IN THE
TENTH COURT OF APPEALS

No. 10-17-00396-CR

TA'DARIUS LA'VONTE DAVIS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 52nd District Court
Coryell County, Texas
Trial Court No. 23265

MEMORANDUM OPINION

In two issues, Appellant Ta'Darius La'Vonte Davis challenges his conviction for capital murder. After a jury found Davis guilty, the trial court imposed a sentence of life without parole as the State elected to not seek the death penalty. Davis asserts that the evidence against him is legally insufficient and that the trial court erred in failing to properly charge the jury on self-defense. We affirm.

I. Background

Thomas Smethers was shot in the early morning hours of October 28, 2015 in the Walmart parking lot in Copperas Cove, Texas and died on the way to the hospital. The State indicted Davis and Terrence Daniel[1] for capital murder, with the special circumstance being that the murder was committed during the course of robbing or attempting to rob Smethers. Davis testified that he shot Smethers but asserted that he did so in self-defense.

A. Davis's Testimony. Davis testified at trial that he and Daniel went to the Walmart parking lot to buy a half-ounce of methamphetamine for another individual. According to Davis, an individual he knew as Rico set up the transaction with a meth dealer, later determined to be Smethers. Rico told Davis to go to the Walmart parking lot in Copperas Cove but did not give Davis a name or a description of the meth dealer. Rico told Davis that the dealer would "pull up on him" because Davis has a distinctive car with distinctive rims. Davis asked Daniel to ride along with him but did not tell Daniel the purpose of the trip. Davis denied taking a firearm to the meeting.

Once Davis and Daniel arrived at the Walmart parking lot, Rico texted Davis where to park. A red truck pulled up beside Davis's car, and the driver of the truck, Smethers, got into Davis's back seat. Another man with Smethers, Michael Morgan, initially stayed in the truck. Davis had never seen Smethers or Morgan before. Smethers

[1] Daniel was convicted of the lesser-included offenses of murder and robbery.

had a gun when he got into Davis's car, and Smethers kept the gun in his lap the entire time he was in Davis's vehicle. The presence of the gun started an argument between Davis and Smethers, with Davis telling Smethers to put the gun away. Davis never saw Smethers put his finger on the trigger of the gun while he was in Davis's car, but Smethers continued rubbing the bottom of the trigger. Davis noted that Smethers was "just fumbling with it, rubbing his finger like under the trigger part." "He was basically just holding onto it." Eventually, Morgan got out of the truck and climbed into the rear seat of Davis's car beside Smethers.

Davis and Smethers continued to argue, and Davis got out of his car. Smethers then returned to the driver's seat of the truck. Morgan got out of Davis's car and went to stand at the rear of the vehicles. Daniel exited Davis's car and went to the rear of the vehicles where Morgan was standing. Smethers told Davis to come over to the truck to finish the drug transaction. Davis walked around to the passenger side of the truck and opened the door. Davis stated that Smethers pointed the gun at him while he was walking toward the truck. Davis happened to rub one of his hands in the pocket of his pants, and Smethers told him to stop. Davis denied that Smethers verbally threatened him, and Smethers put the gun back down when Davis raised his hands. Davis did not leave because he was afraid of being shot in the back.

Smethers produced a baggie filled with what appeared to be a large amount of methamphetamine, which was more than Davis had agreed to purchase. Rico told Davis

that the half-ounce he requested would be $350, and Davis brought $500 to pay for it. Smethers, however, wanted to sell the entire bag for $3,500. While Davis and Smethers were arguing over the drugs, Smethers continued to rub his finger under the trigger of the gun. Smethers wanted Davis to get into the truck, but Davis refused to do so unless Smethers put the gun away. Davis noticed there was another gun in the truck lodged between the passenger seat and the side of the truck. Davis reached for the gun because Smethers kept threatening him by continuing to rub his finger along the bottom of the trigger. As Davis reached for the gun, Smethers told him to stop. Davis continued to pull out the gun, and Smethers raised and pointed the gun he was rubbing, a.44 magnum, at Davis. Smethers then pulled the trigger but the gun did not fire because the hammer was not cocked. Davis testified that he then fired the gun he found beside the seat at Smethers, hitting him at least once. Smethers jumped out of the truck, and Davis fired at least two more shots while still on the passenger side of the truck. Davis ran around the back of the truck and continued to fire at Smethers. Davis thought Smethers was standing on the other side of the truck and continued to fire because he feared Smethers was still armed. Davis then realized that the man he saw was actually Daniel, and Smethers was on the ground. Davis did not know whether Smethers was dead or alive. Davis and Daniel then exited the Walmart parking lot in Davis's car, throwing the .40-caliber gun taken from Smethers's truck out the window while they drove back to Killeen.

