fundamental error even if the claim of error was not properly preserved. *See* Tex. R. Evid. 103(d) ("In criminal cases, a court may take notice of a fundamental error affecting a substantial right,

even if the claim of error was not properly preserved.").

The Court of Criminal Appeals has held that only certain rights are so fundamental as to not require preservation. *See Marin v. State*, 851 S.W.2d 275, 278–80 (Tex. Crim. App. 1993), *overruled on other grounds*, *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997) (placing rights into three separate categories: absolute, not forfeitable, and forfeitable). In *Blue v. State*, the Court of Criminal Appeals held that a trial judge's comments "which tainted [the defendant's] presumption of innocence in front of the venire, were fundamental error of constitutional dimension and required no objection." 41 S.W.3d 129, 132 (Tex. Crim. App. 2000). However, *Blue* was a plurality opinion and is not binding precedent. *Unkart v. State*, 400 S.W.3d 94, 99 (Tex. Crim. App. 2013); *Jasper v. State*, 61 S.W.3d 413, 421 (Tex. Crim. App. 2001). Accordingly, as our sister court noted, "It is an unresolved issue whether and when a trial court's comments constitute fundamental constitutional due process error that may be reviewed in the absence of a proper objection." *McLean v. State*, 312 S.W.3d 912, 916 (Tex. App.—Houston [1st Dist.] 2010, no pet.). Since *Blue*, Texas courts have reserved the question of whether a trial court's comments would constitute fundamental error if they vitiated the impartiality of the jury. *Jasper*, 61 S.W.3d at 421; *McLean*, 312 S.W.3d at 916 ("[Deciding] whether a trial court's comments that taint the presumption of innocence or destroy fundamental fairness constitute fundamental constitutional error that may be reviewed without a proper objection [is unnecessary] because the trial judge's comments in this case did not rise" to that level).

A trial court's comments do not constitute fundamental error unless they rise to "such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." *Jasper*, 61 S.W.3d at 421 (assuming *Blue* is precedential). The types of comments that do not rise to the level of fundamental error include those the trial

court makes to correct counsel's misstatement or misrepresentation of previously admitted testimony, to maintain control or expedite the trial, to clear up a point of confusion, or to reveal irritation at counsel. *Id.*[3]

**A. Preservation**

We first consider which challenges to the trial judge's comments are preserved for appellate review. Appellant did not object to the court's statements to defense counsel to "make an objection, not an explanation" and to "wait for a ruling." Additionally, appellant's objections to the trial court's purported yelling, and purported nodding and mouthing "yes" during the State's closing argument were untimely because they were not made at the earliest possible opportunity. *See* discussion *infra* Section C; Tex. R. App. P. 33.1 (objection must be timely); *Dixon v. State*, 2 S.W.3d 263, 265 (Tex. Crim. App. 1998) ("The objection must be made at the earliest possible opportunity."). Unless these comments were fundamentally erroneous, appellant's challenges to them are waived because they are unpreserved. *See* Tex. R. Evid. 103(d); *Barfield v. State*, 464 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd), *cert. denied*, 136 S. Ct. 2411 (2016). As the Court of Criminal Appeals did in *Jasper*, we presume without deciding that the trial court's comments would constitute fundamental error if they vitiated the impartiality of the

[3] The Court of Criminal Appeals and this court also have reserved the question of whether a judge's comments may exhibit *partiality* to such a degree as to constitute fundamental error. *See Brumit v. State*, 206 S.W.3d 639, 644–45 (Tex. Crim. App. 2006) (declining to decide whether objection is required to preserve error of this nature and instead holding that the record did not reflect partiality of the trial court); *see also Barfield v. State*, 464 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (discussing and following *Brumit*), *cert. denied*, 136 S. Ct. 2411 (2016). Appellant discusses the law applicable to the right to an impartial judge, but does not clearly state whether the same is a fundamental right that was violated in this case. Appellant merely states that the judge's comments are "sufficiently pernicious" and error "could be considered fundamental." To the extent that appellant argues she was denied the right to an impartial judge, we find the issue inadequately briefed and therefore waived. *See* Tex. R. App. P. 38.1.

jury. 61 S.W.3d at 421. We address whether comments (1) through (3) and (5) vitiated the impartiality of the jury in Section C.

