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No. 01-15-00393-CR

In the Court of Appeals for the
First District of Texas at Houston

No. 1389139

In the 248th District Court of Harris County, Texas

CHRISTOPHER ERNEST BRAUGHTON, JR.
Appellant

V.

THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT GRANTED

STATEMENT REGARDING ORAL ARGUMENT

Upon granting appellant's petition for discretionary review, this Court determined that it will permit oral argument in this case.

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rules of Appellate Procedure 38.1(a), 38.2(a)(1)(A), and 70.3, a complete list of the names of all interested parties, and the names and addresses of all trial and appellate counsel, is provided below:

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Trial Judge:

Honorable Marc C. Carter—Presiding Judge of the 228th Criminal District Court of Harris County, Texas

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

The State charged appellant by indictment with the first-degree felony offense of murder. (CR I – 18);[1] *see* Tex. Penal Code Ann. § 19.02(b)(1); Tex. Penal Code Ann. § 19.02(b)(2). On February 11, 2015, a jury found appellant guilty of murder, as charged in the indictment; rejected appellant's claim in the punishment phase of trial that he acted in sudden passion; and assessed appellant's punishment at confinement in the Texas Department of Criminal Justice, Correctional Institutions Division, for twenty years. (CR I – 199, 207-08, 212-13); (RR IX – 9, 74); *see* Tex. Penal Code Ann. § 19.02(d) (describing the punishment issue of sudden passion). On February 11, 2015, the trial court sentenced appellant in accordance with the jury's verdict and entered an affirmative deadly weapon finding in the trial court's written judgment of conviction and sentence. (CR I – 212-13); (RR IX – 75-76). Appellant filed a motion for new trial on March 6,

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[1] The Clerk's Record for appellant's case consists of three volumes: a primary volume filed with the First Court of Appeals on June 5, 2015, hereinafter referenced as (CR I – [page number]); a supplemental volume filed with the First Court of Appeals on June 3, 2015, labeled "MOTION FOR NEW TRIAL," hereinafter referenced as (CR II – [page number]); and another supplemental volume filed with the First Court of Appeals on June 5, 2015, labeled "ORDER DENYING PENDING APPEAL," hereinafter referenced as (CR III – [page number]). The Reporter's Record consists of twelve volumes, hereinafter referenced as (RR [I-XII] – [page number]). State and Defense Exhibits offered at trial are contained in Volumes XI and XII of the Reporter's Record and will be cited as (RR [XI or XII] – [SX or DX] [exhibit number]). References to appellant's brief on the merits to this Court will be cited as (App. Brf. – [page number]).

2015, which the trial court denied by written order after a hearing on the merits of the motion. (CR I – 217-76); (CR II – 4-17); (RR X – 71-72). Appellant then timely filed written notice of appeal on April 16, 2015. (CR I – 286); (CR II – 21).

STATEMENT OF PROCEDURAL HISTORY

On December 29, 2016, the First Court of Appeals at Houston issued an opinion affirming appellant's murder conviction. *See Braughton v. State*, No. 01-15-00393-CR, 2016 WL 7473942 (Tex. App.—Houston [1st Dist.] Dec. 29, 2016, no pet.).[2] Justice Keyes filed a dissenting opinion on the same day. *See Braughton*, 2016 WL 7473942, at *18 (Keyes, J., dissenting).[3] Appellant filed a motion for rehearing in the First Court of Appeals on January 9, 2017. On April 20, 2017, after ordering and receiving a written response from the State, the First Court of Appeals withdrew its original opinion and issued a substitute opinion

[2] The majority opinion issued by the First Court of Appeals on December 29, 2016, is no longer available online because the appellate court withdrew it and replaced it with a substitute opinion on April 20, 2017. However, for this Court's convenience, and to place the majority opinion in context with Justice Keyes's December 29, 2016, dissenting opinion, the State has included the December 29, 2016, majority opinion as Appendix A to this brief. References to the December 29, 2016, majority opinion will cited herein as (App'x A – Maj. Op., p. [page number]).

