Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

Nos. 04-16-00576-CR, 04-16-00577-CR, and 04-16-00578-CR

Kathleen Darleen **DANIEL**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 216th Judicial District Court, Kendall County, Texas
Trial Court Nos. 5924, 5925, and 5926
Honorable N. Keith Williams, Judge Presiding

Opinion by: Patricia O. Alvarez, Justice

Sitting: Karen Angelini, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: June 6, 2018

AFFIRMED

Appellant Kathleen Darleen Daniel was convicted by a Kendall County jury of three counts of aggravated assault with a deadly weapon and sentenced to two-years confinement in the Institutional Division of the Texas Department of Criminal Justice, suspended and probated for a term of two years. Daniel raises several issues on appeal: (1) the trial court erred in denying her motion to suppress, (2) judicial misconduct, (3) jury charge error, and (4) insufficiency of the evidence. We affirm the trial court's judgments.

FACTUAL AND PROCEDURAL BACKGROUND

On July 4, 2015, Jaci Lewis and Skylar Obuch, both teenage girls, were tubing down West Sister Creek when they encountered Daniel and an altercation transpired. By all accounts, Daniel was under the impression that the teenagers were trespassing on her property; the girls believed they were floating on a public waterway. Daniel pulled out her firearm and ordered the girls out of the water and to exit her property. A terrified Jaci called her mom, Jessica Windle. At some point, Daniel's firearm was discharged; Jessica heard the shot and she and her husband headed down the creek toward the girls. As the girls were exiting the waterway, Daniel called her husband, who came to the creek bed. Daniel's husband proceeded to follow the barefoot, crying girls off the property in his golf cart.

Shortly thereafter, Bobby Windle, Jessica's husband, encountered Daniel at the creek bed, and asked if she had seen the two teenage girls. Daniel told Bobby that he was trespassing and pulled out her firearm; the firearm fell to the ground. As Daniel picked up the firearm, Bobby tried to explain to Daniel that he was "just looking for these girls," but Daniel kept the firearm pointed at him, telling him that he was trespassing and to leave her property. As Bobby left the property, he encountered several Kendall County sheriff's officers.

Daniel was ultimately arrested and charged with three counts of aggravated assault with a deadly weapon. A Kendall County jury found her guilty on all three counts and assessed punishment at two-years confinement in the Institutional Division of the Texas Department of Criminal Justice; the jury suspended and probated the sentence for two years. The trial court subsequently assessed thirty-days confinement in the Kendall County jail and 150 hours of community service as conditions of probation.

Daniel raises several issues on appeal: (1) the trial court erred in denying her motion to suppress, (2) the trial court's judicial misconduct resulted in a denial of due process during the jury

charge conference and sentencing, (3) jury charge error, and (4) insufficiency of the evidence. We affirm the trial court's judgment.

We first address Daniel's contention that the trial court erred in denying her oral motion to suppress State's Exhibit #2, an audiovisual recording, with some redacted portions, of Daniel on the day of the altercations.

MOTION TO SUPPRESS

A. Arguments of the Parties

Daniel argues the record clearly supports defense counsel was surprised that the State had redacted the portions of the audiovisual recording wherein Daniel was invoking her rights while being handcuffed and questioned by the officers. The State counters that Daniel's motion to suppress was untimely because it was made after State's Exhibit #2 had already been admitted into evidence without objection.

B. Preservation of Error

We must first determine whether Daniel preserved her complaint for appellate review. *See* TEX. R. APP. P. 33.1(a)(1). A defendant must "make a timely request, objection, or motion with sufficient specificity to apprise the trial court of the complaint." *Johnson v. State*, 365 S.W.3d 484, 491 (Tex. App.—Tyler 2012, no pet.); *see also Haley v. State*, 173 S.W.3d 510, 516–17 (Tex. Crim. App. 2005). To be timely, a party must object either (1) before the evidence is admitted, or (2) if not possible to object before the evidence is admitted, "as soon as the objectionable nature of the evidence becomes apparent." *See Jasso v. State*, 112 S.W.3d 805, 813 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (citing *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991)); *see also Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999) (stating that although "subsequent events may cause a ground for complaint to become *more apparent*, [but that fact] does not render timely an otherwise untimely complaint"). "An appellant fails to preserve error

by failing to object when [she] had the opportunity. . . ." *Burt v. State*, 396 S.W.3d 574, 577–78 (Tex. Crim. App. 2013).

C. Objection at Trial

Towards the beginning of Kendall County Sheriff's Department Corporal Brad McNair's testimony, the State offered State's Exhibit #2, a copy of the in-car audiovisual recording taken from Corporal McNair's patrol vehicle.

> State: [I]s it a fair and accurate recording of the events that your patrol car captured from July 4th, 2015?
>
> McNair: Yes, it is.

Defense counsel inquired which patrol unit the officer was driving. The witness responded and defense counsel affirmatively stated that he had "no objection" to the admission of State's Exhibit #2. The exhibit was admitted.

The State proceeded to question Corporal McNair about the firearm taken from Daniel's possession on the day in question. After defense counsel was permitted to take the witness on voir dire about the chain of custody pertaining to the firearm, the firearm was also admitted by the trial court. The State then requested permission to play State's Exhibit #2 for the jury. At the bench, the prosecutor explained as follows:

> As you can imagine, with patrol car video there's a lot of dead space. So what I've done is time stamped stuff. And I'm going to play what I think is relevant. And then if [defense counsel] wants to play whatever.