Appellant timely objected to the trial judge's comments (4) and (6). Accordingly, these challenges are preserved. We review them next.

**B. Under article 38.05, the trial judge's objected-to remarks were not improper comments on the weight of the evidence and did not convey his opinion of the case.**

The fourth comment at issue occurred during the State's closing argument.

> THE STATE: By pleading guilty or no contest to assault, they're saying: I didn't have a right of self-defense. So, how in the world does she have a right of self-defense, much less the ability to use deadly force? And how ridiculous was their arguments that, oh, you know what, I just pled guilty because I didn't have the time, I needed to go back to work. And yet, they pled to a probation which required them to come back month after month and do community service, report, take random drug tests.
>
> MR.GOMMELS: Your Honor, I object that this line of—
>
> THE COURT: Overruled.
>
> MR. GOMMELS: Your Honor, may we approach?
>
> THE COURT: You may. We're in argument right now.
>
> MR.GOMMELS: I understand, Your Honor.
>
> THE COURT: No, you don't.

The trial judge's remark that they were in closing argument was not a comment on the evidence. The trial judge did not express any opinion on the case. The trial court did not imply approval of the State's argument, indicate disbelief in the defense's position, or diminish the credibility of the defense's approach to its case. *See Wirtz*, 451 S.W.3d at 470–71.

The sixth comment at issue occurred during the State's cross-examination of

appellant at the punishment phase of trial. Defense counsel objected, anticipating the State's elicitation of prior offenses or bad acts. The trial judge subsequently exhibited frustration with defense counsel.

> Q: And your mom had called the police because you hadn't come home. And when you did come home, you got into a fight with your mom. Right?
>
> A: Yes.
>
> MR. GOMMELS: Your Honor, may we approach?
>
> THE COURT: About what?
>
> MR. GOMMELS: The current line of questioning by the prosecutor.
>
> THE COURT: Well, what do you have to approach for?
>
> MR. GOMMELS: Well—
>
> THE COURT: Say it from there. I didn't tell you that you could approach.
>
> MR. GOMMELS: Your Honor, the State gave no notice of this offense.
>
> THE COURT: **Sit down. You've been coming up here all this time and have said nothing. Now, come on.**
>
> MR. GOMMELS: Your Honor, the record will reflect the Court just screamed what the Court said and I object. That's an improper comment on the weight of the evidence.
>
> THE COURT: You object after I tell you to sit down. Sit down.
>
> MR. GOMMELS: I object to the way the Court—
>
> THE COURT: What objection do you have?
>
> MR.GOMMELS: I object the Court's current demeanor and the improper—
>
> THE COURT: I'm talking about your objection to this prosecutor. It's cross-examination.
>
> MR.GOMMELS: I object that the prosecutor has not noticed anything that they are currently going into. And I'd request a ruling on both objections.
>
> THE COURT: Denied.

(emphasis added). The trial judge's remark did not appear to prejudice appellant or benefit the State. The remark was not directed at the weight of the evidence, but to its admissibility. A comment associated with a ruling upon a defense objection which questions the propriety of the objection, without more, does not violate article 38.05. *See* *Rosales v. State*, 932 S.W.2d 530, 538 (Tex. App.—Tyler 1995, pet. ref'd) (commenting "it seems a little far afield" in making ruling was comment on admissibility and was not calculated to benefit State or prejudice defendant). We conclude that these remarks were not improper under article 38.05. *See* Tex. Code Crim. Proc. Ann. art. 38.05.

**C. The trial judge's comments did not bear on the presumption of innocence or vitiate the impartiality of the jury so as to constitute fundamental error.**

The first three unobjected-to comments at issue occurred during the guilt/innocence phase of trial. The first comment occurred when defense counsel objected to the State's direct examination of complainant.

> MR. GOMMELS: Your Honor, I'm sorry. I'm going to have to object here as to relevance.
>
> THE COURT: Make an objection, not an explanation.
>
> MR. GOMMELS: I object to relevance.
>
> THE COURT: Overruled.

The second comment at issue occurred when the State objected to appellant's cross-examination of complainant.

> MR. GOMMELS: How many drinks did you have?
>
> THE STATE: Your Honor, I'm going to object to the relevance. He's already talked about his blood-alcohol level and he's acknowledged he was drinking.
>
> MR. GOMMELS: Your Honor, this goes to his ability to recall—
>
> THE COURT: Would you wait for a ruling? Sustained.