Davis admitted that he did not tell police about Smethers pointing a gun at him. On redirect, Davis noted that his memory of the events of October 28 might be impaired because of the drugs he had imbibed after the shooting and before his arrest.

Davis denied taking the .44 magnum or the baggie of what appeared to be methamphetamine from Smethers, although he conceded that Daniel must have done so as both the .44 magnum and the baggie were found by police in Davis's motel room in Killeen.

B. Morgan's Testimony. Morgan, a convicted felon on parole, testified that he accompanied Smethers to the Walmart in Copperas Cove in the early morning hours of October 28. Morgan was with Smethers all day on October 27. Smethers spent a lot of time that day texting and making telephone calls about a drug deal that was to occur later that night. Smethers said that the deal was for a payment of $3,800 for methamphetamine. In preparation for the deal, Morgan and Smethers used what Morgan termed "horse vitamins" to create a substance that looked like methamphetamine. Smethers eventually received directions to go to the Walmart in Copperas Cove to complete the transaction. Smethers took a friend's .44 magnum handgun with them. Morgan saw the .44 magnum because it kept sliding off the console between the seats. Morgan saw no other weapons in the truck.

After they arrived at Walmart, Morgan and Smethers went into the store where Morgan stole some beer. When they returned to the truck, Smethers received instructions

about where to go in the Walmart parking lot. Smethers drove to another location and parked next to Davis's car. Smethers got out of the truck and got into the back seat of Davis's car. Morgan stayed in the truck, but eventually got out to determine why the transaction was taking so long. Morgan climbed into the back seat of Davis's car beside Smethers. Morgan did not know either the driver or the passenger. Smethers told Morgan that Davis kept reaching for something by the driver's door and asked Morgan to see what it was. Before Morgan could investigate, Davis got out of the car and walked around to the front. Morgan got out and looked into the driver's side of the car but did not see anything that Davis could have been reaching for. Morgan did not see Smethers display a handgun while Morgan was in Davis's car.

Morgan went to stand behind the vehicles with Daniel. Morgan could see Smethers through the back window of the truck. Smethers had both hands on the steering wheel, and the .44 magnum pistol was in Smethers's lap. Davis was at the passenger side of the truck and continued to argue with Smethers through the open door. Daniel then ran to the driver's side of the truck and grabbed the .44 magnum from Smethers's lap. Morgan heard Daniel tell "the driver [Davis] to shoot him, get him, go." Morgan heard shots and ran for the Walmart entrance. Morgan heard more shots fired as he ran and believed that Smethers was running behind him.

Morgan called 9-1-1 and waited for the police to arrive. Morgan made three statements to the police, finally admitting in his third statement that he and Smethers had been at Walmart for a drug deal. Morgan also admitted stealing the beer from Walmart.

C. Other Testimony and Evidence. A nearby resident heard shots from the Walmart parking lot and looked out his window. He saw an African American man who appeared to be holding a handgun running from the driver's side to the passenger side of a red truck. The witness called 9-1-1 to report the shooting. First responders found Smethers on the ground close to the driver's side of the truck. Despite their efforts, Smethers died on the way to the hospital.

The medical examiner testified Smethers was shot three times, and the wounds were consistent with someone firing at him from the right side and continuing to shoot as Smethers turned to his left. One bullet entered Smethers's body under his right arm and continued through his body and out his left elbow. The other two bullets hit Smethers in the back.

Crime scene investigators found three shell casings in the interior of the truck on the passenger side and one shell casing on the ground outside. Three other shell casings, a spent bullet, and a bullet fragment were found on the ground on the driver's side of the truck. Another bullet fragment was recovered from inside the driver's door of the truck. The seven shell casings were.40 caliber S&W manufactured by Federal and were all fired from the same gun. The .40-caliber ammunition was not fired from either a .44-caliber

magnum handgun or a smaller caliber gun. Ballistics analysis could not determine whether any of the spent bullets or bullet fragments were fired from the same weapon, but they could not have been fired from a .44- magnum or a smaller caliber firearm.

Surveillance videos showed Davis and Daniel entering and exiting Walmart. Daniel purchased M&M's and other items. Photos from the scene show a green M&M and a bottle of Mountain Dew on the ground next to the driver's side of Smethers's truck. Davis's DNA was found on the Mountain Dew bottle.