Defense counsel, for the first time, lodged an objection to the exhibit and urged his motion to suppress based on the redactions.

D. Analysis

The Court of Criminal Appeals' analysis in *Soliz v. State* is instructive. 432 S.W.3d 895, 903 (Tex. Crim. App. 2014). In *Soliz*, the defendant's oral statements were offered by the defense

and admitted into evidence. *Id.* The State subsequently offered written summaries of the oral statements and the defense objected. *Id.* The court concluded, "[b]ecause [Soliz] waived error with respect to his oral statement, the admission of his written statements does not constitute reversible error." *Id.*; *see also Gonzalez v. State*, No. 11-16-00140-CR, 2017 WL 3194459, at *3 (Tex. App.—Eastland July 27, 2017, no pet.) (mem. op., not designated for publication) (overruling defense objection to State's request to "partially publish" a DVD recording of victim's statement, the DVD was previously admitted after "no objection" from defense counsel).

Here, Daniel's defense counsel affirmatively stated, "no objection" to the admission of State's Exhibit #2, *in its entirety*. Daniel made no request to limit the purpose of the recording's admissibility, nor did defense counsel reserve the right to later object to any statements contained within the audiovisual recording. Only after stipulating to the exhibit's admissibility and affirmatively stating that the defense had no objection to its admission, and after the trial court admitted the exhibit into evidence, did defense counsel object to State's Exhibit #2's admissibility. "An objection made after the evidence has already been admitted before the jury is not timely and does not preserve error." *Gonzalez*, 2017 WL 3194459, at *3.

We conclude that because Daniel's objection to, or motion to suppress, a portion of State's Exhibit #2 was made after the entire audiovisual recording was admitted by the trial court without objection, the objection was untimely. *See Soliz*, 432 S.W.3d at 903 (citing *Decker v. State*, 717 S.W.3d 903, 908 (Tex. Crim. App. 1986)) ("By offering his oral statement into evidence, appellant waived error concerning the trial court's ruling on his motion to suppress this statement."); *see also Holmes v. State*, 248 S.W.3d 194, 196 (Tex. Crim. App. 2008) ("A defendant who affirmatively states, 'No objection,' when evidence is offered waives his right to complain on appeal that the evidence was . . . illegally obtained under Article 38.23."). Therefore, Daniel

waived any error in the admission of the redacted portions of State's Exhibit #2, and we overrule this issue. *See Soliz*, 432 S.W.3d at 903; *see also Gonzalez*, 2017 WL 3194459, at *3.

We turn next to Daniel's assertion the trial court's actions denied her due process.

ALLEGED JUDICIAL MISCONDUCT

A. Jury Charge Conference in Jury's Presence

Daniel contends the trial court denied her due process by conducting the actual jury charge conference, "with the jury's participation," resulting in the trial court's denial of requested defensive charges and theories amounting to an inappropriate comment on the weight of the evidence.

Texas Rule of Appellate Procedure 38.1(i) provides that an appellate "brief must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. This summary must not merely repeat the issues or points presented for review." *See* TEX. R. APP. P. 38.1(h); *see also Lockett v. State*, 16 S.W.3d 504, 505 n.2 (Tex. App.—Houston [1st Dist.] 2000, pet ref'd) (holding that conclusory statement supported by neither argument nor authority presents nothing for our review). Daniel failed to present an actual due process claim for this court to consider. The sole record citation contained within this section of the brief is for the sentencing hearing, almost a month after the jury returned their verdict and assessed punishment, not during the charge conference, and no authority is provided supporting Daniel's suggestion that the trial court's actions, during the jury charge conference, constituted an inappropriate comment on the weight of the evidence. Although we construe briefs liberally, *see* TEX. R. APP. P. 38.9, Daniel's brief contains no argument or authorities in support of her contentions on this appellate issue. We, therefore, conclude Daniel failed to sufficiently raise this issue on appeal and we overrule her second issue on appeal. *See Griffis v. State*, 441 S.W.3d 599, 612 (Tex. App.—San Antonio 2014, pet. ref'd).

B. Conditions of Probation

Daniel also contends the trial court abused its discretion in stacking thirty-days confinement and 150 hours community service onto the jury's two-year probation sentence.

1. Standard of Review

The trial court may impose "any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 11(a) (West 2015) (current version at TEX. CODE CRIM. PROC. ANN. § 42A.301(a) (West 2017)). We afford the trial court wide discretion in selecting the terms and conditions of community supervision. *See Butler v. State*, 189 S.W.3d 299, 303 (Tex. Crim. App. 2006); *Tamez v. State*, 534 S.W.2d 686, 691 (Tex. Crim. App. 1976). Absent a clear abuse of that discretion, the trial court's judgment must be upheld. *See Briseño v. State*, 293 S.W.3d 644, 647 (Tex. App.—San Antonio 2009, no pet.); *Belt v. State*, 127 S.W.3d 277, 280 (Tex. App.—Fort Worth 2004, no pet.).

2. Arguments of Counsel

Daniel contends the trial court "mocked her" and denied her due process when it "stacked" thirty-days confinement in the Kendall County Jail and 150 hours of community service onto Daniel's community supervision. The State counters the record does not support Daniel's assertions and there are no grounds to remove the terms of probation assessed by the trial court exercising its discretionary authority.

