

Affirmed and Memorandum Opinion filed August 18, 2022.



In The

Fourteenth Court of Appeals

NO. 14-19-00028-CR

MARCUS DEWAYNE NICKERSON, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 85th District Court
Brazos County, Texas
Trial Court Cause No. 18-01753-CRF-85**

MEMORANDUM OPINION

Appellant Marcus Dewayne Nickerson was tried separately and convicted of aggravated assault causing serious bodily injury with a deadly weapon in the first trial, and possession of a firearm by a felon in a second trial. *See* Tex. Pen. Code Ann. §§ 22.02(b)(1), 22.05(b)(2). In three issues, appellant argues that: (1) the deadly weapon submission in the second trial was barred by the Double Jeopardy clause of the United States Constitution; (2) if Double Jeopardy protections were not implicated, the State was precluded under collateral estoppel from alleging

Deadly Conduct under § 22.05(b)(2) of the Texas Penal Code for purposes of a deadly weapon finding; and (3) the evidence was legally insufficient to support the deadly weapon finding if based on any bullet other than the bullet which entered the complainant’s leg and was the subject of appellant’s first trial. We affirm.

I. BACKGROUND¹

On February 7, 2016, Bryan Police Department Officer Gregory Falcon (“Falcon”) responded to reports of a shooting at a duplex residence located at 404 Gainer Street in Bryan, Texas. When Falcon arrived at the residence, he saw blood on the front porch. Falcon located four nine-millimeter shell casings in the nearby parking lot. The casings were found close together in a single parking space in the parking lot. Falcon did not observe any bullet holes or strike marks on the residence or in the parking lot of the duplex. Falcon determined that the complainant—Christina King (“King”)—lived in unit 404, which was a shared duplex with unit 402. Jessica Balderas (“Balderas”) lived in unit 402. The duplex shared a small common porch, separated by a wall. King and Balderas were not on the scene when Falcon arrived because Balderas had driven King to the hospital to receive treatment for a gunshot wound to her leg.

Balderas had known King for many years and shared the duplex with King. Balderas’s four children lived with her. Balderas knew appellant through King, and because appellant is a cousin of the father of three of Balderas’s children. Balderas testified that King came over to borrow Balderas’s phone on the morning of February 7, 2016. After King used the phone, Balderas went outside on the front porch and observed King arguing with appellant. Balderas heard appellant

¹ The Texas Supreme Court ordered the Tenth Court of Appeals in Waco to transfer this case to the Fourteenth Court of Appeals. We must therefore decide the case in accordance with the precedent of the Tenth Court of Appeals if our decision otherwise would have been inconsistent with that court’s precedent. *See* Tex. R. App. P. 41.3.

threatening to kill King if she left him. Balderas then saw appellant walk from the front porch to his vehicle in the parking lot while Balderas and King each still stood on their respective sides of the front porch. Balderas then heard four gunshots that occurred in rapid succession, without pause or delay between them. She could not see appellant shooting the gun and could not see where he was aiming. Balderas further testified that while shots were being fired, she felt something breeze by her hair. When the gunshots ended, she observed appellant drive away in his vehicle. She then walked to King's side of the porch and noticed that King had been shot and was bleeding from her leg.

On the night of the shooting, while running routine traffic enforcement, Texas Department of Public Safety highway patrol trooper James Brooks ("Brooks") stopped the vehicle appellant was riding in, and conducted a search. Brooks recovered a Glock handgun from the vehicle.

Firearms analyst Mallory Foster ("Foster") testified that she examined the shell casings recovered from the parking lot and compared them to the casings fired from the Glock handgun recovered from that vehicle. She determined that all four casings found at the scene of the shooting were fired from the Glock handgun recovered from the vehicle. She further testified that the gun was a semiautomatic weapon that required a separate trigger-pull for each bullet fired.

Sarah Rapp, M.D., ("Dr. Rapp"), a board-certified emergency medicine physician, was working in St. Joseph's emergency room where King sought treatment on the night of the shooting. Dr. Rapp testified that King told her that she had been shot by someone she knew and that she thought that person had been "playing" when he shot her.