Davis was arrested later the morning of October 28 after police found him passed-out at a 7-Eleven in Killeen. Officers quickly identified the vehicle Davis was in as the one involved in the shooting at the Copperas Cove Walmart. Officers recovered a .380 pistol from Davis's pocket when they searched him. Davis also had approximately $163.00 in his possession. Police executed a search warrant at Davis's motel room and discovered Smethers's .44 magnum revolver in a bag wrapped in the clothes Davis was wearing at the time of the shooting. A baggie of a substance that appeared to be a large amount of methamphetamine was also found. The substance was later determined not to be methamphetamine but was consistent with an over-the-counter vitamin supplement. Police also discovered a large amount of marijuana packaged for sale and other items related to drug distribution.

Davis testified that he had no idea how the .44 magnum or the baggie of fake methamphetamine ended up in his motel room. Davis further testified that no one else

was staying at the motel but him, his girlfriend, and their baby. He could not remember if anyone else had visited the motel room. Davis testified that he only had approximately $163.00 on him because he put up the rest of the $500.00 he originally had when he went to his house to pick up his girlfriend and their baby before taking them to the motel.

After his arrest, Davis was questioned by law enforcement. Davis at first denied any knowledge of the shooting of Smethers, but admitted that he was at the Walmart parking lot in Copperas Cove on the night of the shooting. Davis also admitted that he threw a handgun out of his vehicle on the way back to Killeen from Copperas Cove.

Daniel's fingerprint was found on the .44 magnum. Davis testified that he did not personally take the .44 magnum, although he acknowledged that the gun came from Smethers. He further testified, "I don't want to tell on my brother [Daniel], but he's the person I remember with the gun because I didn't bring that gun into the room." Davis's DNA was found on the .44 magnum.

A Walmart employee, who went to high school with both Davis and Daniel, recognized Daniel in the parking lot shortly before the shooting. The employee testified that he saw Davis's car moving to various locations in the parking lot. At one point, the employee noticed that both Davis and Daniel were sitting with the car doors open and their feet on the ground. The day after the shooting, a Walmart customer discovered an unfired, Federal .40-caliber S&W bullet in the parking lot close to where Davis and Daniel were parked.

Intertwined with the evidence regarding the shooting and the robbery, was evidence that Davis had a motive for shooting Smethers. Approximately one week prior to the shooting, Smethers severely beat Davis's uncle over a drug deal, and the uncle ended up in intensive care. Davis's entire family, including Davis, learned that Smethers was responsible for the uncle's injuries. The family also began investigating how to find Smethers.

II. Sufficiency of the Evidence

In his first issue, Davis asserts that the evidence is insufficient to support his conviction for capital murder. Davis contends: (1) a rational jury could not have found against his self-defense claim; and (2) the State failed to prove a link between the shooting of the victim and a robbery.

A. Standard of Review. The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

> When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319, 99 S.Ct. 2781. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not

> speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (*citing Jackson*, 443 U.S. at 319, 99 S.Ct. 2781); *see also Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.
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> We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*; *see also Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

B. Self Defense. Davis argues that a rational jury could not have found against his claim of self-defense. The jury was charged on the law of self-defense, and the self-defense theory was argued by both the prosecutor and defense counsel during final jury argument. By returning a verdict of guilty on the charge of capital murder, the jury implicitly rejected the self-defense theory.

Self-defense is an issue of fact to be determined by the jury, and a "jury verdict of guilty is an implicit finding rejecting the defendant's self-defense theory." *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991). When a defendant raises self-defense, "the defendant bears the burden to produce evidence supporting the defense, while the State bears the burden of persuasion to disprove the raised issues." *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018).

> The defendant's burden of production requires him to adduce some evidence that would support a rational finding in his favor on the defensive issue. By contrast, the State's burden of persuasion is not one that requires the production of evidence; rather it requires only that the State prove its case beyond a reasonable doubt. Thus, in resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted appellant's self-defense testimony, but rather we determine whether after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the offense beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt.

Id., at 608–09 (internal citations and quotation marks omitted).

The evidence presented at trial was sufficient for a rational jury to find beyond a reasonable doubt that Davis was not acting in self-defense when he shot Smethers. The jury could rationally conclude that Davis shot Smethers when Smethers was unarmed after Daniel took the .44 magnum from Smethers's lap.