3. Conditions Imposed

Although a trial court maintains broad discretion, the condition of community supervision must be "reasonably related to the purposes of probation." *Briseño*, 293 S.W.3d at 647–48 (quoting *Lee v. State*, 952 S.W.2d 894, 900 (Tex. App.—Dallas 1997, no pet.) (en banc)). "'Reasonably related' hinges on three factors: '(1) the purposes sought to be served by probation;

(2) the extent to which constitutional rights enjoyed by law-abiding citizens should be accorded to probationers; and (3) the legitimate needs of law enforcement.'" *Id*. (quoting *Macias v. State*, 649 S.W.2d 150, 152 (Tex. App.—El Paso 1983, no pet.)).

The trial court's authority is further limited by the severity of the offense. In a felony cause, the trial court may impose confinement, in the county jail, up to 180 days, as a condition of community supervision. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 12(a) (West 2015) (current version at TEX. CODE CRIM. PROC. ANN. § 42A.302(a)(2) (West 2017)) ("If a judge having jurisdiction of a felony case requires as a condition of community supervision that the defendant submit to a period of confinement in a county jail, the period of confinement may not exceed 180 days."); *see Johnson v. State*, 286 S.W.3d 346, 351 (Tex. Crim. App. 2009). The trial court may order such confinement at the time of sentencing "or at any time during the supervision period." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 12(c). And the trial court "may do so for any reason and perhaps for no reason," unless prohibited by law. *Johnson*, 286 S.W.3d at 351.

The Texas Code of Criminal Procedure further provides that a trial court "may require as a condition of community supervision that the defendant work a specified number of hours [of] community service." TEX. CODE CRIM. PROC. ANN. art. 42.12, § 16(a) (West 2015) (current version at TEX. CODE CRIM. PROC. ANN. § 42A.304(b)(2) (West 2017)). The hours of community service ordered, for an individual convicted of a second-degree felony, may not exceed 800 hours. *Id*. § 16(b).

4. Analysis

The trial court went to great lengths to make sure Daniel understood that not only was her concealed handgun license revoked, but that she could not purchase, own, or possess a firearm, or reside in a residence where another individual is in possession of a firearm. The trial court further explained "this is a typical provision in most people's probation conditions for the protection of

society." The trial court further discussed probation conditions in relation to her ownership in the winery and her medical license and ability to prescribe narcotics. When the issue of assessment of time in the county jail as a condition of community service was addressed, defense counsel argued,

> Based on her, you know, long career, I think that she's not—you know, and all the things that she's done, I'd ask the Court not to do that or to do it at a much reduced rate than that. But she's aware that that's a possibility.
>
> . . . .
>
> The one concern that I'd have, Judge, just because of her—her osteoporosis is so severe, that if she were to fall down or get injured in there, she's—because she's already had like broken bones is part of—

The trial court quickly responded to defense counsel that Daniel was more likely to be harmed climbing rocks at her residence than sitting in jail. Turning to Daniel, however, the trial court provided Daniel an opportunity to "explain something."

> Trial Court: It was evident to me at the trial that you had no remorse over what had taken place. Do you even feel bad about the way you handled that?
>
> Daniel: I certainly regret it.
>
> Trial Court: I didn't ask that. Regret is one thing. You regret it because you have to pay a lawyer and you got in trouble and had to go through a trial and all this worry and everything. Do you have any remorse for the way you handled that?
>
> Daniel: I don't know that I can tell you I wasn't afraid. I—I was terrified.
>
> Trial Court: Of two bikini clad girls on [innertubes]?
>
> Daniel: They were—They disappeared. They just disappeared. I had no idea where they were.
>
> Trial Court: They were girls in bikinis in a float.
>
> Daniel: I didn't know them. And I asked them if they were—
>
> Trial Court: But then you come out and you point a gun at two girls in—
>
> Daniel: I didn't—I'm sorry, sir.
>
> Trial Court: You point a gun. Ma'am, I heard the evidence.
>
> Daniel: Yes, sir.
>
> Trial Court: I'm—

Daniel: Yes, Your Honor.

Trial Court: Okay. So it's evident you have none.

Based on the trial court's conclusion that Daniel was not remorseful, the trial court assessed thirty-days confinement in the Kendall County Jail and 150 hours of community service, as additional conditions of community supervision.

The trial court was authorized to impose confinement, not in excess of 180 days. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 12(a). We cannot say the trial court's decision to order Daniel to serve thirty-days confinement in the Kendall County Jail was not an act to protect or restore the victim, or punish, rehabilitate, or reform Daniel, *see id*. at § 11(a), or that such imposition was an abuse of discretion, *see Johnson*, 286 S.W.3d at 351; *Fuelberg v. State*, 447 S.W.3d 304, 309 n.4 (Tex. App.—Austin 2014, pet. ref'd). Additionally, because the trial court's assessment of 150 hours of community service was well within the community service limitations set forth in article 42.12, section 16(b), and provides similar punishment, rehabilitative, or reformative characteristics as the confinement, we further conclude it was not an abuse of discretion. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 16(b); *id*. § 11(a). Accordingly, we overrule Daniel's second and eighth issues on appeal.

We next address Daniel's issue regarding alleged jury charge error.