In April 2016, appellant was indicted by a Brazos County grand jury on two counts: aggravated assault causing serious bodily injury with a deadly weapon, and possession of a firearm by a felon. *See id.* §§ 22.02(b)(1), 22.05(b)(2). At

appellant's request, the trial court severed the two charges. During the charge conference, and prior to closing arguments in appellant's first trial on the aggravated assault charge, appellant requested that the court include jury instructions on the lesser-included offense of felony and misdemeanor deadly conduct. In requesting the jury instruction, Nickerson's counsel argued, "I realize that there's bodily injury, but it's not intended bodily injury." This request was denied by the trial court. The jury found appellant guilty of aggravated assault as charged in the indictment.

Appellant timely filed an appeal for his aggravated assault conviction, in which he argued that the trial court erred in denying his request that the jury instructions include the lesser-included offenses of felony and misdemeanor deadly conduct. In April 2018, following the aggravated assault conviction, and while the appeal of the first trial was pending, appellant was reindicted for unlawful possession of a firearm by a felon and a new deadly weapon notice was attached that alleged:

the defendant used or exhibited a deadly weapon, to-wit: a firearm, namely by knowingly discharging a firearm at or in the direction of a habitation, and the defendant was then and there reckless as to whether the habitation was occupied to-wit: by discharging a firearm in the direction of a habitation during nighttime hours.

Appellant filed a motion to quash the indictment based on double jeopardy and collateral estoppel grounds, which was denied at a hearing held prior to the second trial. In the second trial, a jury convicted appellant of unlawful possession of a firearm by a felon as charged in the indictment. The jury also found the deadly weapon finding "true." Appellant elected to have the trial court assess his punishment. The trial court sentenced him to twenty years' imprisonment in the Institutional Division of the Texas Department of Criminal Justice. Appellant timely filed a notice of appeal.

While appellant’s appeal of the second trial was pending, the Tenth Court of Appeals issued an opinion in appellant’s appeal of the first trial. *See Nickerson v. State*, No. 10-18-00158-CR, 2021 WL 627849, at *1 (Tex. App.—Waco Feb. 17, 2021, pet. ref’d) (mem. op., not designated for publication). The Tenth Court of Appeals overruled appellant’s sole issue and affirmed the trial court’s denial of the request for jury instructions on the lesser-included offenses of felony and misdemeanor deadly conduct, stating that the trial court did not abuse its discretion in denying the request because there was no evidence from which the jury could rationally find appellant guilty of felony or misdemeanor deadly conduct. *Id.* at *3. Appellant then filed a petition with the Court of Criminal Appeals, which denied discretionary review.

II. APPLICATION

In three issues, appellant argues on appeal that: (1) the deadly weapon submission in the second trial was barred by the Double Jeopardy clause; (2) if Double Jeopardy protections are not implicated, the State is precluded under collateral estoppel from alleging Deadly Conduct under Section 22.05(b)(2) for purposes of a deadly weapon finding; and (3) the evidence was legally insufficient to support the deadly weapon finding if based on any bullet other than the bullet which entered King’s leg and was the subject of appellant’s first trial. However, appellant concedes that “all three issues here briefed are dependent on a finding in [appellant’s] first appeal that legal error occurred in not submitting requested misdemeanor Deadly Conduct as a lesser included [sic] to the jury in [appellant’s] first trial.” Accordingly, because the result of the first appeal is “outcome determinative” on the issues raised in the present appeal, appellant has requested that we abate this appeal until the Tenth Court of Appeals addresses the issue raised in the first appeal.

We need not consider abatement in this case because—as we addressed

above—while the current appeal was pending, the Tenth Court of Appeals issued its opinion regarding appellant’s first trial. *See id.* The Tenth Court overruled appellant’s sole issue, concluding that the trial court did not err by failing to provide instructions on the lesser-included offenses of felony and misdemeanor deadly conduct in the jury charge. *See id.* Because all three of appellant’s issues in the appeal before us are contingent on a conclusion by the Tenth Court of Appeals that the trial court erred in the first trial by failing to include instructions on the lesser-included offenses, we overrule all three of appellant’s issue. *See Tex. R. App. P. 47.1* (“The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.”).

III. CONCLUSION

We affirm the judgment of the trial court.

/s/ Margaret “Meg” Poissant
Justice

Panel consists of Justices Wise, Poissant, and Wilson.
Do Not Publish — Tex. R. App. P. 47.2(b).