[3] Justice Keyes's dissenting opinion is no longer available online, either, because it was also withdrawn when the December 29, 2016, majority opinion was withdrawn and replaced with the April 20, 2017, majority opinion. Hence, for this Court's convenience, as well, Justice Keyes's dissenting opinion is attached to this brief as Appendix B. References to the dissenting opinion will be cited herein as (App'x B – Diss. Op., p. [page number]).

affirming appellant's conviction.[4] *See Braughton v. State*, 522 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2017, pet. granted). Justice Keyes again dissented, but did not file a separate dissenting opinion. *See Braughton*, 522 S.W.3d at 742. On April 26, 2017, appellant filed a further motion for rehearing in the First Court of Appeals. The appellate court denied this motion on May 11, 2017, after ordering and receiving a response from the State. On May 16, 2017, appellant filed a motion for *en banc* reconsideration by the First Court of Appeals. The appellate court denied this motion on July 20, 2017, after ordering and receiving a response from the State. Justices Jennings and Keyes dissented to the court's decision to deny *en banc* reconsideration, but neither Justice filed an opinion in connection with their dissent.[5] Appellant filed a petition for discretionary review in this Court on August 22, 2017, which this Court granted on December 6, 2017.

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[4] In its substitute opinion, the First Court of Appeals did not change its disposition of appellant's sufficiency-related points of error; however, the appellate court did adjust the manner in which the court resolved appellant's jury-charge issue, deciding that appellant was not harmed by the omission of his requested lesser-included-offense instruction, even if appellant had been entitled to the instruction, rather than concluding—as the court did in its initial opinion—that there was no jury-charge error to begin with because appellant was not entitled to the instruction in the first place. *Compare Braughton v. State*, No. 01-15-00393-CR, 2016 WL 7473942 (Tex. App.—Houston [1st Dist.] Dec. 29, 2016, no pet.), *with Braughton v. State*, 522 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2017, pet. granted).

[5] It should be noted that, although Justice Keyes did not file a new dissenting opinion, the order of the First Court of Appeals denying appellant's motion for *en banc* reconsideration reflects that Justice Keyes "dissent[ed] from the denial of *en banc* reconsideration for the reasons stated in her dissenting opinion" filed on December 29, 2016.

ISSUES PRESENTED

1. What is the standard of review for evaluating a claim of legally insufficient evidence on the State's non-evidentiary burden of persuasion in a claim of self-defense/defense of others? Specifically, how should an intermediate-appellate court weigh the evidence to determine whether the State met its non-evidentiary burden of persuasion?
2. Whether the intermediate-appellate court erred when it determined that the State met its non-evidentiary burden of persuasion and that Appellant was unjustified in acting in self-defense/defense of others?
3. Whether the trial court's erroneous decision not to issue a requested-lesser-included offense was harmless as the intermediate-appellate court concluded in its re-issued opinion?

STATEMENT OF FACTS

Emmanuel Dominguez, the complainant, met Jessica Cavender in 2010 at Camp Pendleton in Southern California, where they were both stationed as active-duty marines in the United States Marine Corps (USMC). (RR V – 8-9). Dominguez and Cavender began dating in April 2012, when Cavender returned from a tour of duty in Afghanistan. (RR V – 10). In summer 2012, Dominguez

was assigned to the Wounded Warrior Battalion[6] at Camp Pendleton because of a recurring shoulder injury that doctors had twice been unable to surgically repair. (RR V – 12). Believing that Dominguez would probably be discharged from the USMC because of his injured shoulder, Cavender and Dominguez made plans to relocate to the Houston area—where Dominguez had grown up. (RR V – 13-14). Pursuant to their plan, Cavender went to USMC "recruiter school"; requested and received an assignment at a USMC recruiting station in Conroe, Texas; and then moved into a house on Greenland Oak Court in Spring, Texas, in November 2012. (RR V – 13-14). Dominguez had his retirement ceremony with the USMC and went on "terminal leave[,]" meaning that he was technically still on active-duty, but he was using up his accumulated vacation time until the end of his contract with the USMC. (RR V – 16-17). Dominguez arranged with the USMC to ship his belongings from Camp Pendleton to his mother's house in Spring, Texas, and then, on May 13, 2013, moved in with Cavender. (RR V – 15-16).