JURY CHARGE ERROR

A. Standard of Review

In resolving a challenge to the jury charge, we first determine whether error exists. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If we find error, we analyze that error for harm under the applicable standard set out in *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1984) (op. on reh'g), *superseded on other grounds by rule as stated in Rodriguez v. State*, 758 S.W.2d 787, 788 (Tex. Crim. App. 1988). *See Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim.

App. 2009). Because Daniel timely objected to the omission of the "not guilty" option, this court will reverse the trial court's judgment if Daniel suffered "some harm" as a result of an error, if any. *See Almanza*, 686 S.W.2d at 171; *see also Payne v. State*, 11 S.W.3d 231, 232 (Tex. Crim. App. 2000) (holding jury-charge error to be nonstructural).

For harm to result, however, the record must show "'actual, rather than merely theoretical, harm.'" *Segovia v. State*, 467 S.W.3d 545, 556 (Tex. App.—San Antonio 2015, pet. ref'd) (quoting *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013)). An appellate court is further directed to consider "the entire jury charge, the state of the evidence, including the contested issues and weight of probative evidence, the argument of counsel and any other relevant information revealed by the record of the trial as a whole." *Id*. (quoting *Barron v. State*, 353 S.W.3d 879, 883 (Tex. Crim. App. 2011)); *see also Almanza*, 686 S.W.2d at 171.

The error requires reversal if it was "calculated to injure [Daniel's] rights." *See Jimenez v. State*, 32 S.W.3d 233, 237 (Tex. Crim. App. 2000). In other words, Daniel must have suffered some harm. *See* TEX. CODE CRIM. PROC. ANN. art. 36.19 (West 2006).

B. Arguments of the Parties

Daniel contends the trial court erred in failing "to adequately provide the jury an opportunity to find [Daniel] not guilty of using force," before the jury was required to answer the question of deadly conduct. Additionally, the application paragraph failed to properly define reasonable belief from Daniel's viewpoint as "an elderly, physically fragile female in the vulnerable position she was in at the time."

The State counters that deadly force is not mentioned in the charge records or discussion, but more importantly, Daniel failed to allege any resulting harm.

C. *Almanza* Harm Analysis

A defendant is entitled to every defensive instruction raised by the evidence, whether that evidence is weak or strong, unimpeached or contradicted, and regardless of what the trial court may or may not think about the credibility of the defense. *Allen v. State*, 253 S.W.3d 260, 267 (Tex. Crim. App. 2008).

Assuming, without deciding, the trial court erred in failing to include an instruction on force, prior to the instructions on deadly force, we must determine whether Daniel suffered "some harm." *See Almanza*, 686 S.W.2d at 171; *Segovia*, 467 S.W.3d at 556.

1. Jury Charge

We look first to the jury charge as a whole. *See Segovia*, 467 S.W.3d at 556. In addition to Daniel's complaints regarding deadly force, she contends the jury charge failed to properly define reasonable belief. A person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force. TEX. PENAL CODE ANN. § 9.31(a) (West 2011). Texas Penal Code section 1.07(42) defines "[r]easonable belief" as "a belief that would be held by an ordinary and prudent man in the same circumstances as the actor." *Id*. § 1.07(42) (West Supp. 2017). "[R]easonableness of the defendant's actions [is viewed] solely from the defendant's standpoint," *Johnson v. State*, 271 S.W.3d 359, 366 (Tex. App.—Beaumont 2008, pet. ref'd) (quoting *Ex parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991)), and is a question for the factfinder, *see Granger v. State*, 3 S.W.3d 36, 39 (Tex. Crim. App. 1999). Importantly, however, the use of force against another is not justified in response to verbal provocation alone. TEX. PENAL CODE ANN. § 9.31(b)(1); *Walters v. State*, 247 S.W.3d 204, 213 (Tex. Crim. App. 2007).

"The Court of Criminal Appeals has previously stated that a jury charge that tracks the language of a statute is 'a proper charge on the statutory issue.'" *Navarro v. State*, 469 S.W.3d 687, 698 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (op. on reh'g) (citing *Riddle v. State*, 888 S.W.2d 1, 8 (Tex. Crim. App. 1994)); *see also Casey v. State*, 215 S.W.3d 870, 886–87 (Tex. Crim. App. 2007). Here, the charge properly tracked the language of the statute. How the jury interpreted "same circumstances as the actor," was an ultimate question of fact. *See* TEX. PENAL CODE ANN. § 1.07(42).

The information contained within the charge, specifically the date, location, and manner in which the offenses occurred, corresponded to the facts adduced at trial. *See Rivas v. State*, 486 S.W.3d 640, 652 (Tex. App.—San Antonio 2016, pet. ref'd). Additionally, the charge properly instructed the jury to acquit Daniel if they had a reasonable doubt on the issue of deadly force. *See id.*

2. State of the Evidence

We next consider the state of the evidence, including the contested issues and weight of probative evidence. *See Segovia*, 467 S.W.3d at 556.

The State presented both girls, Jaci and Skylar, who testified they were hysterical and thought they were going to die. The jury heard from Jessica Windle, Jaci's terrified mother who heard the gunshot over the phone, and Bobby Windle, who ran up the river desperately trying to find the girls. Kathryn Biediger testified to receiving Jaci's call as the girls were being forced off the river at gunpoint. Corporal McNair described a "frantic" Bobby looking for the "two girls that were floating down the river."

