



**In The  
Court of Appeals  
Seventh District of Texas at Amarillo**

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No. 07-16-00350-CR

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**MICHAEL TAYLOR PHILLEY, APPELLANT**

**V.**

**THE STATE OF TEXAS, APPELLEE**

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On Appeal from the 108th District Court  
Potter County, Texas  
Trial Court No. 70,448-E; Honorable Douglas R. Woodburn, Presiding

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October 26, 2017

**MEMORANDUM OPINION**

Before QUINN, C.J., and CAMPBELL and PIRTLE, JJ.

Appellant, Michael Taylor Philley, was convicted of the offense of aggravated assault with a deadly weapon and assessed a sentence of twenty years confinement.<sup>1</sup> The judgment entered contained a deadly-weapon finding. By two issues, Appellant contends: (1) his conviction is void because aggravated assault with a deadly weapon

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<sup>1</sup> TEX. PENAL CODE ANN. § 22.02(a)(2) (West 2011). As pertinent to the allegations in this case, an offense under this section is a second degree felony. *Id.* at § 22.02(b).

is not a lesser-included offense of the offense of murder as originally charged and (2) if the conviction is valid, then the trial court erred by entering a deadly-weapon finding because the it failed to orally pronounce an affirmative finding regarding the use of a deadly weapon when his sentence was imposed. We modify the judgment to reflect the offense of conviction as aggravated assault causing serious bodily injury. We reverse and render.

#### BACKGROUND

In December 2013, Appellant, a man in his twenties, got into an altercation with another man in his fifties. The altercation became physical and the older man was killed. Appellant was subsequently charged by indictment with the offense of murder pursuant to the provisions of section 19.02(b)(3) of the Texas Penal Code.<sup>2</sup> The indictment alleged Appellant “did then and there, while in the course of knowingly committing a felony, namely AGGRAVATED ASSAULT CAUSING SERIOUS BODILY INJURY, did then and there intentionally or knowingly commit an act clearly dangerous to human life, namely striking [the victim] with [Appellant’s] foot, [Appellant’s] hand, [Appellant’s] elbow, a rifle, or a combination thereof, causing the death of [the victim] . . . .” In a separate paragraph, the indictment included a “Deadly Weapon Notice” stating “AND THE GRAND JURORS do further present in and to the Court that during the commission of this offense the defendant did use or exhibit a deadly weapon, namely his foot, his hand, a knife, and a rifle.”

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<sup>2</sup> TEX. PENAL CODE ANN. § 19.02(b)(3) (West 2011). Pursuant to this section, a person commits the offense of murder if he commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual. An offense under this section is a first degree felony. *Id.* at § 19.02(c).

On October 30, 2015, Appellant appeared in court, in person and by attorney, for the purpose of entering a plea of guilty pursuant to a plea bargain. In conjunction therewith, the State and Appellant tendered to the court Appellant's *Written Plea Admonishments* containing his judicial confession stating that he was "guilty of the offense alleged [felony murder] as well as all lesser included offenses." Attached thereto was a document entitled *State's Punishment Plea Recommendation*, reflecting "Prosecution for lesser included offense of Aggravated Assault w/ Deadly Weapon," and recommending deferred adjudication community supervision for a term of ten years and a fine of \$500. Although not contained within the State's plea recommendation, the State orally announced that it was also asking the court to "make an affirmative finding of a deadly weapon." Upon inquiry from the court, Appellant acknowledged that he understood the State's recommendation, whereupon the court announced that it would "accept the State's recommendation." In its pronouncement of sentence, the court states, "I find that the evidence is sufficient to establish your guilt beyond a reasonable doubt, however, in your own interest and in the interest of society, I am going to postpone any finding that you're guilty at this time and place you on probation for a period of ten years . . . ." The court did not make an oral pronouncement regarding the specific offense being deferred or the use of a deadly weapon. The *Order of Deferred Adjudication* signed by the court the same day reflects the offense as "AGGRAVATED ASSAULT WITH A DEADLY WEAPON-A LESSER INCLUDED OFFENSE OF THAT ALLEGED IN THE INDICTMENT." The order included the statement, "Findings on Deadly Weapon: YES, NOT A FIREARM."