On the afternoon of May 24, 2013, Dominguez drove himself and Cavender on Dominguez's motorcycle to a restaurant to eat. (RR V – 17, 39). Afterward, Dominguez and Cavender went to Jailhouse Saloon to hang out, drink beer, and

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[6] Cavender described that the Wounded Warrior Battalion of the USMC is a special unit which gives injured marines the opportunity to rehabilitate their injuries and rejoin a conventional USMC battalion or, if the marines' injuries are such that they cannot rehabilitate in a reasonably timely manner, they receive assistance to transition back into civilian life. (RR V – 12).

play pool. (RR V – 18, 40, 44). At the saloon, Dominguez and Cavender met and conversed with an older USMC veteran who also had a motorcycle. (RR V – 18, 40-41). The older marine then invited Dominguez and Cavender to Cross Track, an icehouse across the street which was owned by a former marine and was known to be an "old marine veteran hangout"; Dominguez and Cavender accepted the older marine's invitation and accompanied him to Cross Track, where they continued drinking. (RR V – 18-20, 43, 45-46). Sometime later, another USMC veteran invited Dominguez and Cavender to yet another bar, Spring Tavern, where there was karaoke; Dominguez and Cavender again accepted the invitation, drove to the third bar, and continued to drink. (RR V – 19-20).

At some point while they were at Spring Tavern, Dominguez and Cavender got into an argument. (RR V – 20-21). Though he was intoxicated,[7] Dominguez decided to leave the bar and drive home to Cavender's house. (RR V – 21-22, 51). Dominguez tried twice to get Cavender to leave with him but, when she refused to do so because she was angry with him, he rode away without her. (RR V – 21-23).

Around 10:00 PM, as Dominguez was driving his motorcycle through a subdivision on his way home, he came upon Christopher Braughton, Sr.—appellant's father—who was driving himself, appellant's mother, and appellant's

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[7] Forensic toxicological testing of Dominguez's blood established that his blood alcohol concentration at the time of his death, a short time later, was 0.17 grams per deciliter. (RR V – 76).

younger brother home from dinner. (RR VI – 142-45). Unbeknownst to either the Braughtons or Dominguez at the time, the Braughtons and Dominguez were neighbors, living one house away from each other in the cul-de-sac at the end of Greenland Oak Court. *See* (RR XI – SX 15, 44). Apparently frustrated by the fact that appellant's father was driving slower than the speed limit, Dominguez tailgated the Braughtons' vehicle and revved the engine of his motorcycle. (RR VI – 144-45, 178-79). Dominguez then passed the Braughtons' car and abruptly applied his brakes to "brake check" Braughton, Sr. (RR VI – 147-48). Braughton, Sr. slammed on his brakes to avoid colliding with the back of Dominguez's motorcycle, but then immediately accelerated, swerved in front of Dominguez, and sped onto Greenland Oak Court, making the tires of the Braughtons' vehicle loudly "screech" in the process. (RR IV – 13-14); (RR VI – 147-48, 181-82). Dominguez rapidly pursued the Braughtons' vehicle onto Greenland Oak Court. (RR IV – 15).

Robert Bannon, who lived in the house between the Braughtons' residence and Cavender's and Dominguez's home, was smoking a cigarette in his driveway when he heard "tires screeching" and saw the Braughtons' vehicle—followed closely by Dominguez's motorcycle—turn onto Greenland Oak Court. (RR IV – 11-15). Bannon watched the vehicles as they "drove down the street, went in a loop in the cul-de-sac[,] and then stopped"; Braughton, Sr. stopped the

Braughtons' vehicle near the beginning of Bannon's driveway and Dominguez stopped his motorcycle near the edge of Dominguez's and Cavender's driveway. (RR IV – 15-16); *see* (RR XI – SX 13). As soon as he'd stopped his car, Braughton, Sr. immediately exited the vehicle and yelled at Dominguez, "Why the fuck you following me so close for?" (RR IV – 16-17, 20). Dominguez dismounted his motorcycle and, without pausing to properly engage the kickstand, quickly approached Braughton, Sr. and began yelling back at him. (RR IV – 17-18, 54). Their argument soon grew even more heated and escalated into a physical altercation, during which Dominguez punched Braughton, Sr. in the mouth, and appellant's father punched and shoved Dominguez. (RR VI – 153-54, 194-95); (RR VII – 15-16); *see* (RR XI – SX 23).

While Dominguez and Braughton, Sr. were yelling and cursing at each other in the street, appellant retrieved his 9-millimeter SR9 Ruger pistol from his parents' bedroom, loaded it with a full magazine, pulled back the pistol's slide to load a bullet in the pistol's chamber, left the pistol's safety mechanism disengaged,[8] rushed outside through the front door of the Braughtons' house, and, holding the pistol in the air, shouted, "I have a gun." (RR IV – 22-23, 56); (RR VII – 77, 91-92).