The defense called Daniel, Vernon Friesenhan (Daniel's husband), Mark Juliano, and Leticia Hernandez (Mark's wife), all of whom testified Daniel was upset, frightened, and scared.

Several other witnesses testified there were numerous "no trespassing" signs posted and that they had never seen "tubers floating down West Sister Creek."

Daniel's testimony was contradicted by Corporal McNair and Kendall County Deputy Matthew Cathey, both of whom testified that on the day of the altercations, Daniel never reported fearing the girls, that Bobby Windle threatened her, that she feared for her life or her safety, or any medical issues or being afraid of falling.

3. Argument of Counsel and Other Relevant Information

Lastly, we look at argument of counsel and any other relevant information. *See id*.

Defense counsel spent a great amount of time discussing all of the different ideas Daniel thought about while she watched the girls in the water, talking on their phones. "She doesn't know if these girls have a boyfriend who just got out of the penitentiary who's there to rob them." She told Investigator Whitt she found it very odd that they were just sitting there, not moving. "She didn't know if they were casing the house for a robbery." And, when she talks to them, "they're not responding to her in a way that she believes is appropriate."

Defense counsel then proceeded to walk the jurors through the charge.

> And that's the most important pages on this jury charge is page two and three, because if you—you follow that, you don't ever get further into this charge. Because if you follow pages two and three, my client is not guilty.
>
> And you'll see right here it talks about the fact that that production of weapon, exhibiting that weapon is not deadly force, it is just force. So if she's justified in using force, she's justified in using the threat of deadly force, because that production or exhibiting the weapon is just force. It is not deadly force.

After specifically explaining to the jurors that if they found Daniel used force, and not deadly force, the State failed to meet its burden of proof, defense counsel proceeded to describe in great detail the situation from Daniel's perspective, *see Johnson*, 271 S.W.3d at 366, and why she

"reasonably believe[d] the force [was] immediately necessary," *see* TEX. PENAL CODE ANN. § 9.31(a).

> . . . she's frightened because she's—she has osteoporosis. She's got very brittle bones. She's broken 14 bones already. She's in a remote area where she has no help. If she screamed, no one would hear her.
>
> When the girls screamed, no one heard them because they're so far away from everybody. When the gun goes off, nobody hears it because they're so far away. She's in an isolated and remote place. Is it reasonable to be afraid in that situation, when you don't know who these people are and why they're doing what they are? Yes.

Defense counsel argued that pointing the gun was force, pulling the trigger moves it to deadly force. Here, defense counsel passionately argued that Daniel accidentally discharged the gun and the jury had to find her not guilty.

4. Analysis

The jury charge properly set forth the statutorily required language. Although Daniel properly argues the reasonable belief is viewed from Daniel's viewpoint, defense counsel argued that exact point during his closing argument. Daniel's "advanced age" and frailty were addressed and explained during closing argument. The entirety of the evidence provided multiple witnesses from which the jury could determine credibility and veracity. And, finally, both the State and defense counsel spent a significant amount of time explaining the jury charge to the jurors. Having reviewed the entire jury charge, the weight of the contested evidence, and the arguments of counsel, notwithstanding the erroneous application paragraph about which Daniel complains and the trial court's failure to properly charge the use of force, the jury could have found beyond a reasonable doubt that Daniel was not justified in using force and that a reasonable person, similarly situated, would not have believed force was immediately necessary. *See* TEX. PENAL CODE ANN. §§ 1.07(42); 9.31(a); *Rivas*, 486 S.W.3d at 651–52. Accordingly, Daniel failed to show evidence

of actual harm as required under *Almanza*, and we overrule Daniel's third and fourth issues. *See Reeves*, 420 S.W.3d at 816; *Segovia*, 467 S.W.3d at 556.

Lastly, we turn to Daniel's issues related to the sufficiency of the evidence.

SUFFICIENCY OF THE EVIDENCE

A. Standard of Review

In reviewing the sufficiency of the evidence, "we view all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Adames v. State*, 353 S.W.3d 854, 860 (Tex. Crim. App. 2011); *accord Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011). "This standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence. . . ." *Adames*, 353 S.W.3d at 860; *accord Gear*, 340 S.W.3d at 746. The reviewing court must also give deference to the jury's ability "to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction." *Id*. (citing *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993)).

We may not substitute our judgment for that of the jury by reevaluating the weight and credibility of the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000). We defer to the jury's responsibility to resolve any conflicts in the evidence fairly, weigh the evidence, and draw reasonable inferences. *See Hooper*, 214 S.W.3d at 13; *King*, 29 S.W.3d at 562. The jury alone decides whether to believe eyewitness testimony, and it resolves any conflicts in the evidence. *See Hooper*, 214 S.W.3d at 15; *Young v. State*, 358 S.W.3d 790, 801 (Tex. App.—Houston [14th Dist.] 2012, pet. ref'd). In conducting a sufficiency review, "[w]e do not engage in

a second evaluation of the weight and credibility of the evidence, but only ensure that the jury reached a rational decision." *Young*, 358 S.W.3d at 801.