The third comment at issue occurred during defense counsel's cross-examination of Amayo.

> Q. All right. And that photo array has to be what's called double-blind administered. In other words, the person—
>
> [STATE]: Your Honor, I object to relevance in this case.
>
> THE COURT: Sustained.
>
> Q. (By Mr. Gommels) One of the things that they recommend against policies is to do what's called a showup—
>
> THE COURT: Sir, I sustain the objection. Now what else?
>
> MR. GOMMELS: I apologize, Judge. I thought that was outside the scope of the Court's ruling.
>
> THE COURT: It's not.

The first three comments were made in effort to maintain control and expedite the trial proceedings. *See Jasper*, 61 S.W.3d at 421 (stating that trial judge has broad discretion in maintaining control and expediting trial); *see also* Tex. R. Evid. 611 ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence"). This type of comment does not rise to the level of fundamental error. *See Jasper*, 61 S.W.3d at 421.

The fifth comment at issue occurred during the State's closing argument. Defense counsel requested that the record reflect the trial judge's affirmative nod of his head when the State argued to the jury that appellant stabbed complainant and then left him for dead.

> THE STATE: . . . She told the police officers that she was in the car and she didn't see anything. And the reason why she told them that is because she knew very well that her friend had stabbed Irving Anzora and left him for dead. But we'll talk about that later on.
>
> We all know what the truth is because you can rely on not just Irving Anzora's testimony—

> MR. GOMMELS: Your Honor, I apologize. I need to put something on the record. Just a moment ago when the prosecutor—
>
> THE COURT: Would you—just a minute. Let her finish her argument. You can put anything on the record afterwards.
>
> MR. GOMMELS: Thank you, Your Honor.
>
> . . . .
>
> (Jury deliberating)
>
> (Open court, no jury, defendant present)
>
> THE COURT: You have something for the record?
>
> MR. GOMMELS: Yes, Your Honor. **When the prosecution made the comment to the jury: She stabbed him and left him for dead, the Court nodded his head in the affirmative. And I object that that's an improper comment on the weight of the evidence**.
>
> THE COURT: **Overruled. I don't remember ever nodding my head, but okay.**

(emphasis added). Later, following the guilt/innocence phase of trial and while the jury was deliberating punishment, defense counsel moved for a mistrial on grounds that the "opinion of the Court was made clear to the jury" as a result of the trial judge's demeanor and loud-tone during the course of trial. Defense counsel cited the head-nod as an example of such demeanor. Defense counsel also asserted a new fact—that the court mouthed the word "yes" during the head-nod. We do not have the benefit of a video recording or bystander's bill of exception, and so there is no indication that this particular head-nod and the mouthing of the word "yes" was obvious. The judge did not dispute nodding his head but he did not remember it. Appellant's objections to this comment were untimely. *See* Tex. R. App. P. 33.1; *Dixon*, 2 S.W.3d at 265.

Assuming without deciding that the conduct occurred and was noticed by the jury, the conduct did not present fundamental error by bearing on appellant's presumption of innocence or vitiating the jury's impartiality. The trial judge

purportedly mouthed "yes" and nodded and in agreement to the assertion that appellant stabbed complainant and then left complainant for dead. Appellant's defensive theory was self-defense and defense of others, and the fact that appellant *did* stab complainant was not a point of dispute.[4] The trial judge's isolated and subtle agreement on such point would not distort the jury's impartiality.

Having found that the trial judge's comments were not improper comments on the weight of the evidence or did not vitiate the impartiality of the jury, we overrule appellant's second issue.

## CONCLUSION

Having overruled appellant's two issues, we affirm the judgment of the trial court.

/s/ Marc W. Brown
Justice

Panel consists of Justices Boyce, Jamison, and Brown.
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[4] For instance, the defense argued the following in its closing statement:

> How do we determine whether or not her deadly force is reasonable? Here's what we've got. We've got attempted serious bodily injury and you have to decide whether it was immediately necessary and whether it was reasonable. How do we do that? We look at the facts and we look at the circumstances that have been presented throughout these couple of days. Okay? We look at the facts specific to the attacker, Mr. Anzora; to Leah, to David, to Whitney, to Tim, and to everything else. And that's how we decide if she acted reasonably when she employed deadly force to defend them.