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[8] Appellant testified that "[w]hen you pull the slide back, there is no safety on" his SR9 Ruger pistol; rather, you have to manually engage the safety mechanism after you pull the slide back or else the pistol is ready to fire. (RR VII – 91-92).

Gina,[9] who lived across the cul-de-sac from Cavender's and Dominguez's house, heard Dominguez and Braughton, Sr. shouting at each other in the street and looked through the blinds of her second-floor bedroom window to see what was going on. (RR IV – 81, 84, 130); *see* (RR XI – SX 39, 41). From her window, Gina could see Dominguez and Braughton, Sr. arguing, while appellant's mother—who had also gotten out of the Braughtons' vehicle—stood nearby. (RR IV – 86-90, 105, 113-15, 124-25). Gina then saw appellant walk towards Dominguez "with [appellant's] right arm stretched out with a gun in his hand." (RR IV – 92). Appellant's mother and father told appellant to put his gun down and go back inside the Braughtons' house, but appellant refused; instead, appellant purposefully strode towards Dominguez and said, "No, I got a gun now." (RR IV – 23, 67, 91-93). "As soon as [Dominguez] saw [appellant's] gun, he just stopped[,]...put his hands up[,]" and began to slowly back away from appellant. (RR IV – 93-96, 127). Appellant continued to advance on Dominguez, though, and, just as Dominguez started to turn away from him—with his hands still raised in the air—shot him once. (RR IV – 96-98, 134).

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[9] The majority and dissenting opinions of the First Court of Appeals use the pseudonym "Gina" for this witness to protect her privacy, given that she was a minor at the time of the offense. To be consistent with these opinions, as well as with appellant's brief on the merits, the State also employs the pseudonym "Gina" herein. *See generally* Tex. R. App. P. 9.10(a) (listing "the name of any person who was a minor at the time the offense was committed" as "sensitive data" that should be protected in the interests of the person's privacy).

The bullet entered the rear area of Dominguez's right axilla, or armpit, and traveled laterally through Dominguez's body—passing through his right eighth rib and the lower lobe of his right lung, grazing his vertebral column and sixth thoracic vertebra, injuring his aorta, puncturing the lower lobe of his left lung, passing through the muscles between his left fifth and sixth ribs, and then lodging in the muscles of his left armpit—causing severe internal injuries and killing him in seconds. (RR V – 66, 71-74); *see* (RR XI – SX 54, 75). As Dominguez "just [fell] back" onto the grass between the curb and the sidewalk in front of his and Cavender's house, appellant's mother asked appellant, "What did you do?"; dialed 911; passed the phone to Braughton, Sr.; and then ran to Dominguez to begin administering cardiopulmonary resuscitation (CPR). (RR IV – 30-31, 44, 96-98); (RR VII – 31, 60); *see* (RR XI – SX 13). Bannon rushed to Dominguez, too, to help appellant's mother render aid, and then, upon hearing patrol-car emergency sirens, drove to the end of Greenland Oak Court to flag-down the police. (RR IV – 31-34, 45, 57-57, 71).

The police detained several people on scene, including appellant, appellant's parents, and Bannon; cordoned-off the crime scene and collected evidence; obtained witness statements; and later, after completing their investigation, arrested appellant for murder. (RR III – 31-39, 43, 45, 69-82, 107-09, 125-63); *see* (RR XI – SX); (CR III – 9-11).

SUMMARY OF THE ARGUMENT

Because the majority opinion of the First Court of Appeals correctly articulated the proper standard of review for a legal-sufficiency challenge involving the jury's implicit rejection of claims of self-defense and defense of a third person, this Court should dismiss appellant's first issue presented as improvidently granted. Alternatively, this Court should affirm the analysis of the First Court of Appeals and again reiterate that legal-sufficiency review in this scenario is governed by the maxims of *Jackson*, *Brooks*, and *Saxton*.

The First Court of Appeals correctly determined that the evidence developed in this case is legally sufficient to substantiate the jury's rejection of appellant's claims of self-defense and defense of a third person.