We employ the same standard of review when an appellant raises a nonaffirmative statutory defense at trial. At trial, once a defendant introduces some evidence supporting a defense under section 2.03 of the Penal Code, the State bears the burden of persuasion to disprove the defense. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *Kirk v. State*, 421 S.W.3d 772, 777 (Tex. App.—Fort Worth 2014, pet. ref'd). An appellate court must determine "whether[,] after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact [1] would have found the essential elements of [the offense] beyond a reasonable doubt and [2] also would have found against appellant on the [defensive] issue beyond a reasonable doubt." *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991); *see also Smith v. State*, 355 S.W.3d 138, 144–47 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

B. Arguments of the Parties

Daniel contends the State was required to prove, beyond a reasonable doubt, that Daniel's belief was not reasonable from her point of view. Daniel argues the law, when the facts are viewed from the perspective of an elderly, frightened, seventy-one-year-old female, can only result in self-defense and defense of land.

The State counters that when viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt.

C. Applicable Law

A person commits aggravated assault if she intentionally or knowingly threatens another with imminent bodily injury and uses or exhibits a deadly weapon while doing so. TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02 (a)(2). But a person is justified in using force against another

when and to the degree she reasonably believes the force is necessary to protect herself against the other's use or attempted use of unlawful force. *Id*. § 9.31(a) (West 2011) (self-defense); § 9.32 (deadly force necessary for self-defense); § 9.41 (protection of one's own property). The person may also use deadly force against another when, among other things, she reasonably believes the deadly force is immediately necessary to protect against the other's use of unlawful deadly force. *Id*. §§ 9.31(d), 9.32(a)(2) (West 2011). The penal code defines "[d]eadly force" as "force that is intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury." *Id*. § 9.01(3) (West 2011). But "a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force." *Id*. § 9.04 (West 2011).

D. Evidence Admitted at Trial

1. Jessica Windle, and Kathryn Biediger

Jessica Windle, Jaci's mother, testified that on July 4, 2015, nineteen-year-old Jaci Lewis and eighteen-year-old Skylar Obouch were dropped off, under the bridge at Highway 473, to float down the river. The two girls were dressed in bikinis, shorts, and flip-flops. They were carrying a grocery store bag, with non-alcoholic drinks, and they each had an innertube. Jessica testified that her cellphone rang about thirty-minutes later. Jaci was very upset; Jessica described her as "excited" and "kind of in shock." "[Jaci] said there was a lady on the bank standing there and that [the lady] was holding them at gun point. [The lady] said she was going to call the cops and have them arrested." Jessica told Jaci to go ahead and let the lady call the police, but to keep going.

Jaci called right back and reported that she and Skylar were under the waterfall, "[a]nd then I heard a gunshot." Jessica could hear the lady yelling in the background, but she could not make out what the lady was saying. Jessica yelled at Bobby, her husband, that someone was shooting at

the girls and to get down to the river. They both started running barefooted, running upstream in the water. Bobby was way ahead of her.

As Jessica and Bobby left, Jessica threw the phone towards her friend Kathryn Biediger. After they left, Jaci called again. Kathryn described Jaci as "panicked," and "hysterically crying." Kathryn testified that Jaci said she and Skylar "were being forced off the river and that there was somebody that was forcing them at gunpoint to go to the highway because she was yelling at them that they were trespassing." Kathryn could hear voices in the background. Based on Jaci's description of her surroundings, Kathryn was able to tell 911 officers that the girls were at the Sisterdale Saloon.

2. Kendall County Sheriff's Office Responding Officers

When Corporal Brad McNair arrived at Daniel's property, Vernon Friesenhan, Daniel's husband, was the first person with whom he made contact. Corporal McNair testified that he received a call for shots fired at some tubers; Friesenhan corrected the officers that the "tubers" were "trespassers." Friesenhan was placed in the backseat of Corporal McNair's patrol vehicle and they drove to the property's front gate. As Corporal McNair and Freisenhahn exited the vehicle, Bobby Windle was walking up the driveway frantically looking "for two girls that were floating down the river." Corporal McNair assured Bobby that the girls were safe; he then observed Daniel walking up the roadway. Corporal McNair testified that he did not realize Daniel was in possession of a firearm until Bobby reported it to him. The officers stopped Daniel and retrieved the weapon.

Corporal McNair testified that Bobby did not have any weapons; he also affirmatively stated that he did not see any no trespassing signs on either side of the river bank. Corporal McNair further testified that when he spoke to Daniel, "The first time she said she did not shoot. Then the next time she said she did shoot. And the next time after that I believe it was target practice." He

continued that Daniel never said (1) that she was scared of the girls, (2) that Bobby threatened her, (3) that any of them had a weapon, (4) that she thought she was going to get killed or knocked over, (5) anything about a medical condition, (6) that she was afraid that she would fall because of the girls, or (7) that the girls or Bobby made physical contact with her.

Deputy Matthew Cathey was the first officer to make contact with Jaci and Skylar. He described both girls as very upset and hysterical. The girls were dressed in bathing suits and shorts. Deputy Cathey testified that Daniel never said she was afraid for her life; or that Jaci, Skylar, or Bobby tried to attack her; or that any of them physically contacted her.

3. Jaci Lewis, Skylar Obouch, and Bobby Windle

Jaci testified that at some point during the float, Sklyar's tube deflated so the girls were in one innertube. As they first approached the lady, Skylar noticed she appeared upset. Jaci tried to be friendly and said, "Happy Fourth of July." When Daniel told them they were trespassing, she insisted the girls "go back upstream." Jaci explained that would have been very difficult, so Jaci asked if they could simply call her mother and wait for her to come and get them. Daniel told her no. When Jaci called her mom, her mom told her, "just keep floating, you'll get here soon." Jaci testified that she saw the gun, but that they were trying to "just be on their way," when they heard the shot. Daniel was running down the river telling them to get out of the river. She and Skylar jumped out of the tube and put it over their heads.