Less than a year later, the State moved to proceed with an adjudication of guilt based on multiple alleged violations of the conditions of Appellant's community supervision.<sup>3</sup> At a hearing on that motion, Appellant entered a plea of true to all of the alleged violations. Following presentation of testimony and evidence, the trial court revoked Appellant's deferred adjudication community supervision, stating that it did "enter a guilty finding against you, and sentence you to serve 20 years in the Texas Department of Corrections, Institutional Division, plus pay a \$500 fine." Again, at no time did the court specify the offense for which he was finding Appellant guilty, nor did it make an oral pronouncement regarding a deadly-weapon finding. The *Judgment Adjudicating Guilt* signed by the court the same day reflects the offense as "AGG. ASSAULT WITH A DEADLY WEAPON-A LESSER INCLUDED OFFENSE OF THAT ALLEGED IN THE INDICTMENT." The judgment also included the statement, "Findings on Deadly Weapon: YES, NOT A FIREARM." Thereafter, Appellant filed a timely notice of appeal.

#### VOID CONVICTION

By his first issue, Appellant contends his conviction of the offense of aggravated assault with a deadly weapon is void and should be set aside because aggravated assault through the use of a deadly weapon is not a lesser-included offense of the offense of murder as it is alleged in his indictment. Appellant reasons that, without a valid charging instrument, the trial court was without jurisdiction to enter a finding of guilt. While the State concedes aggravated assault through the use of a deadly weapon

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<sup>3</sup> At the time of the hearing, Appellant had amassed more than one hundred violations of the conditions of his community supervision.

is not a lesser-included offense of the offense of murder as alleged in the indictment in this case, it contends Appellant is estopped from asserting his conviction is a nullity.

Aggravated assault may be committed in two different ways: (1) the actor could commit an assault that causes serious bodily injury to another, including the person's spouse; TEX. PENAL CODE ANN. § 22.02(a)(1) (West 2011), or (2) the actor could commit an assault while using or exhibiting a deadly weapon during the commission of that assault. *Id.* at § 22.02(a)(2).

Here, the indictment charged Appellant with the offense of murder, pursuant to the provisions of section 19.02(b)(3) of the Texas Penal Code, by alleging that he “did then and there, while in the course of knowingly committing a felony, namely AGGRAVATED ASSAULT CAUSING SERIOUS BODILY INJURY, did then and there intentionally or knowingly commit an act clearly dangerous to human life, namely striking [the victim] with [Appellant's] foot, [Appellant's] hand, [Appellant's] elbow, a rifle, or a combination thereof, causing the death of [the victim] . . . .” At no time did the State ever amend its indictment to allege aggravated assault by the use or exhibition of a deadly weapon as the underlying felony offense.

An offense is a lesser-included offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission; (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or (4) it consists of an

attempt to commit the offense charged or an otherwise included offense. TEX. CODE CRIM. PROC. ANN. art. 37.09 (West 2006).

Here, the offense charged was felony murder based on the commission of the offense of aggravated assault causing serious bodily injury. As charged in the indictment, in order to establish the commission of that offense, the prosecution was required to prove beyond a reasonable doubt the following elements: (1) death of an individual, (2) caused by the commission or attempted commission of an act clearly dangerous to human life, (3) committed in furtherance of the commission or attempted commission of the offense of aggravated assault causing serious bodily injury, which would involve proof that the defendant, (4) intentionally, knowingly, or recklessly, (5) caused serious bodily injury to another. By contrast, the offense of aggravated assault with a deadly weapon requires proof that the defendant: (1) intentionally, knowingly, or recklessly, (2) caused bodily injury to another, and (3) while using or exhibiting a deadly weapon during the commission of the offense. *Id.* at § 22.02(a)(2). Applying the criteria of article 37.09, aggravated assault with a deadly weapon is not established by proof of the same or less than all the facts required to establish the commission of the offense felony murder, as charged, because it requires proof of the additional element of use or exhibition of a deadly weapon. Furthermore, aggravated assault with a deadly weapon does not differ from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission, nor does it differ from the offense charged only in the respect that a less culpable mental state suffices to establish its commission, nor does it consist of an attempt to commit the offense charged or an otherwise included offense. Accordingly,

we agree with Appellant's contention that aggravated assault with a deadly weapon is not a lesser-included offense to the offense of felony murder alleging aggravated assault by causing serious bodily injury. As stated above, the State concedes as much.