This Court should use its authority to grant discretionary review without a petition, per Texas Rule of Appellate Procedure 67.1, to examine the prerequisite issue of whether appellant was entitled to a jury instruction on felony deadly conduct in the first place, given that the record demonstrates that that lesser offense was not a valid, rational alternative to murder, as charged. However, if this Court declines to do so, or if this Court ultimately concludes that appellant was entitled to the requested instruction, this Court should affirm the conclusion of the First Court of Appeals that appellant was not harmed by any error in omitting a felony-deadly-

conduct instruction from the jury charge in this instance because the jury was provided an instruction on the intervening lesser-included offense of manslaughter and rejected it.

ARGUMENT ON FIRST ISSUE PRESENTED

Issue One Restated: What is the standard of review for evaluating a claim of legally insufficient evidence on the State's non-evidentiary burden of persuasion in a claim of self-defense/defense of others? Specifically, how should an intermediate-appellate court weigh the evidence to determine whether the State met its non-evidentiary burden of persuasion?

A. In their majority opinion, the First Court of Appeals correctly articulated the proper standard of review for a legal-sufficiency challenge involving the jury's implicit rejection of claims of self-defense and defense of a third person

i. Legal-sufficiency review, generally

This Court and all intermediate appellate courts in Texas apply only one standard of review to evaluate whether the evidence adduced at trial is adequate to substantiate a criminal conviction—legal sufficiency. *Temple v. State*, 390 S.W.3d 341, 359 (Tex. Crim. App. 2013) (citing *Brooks v. State*, 323 S.W.3d 893, 896 (Tex. Crim. App. 2010)) (dispensing with factual-sufficiency review as a distinct standard and holding that "the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the

evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt.”)). Under the legal-sufficiency standard, to satisfy the Due Process Clauses of the United States Constitution,[10] every criminal conviction must be supported by “sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of every element of the offense.” *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). When engaged in a legal-sufficiency analysis, an appellate court must consider all of the evidence in the light most favorable to the prosecution and must decide whether, based on the evidence and the reasonable inferences therefrom, any rational trier of fact could have the defendant guilty beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318-19 (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”) (emphasis in original); *Temple*, 390 S.W.3d at 360; *Adames v. State*, 353 S.W.3d 854, 859-60 (Tex. Crim. App. 2011).

Reviewing the record in the light most favorable to the prosecution requires an appellate court to defer to the jury’s implied credibility assessments and determinations as to the weight to give the evidence, given that the jury is the sole

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[10] *See generally* U.S. Const. amend. V (“No person shall…be deprived of life, liberty, or property without due process of law….”); U.S. Const. amend. XIV (“No State shall…deprive any person of life, liberty, or property without due process of law….”).

factfinder, judge of the credibility of the witnesses, and judge of the weight to assign to the witnesses' testimony. *See Temple*, 390 S.W.3d at 360; *see also Jackson*, 443 U.S. at 319 ("Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.") (emphasis in original). Further, "a reviewing court, 'faced with a record of historical facts that supports conflicting inferences' must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflict in favor of the prosecution, and must defer to that resolution." *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim. App. 1991) (quoting *Jackson*, 443 U.S. at 326); *see Temple*, 390 S.W.3d at 360 ("When the record supports conflicting inferences, we presume that the jury resolved the conflicts in favor of the verdict and therefore defer to that determination."). In other words, an appellate court may not re-evaluate the weight and credibility of evidence and testimony adduced at trial or substitute its own judgment for that of the factfinder. *Febus v. State*, No. PD-1369-15, 2018 WL 850336, at *3 (Tex. Crim. App. Feb. 14, 2018); *see Laster v. State*, 275 S.W.3d 512, 517-18 (Tex. Crim. App. 2009) (explaining that, because "[a]ppellate courts are ill-equipped to weigh the evidence," the appellate courts' "role on appeal is restricted to guarding against the rare occurrence when a factfinder does not act

rationally" and to "uphold[ing] the verdict unless a rational factfinder must have had reasonable doubt as to any essential element" of the offense charged).

ii. Legal-sufficiency review involving claims of self-defense or defense of a third person