> I remember looking up and her telling me to get out, get out. And I was on the phone with my mom. And I ended up hanging up for a little bit. And they pulled us out—didn't pull us, but like told me to get out of the water. So I listened. At this point I have a gun pointed at me, I'm scared to death.

Daniel was still pointing the gun at Jaci and Skylar as they crawled up the bank. They were terrified; Jaci thought they were going to die. Daniel finally agreed to allow Jaci to grab her shorts and her keys, but Daniel would not allow her to grab her shoes. Daniel made them leave, barefoot,

across her property. Then two men arrived in a golf cart screaming at the girls, and Daniel "just stood there with the gun in her hand pointing at us."

Skylar testified similarly. She explained they were about thirty feet from Daniel when they heard the gunshot. They ducked under the innertube. "We were just crying and begging her not to shoot again." Skylar testified that the two older men came on the golf cart and started yelling at them; the whole time, Daniel was standing next to them pointing the gun at Skylar and Jaci. Daniel and the two men made the girls walk off the property, on the gravel, without shoes.

Bobby also testified regarding his encounter with Daniel. As he was running up the creek bed, he saw a deflated tube and a shoe laying in it. He saw Daniel picking up rocks on the creek bed and asked her if she had seen two girls. Daniel immediately said, "You get out of here, you're trespassing. . . . And then she pulled out a pistol and it fell to the ground." As Daniel picked up the weapon, Bobby tried to reassure her that he meant no harm, that he was just looking for the girls. Bobby walked up towards where Daniel pointed him, along her property he assumed, and that was when he saw the officers at the gate.

4. Remaining State Witnesses

The State also called Mark Neugebauer, with the Texas General Land Office. Neugebauer testified the West Sister Creek is a statutory navigable stream; and, therefore, the public has the right to use it.

Detective James Whitt testified that approximately ten weeks after the incident, Daniel came to his office, with her attorney, and gave a recorded statement. Daniel acknowledged that, on the afternoon of the altercations, she had her gun in her holster, because "she always had it on her." She was standing on the creek, looking for fossils, when she noticed the girls. They had stopped and appeared to be talking on the phone and "watching her . . . for what I thought was an unusually long time." She asked them who they were guests of and they responded that they were

simply floating down the Guadalupe River. Although she told them several times that they needed to leave because it was private property, they did not respond. Even worse, it appeared one girl's parent was telling them to ignore her. Daniel could not understand how the parent could encouraged the girls to trespass.

Daniel then went into the house to get her phone to call 911, and when she came back out, she did not see them. Daniel claimed that she heard an explosion, so she took her gun out and pointed it at the ground; she looked behind her, and up and down the creek. Daniels said that she walked down to the bluff and then she tripped or stepped into a depression and the gun went off. Daniel was adamant that she never pointed the gun at the girls. Daniel claimed that when the gun went off, she was by the house and she heard the girls shrieking, and that was how she knew where they were. Daniel's husband then took the girls out of the water, up to the road, and told them to get off their property. Her husband then went back to work.

Daniel told Detective Whitt that within a short period of time, an adult male came up from behind her. She felt for her gun and was surprised that she got to the gun before he did. The man just kept saying, "where are my girls?" Daniel said that she managed to call her husband and tell him that she was "really scared." The man came out of nowhere; Daniel was convinced that the man was not looking for the girls, but that he was looking for her. She could not "imagine threatening someone like that with the force he had; he was threatening her—his demeanor, his stance, and his attitude. What was he doing there?" Daniel told the officer that she watched to make sure the man left, and was relieved to see the officers at the gate.

5. Vernon Frisenhahn, Daniel's Husband

Vernon Frisenhahn, Daniel's husband, testified that Daniel called and was terrified and very frightened. When he arrived, Daniel did not have a gun and he never heard a gunshot. He described the girls as "sort of loud and boisterous," and testified that he told them, "I wish you'd

leave our property," and they agreed. He conceded that he noticed that one of the girls did not have on shoes, but he could not remember about the other. He did not call the police because "We wouldn't bother the sheriff's department because [of] the girls; after I had asked them to leave two or three times, they agreed to leave." He went back to his office and about five minutes later, Daniel called again. As he was headed back to Daniel, he ran into the officers and they put him in the back seat of their patrol car. He saw Bobby coming up the driveway and then he saw Daniel coming up behind him.

6. Kathryn Darleen Daniel

Daniel testified that she was a general practice doctor until 2006 when she retired. She and Vernon bought the property on West Sister Creek thirty-one years earlier and he began running the winery. She described herself as a self-taught, "want-to-be" geologist. It was always her understanding that they owned half the creek; that it was private property and other people could not enter unless invited. She and Vernon had many no trespassing signs on their property.

She obtained a license to carry a firearm about six years before this incident and she would practice at the shooting range every couple of months. She took firearm safety very seriously; she kept her handguns in a safe, and her other guns unloaded.

On the day of the altercations, she was carrying her firearm. She always carried her firearm when she was out at the property, "because I'm really quite alone out there and it gives me a sense of being able to control my environment and to not—not be subject to somebody else taking advantage of me." She explained that she has profound osteoporosis, which means she has the bones of an eighty-five-year-old and she has probably broken fifteen bones in her lifetime.