The jury could also rationally believe that Davis brought a .40 caliber handgun with him to the meeting with Smethers rather than finding a .40 caliber handgun in Smethers's truck. The jury could infer that Davis already had the .40 caliber in his

possession based on the testimony of the Walmart customer who found an unfired .40 caliber bullet in an area where Davis and Daniel parked prior to the shooting and that Davis or Daniel dropped the bullet when readying the gun to rob Smethers. The jury could also infer from Morgan's testimony that Davis had the .40 caliber gun secreted in his car and took it with him when he went to Smethers's truck.

Davis argues that Morgan was not a credible witness and that the jury should have considered Smethers's history of violence in evaluating Davis's self-defense claim. As previously noted, the jury is the sole judge of the weight and credibility of any witness's testimony. *Brumbalow v. State*, 432 S.W.3d 348, 353 (Tex. App.—Waco 2014, no pet.). The jury may choose to believe all, none, or any part of a witness's testimony, even if such testimony is contradicted. "A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony." *Febus v. State*, 542 S.W.3d 568, 572 (Tex. Crim. App. 2018); *see also Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986) (jury may believe all, none or any part of witnesses' testimony even if uncontradicted). We may not reevaluate the weight and credibility of the evidence or substitute our own judgment for that of the factfinder. *Braughton*, 569 S.W.3d at 608.

After viewing all of the evidence in the light most favorable to the prosecution, a rational trier of fact could have found against Davis on the self-defense issue beyond a reasonable doubt.

C. Murder During the Course of a Robbery. Davis also alleges in his first issue that the evidence was insufficient to establish that he committed capital murder because the State failed to prove a link between the shooting of Smethers and the ~~purported~~ robbery. Davis does not contend that there was insufficient evidence to prove the other elements of capital murder.

The indictment charged Davis with murder committed during the course of committing or attempting to commit the offense of robbery. "A person is guilty of capital murder as a principal actor if he intentionally causes the death of another in the course of committing or attempting to commit robbery." *Nickerson v. State*, 478 S.W.3d 744, 755 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

The indictment charged Davis as both a principal and a party to the offense. A person may be guilty of capital murder either as a principal actor or as a party to the offense. TEX. PENAL CODE § 7.01 ("A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both"); TEX. PENAL CODE § 7.02(b) ("A person is criminally responsible for an offense committed by the conduct of another if . . . acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. . ."). "Party liability is as much an element of an offense as the enumerated elements prescribed in a statute that defines a particular crime." *In re State ex rel. Weeks*, 391 S.W.3d 117, 124 (Tex.

Crim. App. 2013). Even if not charged by indictment, "liability as a party is an available legal theory if it is supported by the evidence." *Id*.

When a defendant is charged as a party, he may not be convicted without evidence of intentional participation. *See Cary*, 507 S.W.3d at 758. "There must be sufficient evidence of an understanding and common design to commit the offense." *Gross v. State*, 380 S.W.3d 181, 186 (Tex. Crim. App. 2012). The necessary intent may be proven through circumstantial evidence, and the reviewing court may look to "events that took place before, during, or after the commission of the offense." *Cary*, 507 S.W.3d at 758 (citing *Wygal v. State*, 555 S.W.2d 465 (Tex. Crim. App. 1977)).

We must determine whether any rational fact finder could have found beyond a reasonable doubt from the direct and circumstantial evidence as a whole that Davis murdered Smethers and that he and/or Daniels formed the intent to take Smethers's property prior to or concurrent with the murder. The State alleged three items were or could have been stolen from Smethers: (1) an unknown make and model firearm in .40 S&W caliber taken from Smethers's truck; (2) a Ruger Super Blackhawk in .44 caliber; and (3) a plastic bag containing a substance thought to be methamphetamine.

For a murder to qualify as capital murder, the intent to rob must be formed prior to or concurrent with the murder. *Robertson v. State*, 871 S.W.2d 701, 705 (Tex. Crim. App. 1993); *see also Shuffield v. State*, 189 S.W.3d 782, 791 (Tex. Crim. App. 2006) ("Evidence is sufficient to support a capital murder conviction if it shows an intent to obtain or

maintain control of property which was formed before *or contemporaneously with* the murder.").