Because aggravated assault with a deadly weapon is not a lesser-included offense to the offense of felony murder as charged, the question arises as to whether the trial court had jurisdiction to convict Appellant of aggravated assault by the use of a deadly weapon pursuant to section 22.02(a)(2) of the Texas Penal Code. In *Houston v. State*, 556 S.W.2d 345 (Tex. Crim. App. 1977), the Texas Court of Criminal Appeals held that a trial court lacked jurisdiction to convict the accused of an offense that was not a lesser-included offense of the offense charged in the indictment. Under those circumstances, the court held that the conviction was a "nullity." There, the accused was originally charged by indictment with the offense of burglary of a habitation with intent to commit rape. Following a bench trial, the appellant was found guilty of "Rape, a lesser offense than the indictment." The State's subsequent motion to dismiss that conviction was granted by the trial court and the appellant was then indicted for the offense of rape. Later, the trial court overruled appellant's plea of double jeopardy. On appeal, the Court of Criminal Appeals held that "[s]ince rape is not a lesser included offense of burglary with intent to commit rape, there was no valid indictment before the court in [that cause] charging rape, and the court was without jurisdiction to convict appellant for rape." As a result, the appellant's plea of double jeopardy failed.

Here, there was no valid instrument charging Appellant with aggravated assault with a deadly weapon, either as an original indictment or as a lesser-included offense. However, although the trial court erred in assuming that aggravated assault with a

deadly weapon was a lesser-included offense to the offense of felony murder alleging aggravated assault by causing serious bodily injury, it had jurisdiction to commit that error. See *Trejo v. State*, 280 S.W.3d 258, 261 (Tex. Crim. App. 2009) (holding that, by virtue of the indictment, the trial court had both subject matter and personal jurisdiction over the defendant, such that submission of a “lesser-but-not-included” offense, although error, did not deprive the trial court of jurisdiction).

Therefore, in the final analysis, the non-jurisdictional error committed by the court was the finding of an additional element of the offense not charged in the indictment. Under these circumstances, we are not limited to ordering an acquittal, or even reversing and remanding for a new trial. Where there is proof beyond a reasonable doubt of all elements of a lesser-included offense, an appellate court should render a judgment of conviction as to that lesser-included offense. *Britain v. State*, 412 S.W.3d 518, 521 (Tex. Crim. App. 2013). Here, that would be the lesser-included offense of aggravated assault by causing serious bodily injury. In accepting Appellant’s plea of guilty as to the offense of felony murder alleging aggravated assault by causing serious bodily injury, the trial court necessarily accepted Appellant’s plea of guilty as to the lesser-included offense of aggravated assault by causing serious bodily injury. Applying the standards of evidentiary review to that lesser-included offense, we find there is sufficient evidence to support a conviction as to that offense. Accordingly, we reverse the judgment finding Appellant guilty of the offense of aggravated assault with a deadly weapon, and we render a judgment of conviction as to the offense of aggravated assault by causing serious bodily injury. Because the two offenses are punishable by the same range of punishment, and because Appellant has heretofore agreed to be



punished within that range of punishment, we find no need to remand for a new trial on the issue of punishment. Issue one is sustained as to the commission of error, but overruled as to the question of the judgment being void.

#### DEADLY-WEAPON FINDING

By his second issue, Appellant complains the deadly-weapon notice contained in the indictment was inadequate and that the deadly-weapon finding contained in the judgment was inappropriate because the trial court failed to orally pronounce a deadly-weapon finding at either the original guilty plea hearing or the adjudication hearing. Appellant's requested relief is to reform the judgment by deleting the deadly-weapon finding.<sup>4</sup> We disagree.