When she saw the girls, one of them was actually standing outside of the creek, on her property. They looked like they were on the phone. The longer they stayed, the more she thought there were more than two trespassers. One was walking and one was floating. They just kept

getting closer to Daniel; at one point, they were within five feet or so of Daniel. Daniel asked who they were guests of, but "[t]hey told me they weren't guests of anybody that they—this was public property and they were just tubing down the Guadalupe [River]." Daniel explained that it was Sister Creek; it was private property, not the Guadalupe. They told her that they knew where they were. She told them "to go back the way they came." She told the jury, "I wanted them off my property. I wasn't going to feel safe until they were off my property." But they did not listen to her. Daniel continued, "I wasn't sure that I was safe because they were not making good sense. . . . They weren't reacting to me in a normal way." She did not think they were in control of their "own faculties."

Daniel went to the house, retrieved her cellphone, called Vernon, and walked back outside. The girls were hidden. She was terrified that she was going to have to defend herself. She took her gun out of its holster—"I wanted to defend myself against getting hurt. I wanted to defend my property." She tripped or stumbled and the gun went off. That was when her husband drove up and the girls started screaming. They were screaming, "don't shoot." She holstered the firearm and never took it out of the holster again. Vernon took them off the property.

Daniel went back down to the creek and was picking up rocks when she heard someone yelling at her. She turned around and there was a man right behind her. He was angry and just kept asking, "where are the girls?" She again reached for her gun, but it dropped and she told him to get off her property. He just stood there and looked at her. She was scared and she wanted him to leave. He turned and started to walk away. "He said, What are you going to do with that gun, shoot me?" Daniel replied, "Well, if you don't get off the property I might." He walked off the property and as she followed him she saw the officers.

7. Remaining Defense Witnesses

Mark Juliano, an employee of Frisenhahn for twenty-three years, testified there were "no trespassing" signs and that he had never seen anyone tubing on West Sister Creek. He described Daniel as "a good shot, . . . she knows what she's doing." Juliano never heard a gunshot and Daniel did not have a gun in her hand. Daniel was upset, but the girls were leaving, so he and Frisenhahn headed back to work.

The defense called several additional witnesses who testified that "no trespassing" signs were posted on Daniel's property and that no one floats on West Sister Creek.

E. Analysis

The record clearly contains conflicts within the testimony; however, we afford deference to the jury's role to resolve the conflicts and determine the appropriate weight and credibility of the witnesses and evidence presented. *See Hooper*, 214 S.W.3d at 13; *King*, 29 S.W.3d at 562 (declining to reevaluate weight and credibility of the evidence). Jaci and Skylar testified that Daniel threated them with the firearm; that she not only pointed the weapon at them, but held the firearm on them until they left the property. Although Daniel contends the weapon discharged accidentally, both girls testified they were hiding under the innertube and came out of the water crying, "don't shoot." Daniel's own testimony supports that the girls exited the creek saying, "don't shoot." Bobby also testified that Daniel threatened him with the firearm. In fact, Daniel's own testimony supports Bobby's testimony—he asked her if she was going to shoot him and she said she might if he did not get off her property.

Viewing all of the evidence in the light most favorable to the verdict, *Adames*, 353 S.W.3d at 860, we conclude a rational trier of fact could have concluded that Daniel intentionally and knowingly threatened Jaci, Skylar, and Bobby with imminent bodily injury and that she used or exhibited a deadly weapon while doing so. *See* TEX. PENAL CODE ANN. §§ 22.01(a)(2), 22.02

(a)(2); *see also Young*, 358 S.W.3d at 801 (concluding jury's decision was not irrational). We, therefore, conclude the State's evidence was sufficient to support the trial court's judgments.

Additionally, Daniel produced some evidence to raise the defense. Daniel testified that she was scared of Jaci, Skylar, and Bobby. She testified that she was out by the creek bed and that no one could hear her and that she had the bones of an eighty-five-year-old female. She further testified that she was trying to defend herself and her property. Because Daniel introduced some evidence raising a defense under Penal Code section 2.03, the burden of persuasion shifted to the State to disprove the defense. *See Zuliani*, 97 S.W.3d at 594; *Kirk*, 421 S.W.3d at 777. The jury could have relied on the fact that the two girls were eighteen- and nineteen-years-old. They were dressed in bikinis and shorts and wearing no shoes when they were forced off Daniel's property. By all accounts, they were hysterical when they were talking to Jessica, Kathryn, and the officers during and immediately after the incident. The jury was also able to assess the credibility of Bobby and whether he posed a threat to Daniel. The audiovisual recording viewed by the jury showed not only Daniel walking up the walkway, but also Bobby. The jury could have used each of these factors in making their findings.

Based on a review of the entire record, and viewed in the light most favorable to the verdict, we further conclude the jury could have also determined Daniel's testimony and her belief that deadly force was necessary to protect herself and her property was unreasonable. *See* TEX. PENAL CODE ANN. §§ 9.31, 9.32, 9.41. Accordingly, the State sufficiently disproved, by a preponderance of the evidence, the defensive issues raised by Daniel.

We, therefore, overrule Daniel's issues five, six, and seven.

CONCLUSION

Having overruled each of Daniel's issues on appeal, we affirm the trial court's judgments.

Patricia O. Alvarez, Justice

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