> Proof that the robbery was committed as an afterthought and unrelated to the murder is not sufficient. *Herrin v. State*, 125 S.W.3d 436, 441 (Tex. Crim. App. 2002); *see White v. State*, 779 S.W.2d 809, 815 (Tex. Crim. App. 1989) (explaining that the point at which the appellant formulated his intent is critical to differentiating between the commission of capital murder in the course of a robbery or a lesser offense). The State must prove that the murder occurred to facilitate the taking of the property. *Moody v. State*, 827 S.W.2d 875, 892 (Tex. Crim. App. 1992); *Ibanez v. State*, 749 S.W.2d 804, 807 (Tex. Crim. App. 1986).
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> The Court of Criminal Appeals has repeatedly held that the requisite intent may be inferred from the actions or conduct of the appellant. *See Robertson*, 871 S.W.2d at 705; *McGee* [*v. State*], 774 S.W.2d [229] at 234 [(Tex. Crim. App. 1989)]; *Fierro v. State*, 706 S.W.2d 310, 313 (Tex. Crim. App. 1986); *Johnson v. State*, 541 S.W.2d 185, 187 (Tex. Crim. App. 1976).

Dawkins v. State, 495 S.W.3d 890, 895 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "If there is evidence . . . from which the jury could rationally conclude beyond a reasonable doubt that the defendant formed the intent to obtain or maintain control of the victim's property either before or during the commission of the murder, then the State has proven that the murder occurred in the course of robbery." *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Crim. App. 1995), *overruled on other grounds, Warner v. State*, 245 S.W.3d 458 (Tex. Crim. App. 2008).

The State is not required to produce direct evidence of a defendant's culpable mental state in order to maintain a conviction. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002). Instead, the requisite culpable mental state is almost always proved

circumstantially. *See Russo v. State*, 228 S.W.3d 779, 793 (Tex. App.—Austin 2007, pet. ref'd) ("Mental culpability is of such a nature that it generally must be inferred from the circumstances under which the prohibited act occurred."). "A jury may infer intent from any facts which tend to prove its existence, including the acts, words, and conduct of the accused, and the method of committing the crime and from the nature of wounds inflicted on the victims." *Hart*, 89 S.W.3d at 64 (*quoting Mannique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)).

In the present case, there was sufficient evidence presented by the State from which the jury could find that Davis and/or Daniel formed the intent to rob Smethers before or contemporaneously with his murder.

The jury could infer that Smethers was lured to the Walmart by Davis for two reasons: (1) to steal methamphetamine; and (2) to avenge the beating of Davis's uncle. The jury heard from Davis's family that the family knew Smethers was the individual who beat Davis's uncle and that the family had been trying to find Smethers to avenge the beating. The jury could infer from this evidence that Davis knew Smethers beat Davis's uncle and that Davis concocted a plan to get revenge. The jury could also infer that Davis told Smethers that he would buy a large amount of methamphetamine, but that Davis intended to steal the methamphetamine rather than purchase it. Davis had only approximately $163 on him when arrested after the shooting, less than the $500 that Davis testified was required for the amount of meth he was to purchase. Additionally,

the fake methamphetamine was found in Davis's motel room, creating the inference that it was taken from Smethers by either Davis or Daniel.

The jury could also infer that Daniel formed the intent to steal the .44 magnum from Smethers when he snatched it out of Smethers's lap. The jury could infer that Davis and Daniel intended to keep the .44 magnum rather than to merely disarm Smethers because: (1) the .44 magnum was not left at the scene of the shooting; (2) the .44 magnum was not thrown out the car window along with the .40 caliber; and (3) the .44 magnum was found in a bag in Davis's motel room wrapped in the clothes Davis was wearing during the shooting. Under the law of parties, Davis was equally responsible for the theft of the .44 magnum.

Finally, if the jury believed that Davis found the .40 caliber gun in Smethers's truck, the jury could also reasonably infer that Davis killed Smethers while robbing him of the .40 caliber gun. Davis testified that he took the .40 caliber from Smethers's possession and used it to kill Smethers.

"We presume that the factfinder resolved any conflicting inferences in favor of the verdict, and we defer to that resolution." *Braughton*, 569 S.W.3d at 608.

Based upon the foregoing, the evidence was sufficient for the jury to rationally conclude beyond a reasonable doubt that Davis killed Smethers during the course of a robbery. Davis's first issue is overruled.

II. Charge Error

In his second issue, Davis asserts that the trial court erred in failing to properly apply self-defense to the capital murder allegation resulting in egregious harm. Davis argues that the court's instruction on self-defense was improperly placed in the court's charge. Specifically, Davis argues:

> Here, the jury charge first instructed the jury to convict Mr. Davis without reference to the right of self defense. To be sure, under roman numeral VIII, the trial court did instruct the jury in an exceedingly dense matter, that the law of self-defense did apply to the allegations of capital murder. But this was long after they were instructed to convict him solely of whether the jury believed beyond a reasonable doubt, that the elements of capital murder were satisfied.