#### APPLICABLE LAW

A defendant is entitled to notice in some form that the State intends to pursue an affirmative finding of the use or exhibition of a deadly weapon. *Narron v. State*, 835 S.W.2d 642, 643 (Tex. Crim. App. 1992). Notice can be sufficiently provided by language in the charging portion of an indictment that specifically mentions a particular object or substance and its use with respect to death or serious bodily injury. *Johnson v. State*, 815 S.W.2d 707, 709 (Tex. Crim. App. 1991) (finding that allegation in indictment charging appellant with "causing death by striking with [his] feet and hands" provided adequate notice that State was seeking a deadly-weapon finding). Furthermore, a deadly-weapon finding may be authorized simply by convicting a defendant based upon an indictment that expressly contains an allegation regarding the

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<sup>4</sup> The State argues that Appellant's failure to object during the trial court's pronouncement waived any error. However, in light of our disposition of issue one, we will review this issue in the interest of justice.

use or exhibition of a deadly weapon. See *Polk v. State*, 693 S.W.2d 391, 394 (Tex. Crim. App. 1985). See also *Ex parte Empey*, 757 S.W.2d 771, 774 (Tex. Crim. App. 1988) (holding that an affirmative deadly-weapon finding arose as a matter of law when an indictment charged the defendant with the use of a deadly weapon and the trial court found the defendant guilty as charged).

While a deadly-weapon finding is not part of a defendant's sentence and it need not be orally pronounced; *Ex parte Huskins*, 176 S.W.3d 818, 820-21 (Tex. Crim. App. 2005), the Court of Criminal Appeals has held that in order to be effective, the affirmative deadly-weapon finding must be an "express" determination. *Guthrie-Nail v. State*, 506 S.W.3d 1, 4 (Tex. Crim. App. 2015) (specifically identifying the inclusion of "express words, in a verdict or judgment" that refer to a portion of the charging instrument that includes a deadly-weapon allegation as being sufficient). Although an oral pronouncement of a deadly-weapon finding would certainly satisfy the express determination requirement, the Court of Criminal Appeals has concluded that certain less explicit acts also satisfy that requirement. *Id.* (stating that, "in a bench trial, a trial judge need not include a deadly-weapon finding in the oral pronouncement of judgment, if the charging instrument alleges a deadly weapon"). The Court went on to intimate that the express determination requirement could be satisfied by a record which "readily supports" an affirmative finding that a deadly-weapon finding was made "at or before the time the written judgment was signed." *Id.* at 7.

#### ANALYSIS

Given that Appellant was properly adjudged guilty only of the offense of aggravated assault by causing serious bodily injury, the use or exhibition of a deadly-

weapon would not be implicitly included within that finding of guilt. Accordingly, we must determine whether the trial court made an express determination regarding the use of a deadly weapon and whether the record readily supports that finding.

Here the indictment alleged that Appellant committed the offense of felony murder by committing an act “clearly dangerous to human life, namely striking [the victim] with [Appellant’s] foot, [Appellant’s] hand, [Appellant’s] elbow, a rifle, or a combination thereof, causing the death of [the victim]” while in the course of knowingly committing the felony offense of aggravated assault causing serious bodily injury. Furthermore, the indictment included a “Deadly Weapon Notice” that alleged he “did use or exhibit a deadly weapon, namely, his foot, his hand, a knife, and a rifle.” As such, under *Johnson*, notice of the State’s intent to seek a deadly-weapon finding was clearly sufficient. 815 S.W.2d at 709.

Furthermore, Appellant’s sworn judicial confession recites, “I have read the indictment . . . . I committed each and every allegation it contains. I am guilty of the offense alleged as well as all lesser included offenses.” Appellant’s signed plea documents also specify the offense as “aggravated assault w/deadly weapon.” By admonishing Appellant and accepting his guilty plea, and by including an affirmative deadly-weapon finding in the judgment, the trial court necessarily determined that he used a deadly weapon in his commission of the offense and the record readily supports that finding. Accordingly, the trial court did not err by including a deadly-weapon finding in its judgment. Issue two is overruled.

CONCLUSION

The trial court's judgment is reversed and we render judgment to reflect the offense of conviction as aggravated assault by causing serious bodily injury.

Patrick A. Pirtle  
Justice

Do not publish.

Quinn, C.J., concurring in result.