Appellant's Brief, p. 48 (citations omitted). Davis also contends that the charge should have included transitional language such as that recommended in the Pattern Jury Charge from the State Bar of Texas: "If you all agree the state has proved, beyond a reasonable doubt, each of the . . . elements listed above, you must next consider whether the defendant's use of force was made in self-defense."

In reviewing a jury-charge issue, an appellate court's first duty is to determine whether error exists in the jury charge. *Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App. 1996). If error is found, the appellate court must analyze that error for harm. *Middleton v. State*, 125 S.W.3d 450, 453-54 (Tex. Crim. App. 2003).

If error was properly preserved by objection, reversal will be necessary if the error is not harmless. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Conversely,

if error was not preserved at trial by objection, as was the case here, a reversal will be granted only if the error presents egregious harm. *Id*. To obtain a reversal for jury-charge error, Davis must have suffered actual harm and not just theoretical harm. *Sanchez v. State*, 376 S.W.3d 767, 775 (Tex. Crim. App. 2012); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986). However, because we conclude that the charge was not erroneous in this case, we do not conduct a harm analysis on this issue. *See Cortez v. State*, 469 S.W.3d 593, 598 (Tex. Crim. App. 2015) (citing *Kirsch v. State*, 357 S.W.3d 645, 649 (Tex. Crim. App. 2012)).

The purpose of the jury charge is "to inform the jury of the applicable law and to guide it in applying the law to the facts of the case." *Musgrove v. State*, 425 S.W.3d 601, 613 (Tex. App.—Houston [14th Dist.] 2014, pet. ref'd); *see also* TEX. CODE CRIM. PROC. art. 36.14. "Because the charge is the instrument by which the jury convicts, [it] must contain an accurate statement of the law and must set out all the essential elements of the offense." *Dinkins v. State*, 894 S.W.2d 330, 339 (Tex. Crim. App. 1995) (citation omitted). "In examining the charge for possible error, reviewing courts 'must examine the charge as a whole instead of a series of isolated and unrelated statements.'" *Vasquez v. State*, 389 S.W.3d 361, 366 (Tex. Crim. App. 2012) (*quoting Dinkins*, 894 S.W.2d at 339). As noted, Davis does not contend that the charge contains an inaccurate statement of the law or fails to properly guide the jury in applying the law to the facts of the case. Davis argues

that the self-defense instruction should have been placed in a different location in the charge and that a sentence from the pattern jury instructions should have been included.

When analyzing a jury charge, the reviewing court looks at the entire charge to determine whether it adequately instructs the jury and is not misleading when read as a whole. *See Vuong v. State*, 830 S.W.2d 929, 940 (Tex. Crim. App. 1992). The pattern jury instructions are not mandatory, but merely "suggestions and guides" that "have no official status." *Garcia-Martinez v. State*, No. 09-17-00395-CR, 2019 WL 1924240 at *7 (Tex. App.—Beaumont May 1, 2019, no pet.) (mem. op., not designated for publication). Therefore, the omission of language from the pattern jury instructions that is not an instruction on the law but rather a transitional phrase is not erroneous so long as the charge otherwise correctly instructs the jury on the law.

Additionally, there is no requirement that the trial court arrange the instructions in a particular manner. *See Wingo v. State*, 143 SW.3d 178, 190 (Tex. App.—San Antonio 2004, *aff'd on other grounds*, 189 S.W.3d 270 (Tex. Crim. App. 2006) (appellant pointed to no authority showing instructions on defensive issue must necessarily follow application paragraph). The jury charge here was not erroneous merely because the self-defense instruction was placed later in the charge than Davis wished. *See Mercer v. State*, No. 02-16-00437-CR, 2017 WL 4819390 at *3 (Tex. App.—Fort Worth Oct. 26, 2017, pet. ref'd) (mem. op., not designated for publication); *see also Savoy v. State*, No. 14-15-0063-CR, 2016

WL 6809168 (Tex. App.—Houston [14th Dist.] Nov. 17, 2016, pet. ref'd) (mem. op., not designated for publication).

The abstract paragraphs of the jury charge correctly delineate the law as it applies to this case, and the application paragraphs correctly apply the law to the facts. Having concluded that the trial court did not err, we need not perform a harm analysis. *See Kirsch*, 357 S.W.3d at 649. We overrule Davis's second issue.

III. Conclusion

Having overruled both issues raised by Davis, we affirm the judgment of the trial court.

REX D. DAVIS
Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed July 22, 2020
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