Self-defense and defense of a third person are "justifications excluding criminal responsibility" under Chapter 9 of the Texas Penal Code, and are also "defenses to prosecution" per Section 2.03 of the Penal Code. *See* Tex. Penal Code Ann. § 9.31 (describing self-defense); Tex. Penal Code Ann. § 9.32 (describing the use of deadly force in self-defense); Tex. Penal Code Ann. § 9.33 (describing the use of force or deadly force in defense of others); *see generally* Tex. Penal Code Ann. § 2.03(a) ("A defense to prosecution for an offense in this code is so labeled by the phrase: "It is a defense to prosecution....'"); Tex. Penal Code Ann. § 9.02 ("It is a defense to prosecution that the conduct in question is justified under this chapter."). To claim self-defense or defense of a third person, the defendant bears the initial burden of producing some evidence which supports his defensive theory. *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003); *see* Tex. Penal Code Ann. § 2.03(c) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."). Once the defendant does so, the State then assumes the ultimate burden of persuasion to dispel the defendant's evidence of self-defense. *Zuliani*, 97 S.W.3d at 594-95; *Saxton v. State*, 804 S.W.3d 910, 913-14 (Tex. Crim. App. 1991). As this Court

clearly explained in *Saxton*, the State has no burden of *production* in this regard and, thus, is not required to produce evidence which affirmatively and specifically refutes the defendant's claims self-defense or defense of a third person; rather, the State need only prove its case beyond a reasonable doubt. *See Saxton*, 804 S.W.2d 910, 913-14 (emphasizing that the State's "burden of *persuasion* in disproving the evidence of self-defense[,]" is "not a burden of *production*, i.e., one which requires the State to affirmatively produce evidence refuting the self-defense claim, but rather a burden requiring the State to prove its case beyond a reasonable doubt.") (emphasis in original; internal citation omitted); *see also Zuliani*, 97 S.W.3d at 594.

Importantly, the issue of self-defense or defense of a third person is a fact issue to be determined by the factfinder, alone. *Saxton*, 804 S.W.2d at 913. Further, "[d]efensive evidence which is merely consistent with the physical evidence at the scene of the alleged offense will not render the State's evidence insufficient since the credibility determination of such evidence is solely within the jury's province and the jury is free to accept or reject the defensive evidence." *Id*. at 914. When a jury finds the defendant guilty, it implicitly rejects the defendant's self-defense or defense-of-third-person theories. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 914.

When reviewing a legal-sufficiency challenge on the issues of self-defense and defense of a third person in a murder case, a reviewing court considers all of the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found beyond a reasonable doubt that: (1) the defendant committed the essential elements of murder, and (2) the defendant did not act in self-defense or defense of a third person. *See Saxton*, 804 S.W.2d at 914 ("In resolving the sufficiency of the evidence issue, we look not to whether the State presented evidence which refuted [the defendant'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 murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt."). When some evidence, if believed, supports the defendant's claim of self-defense or defense of a third person, but other evidence, if believed, supports a conviction, a reviewing court defers to the jury's implicit resolution of the conflict in favor of the prosecution, and "will not weigh-in on this fact-specific determination, as that is a function reserved for a properly instructed jury." *Reeves v. State*, 420 S.W.3d 812, 820 (Tex. Crim. App. 2013).

iii. The majority opinion of First Court of Appeals accurately articulated the standard or review for a legal-sufficiency challenge involving self-defense or defense of a third person, per *Jackson*, *Brooks*, and *Saxton*

Examining the majority opinion of the First Court of Appeals, it is clear that the appellate court accurately stated standard of review for a legal-sufficiency challenge involving the defenses of self-defense or defense of a third person, replete with legal citations to the pertinent and authoritative cases on the matter, such as *Jackson*, *Brooks*, *Saxton*. *See Braughton*, 522 S.W.3d at 726-27.

B. Justice Keyes advocates for an improper standard of review in her dissenting opinion

In her dissenting opinion, Justice Keyes states that she believes that the standard of review of the sufficiency of the evidence for rejecting the defenses of self-defense and defense of a third person "remains that set out prior to *Brooks* in *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim. App. 2003) and *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991)." (App'x B – Diss. Op., p. 2). In essence, though, Justice Keyes advocates that the standard of review that an appellate court should employ when confronted with a defense, such as self-defense or defense of a third person, is that of factual sufficiency, not legal sufficiency. This is evident because Justice Keyes asserts that a reviewing court should "weigh all the evidence" and subjectively determine what evidence and testimony is reasonable, and what evidence and testimony is unreasonable; excise from further consideration any evidence or testimony that the court subjectively concludes is

unreasonable; and then consider whether the remaining evidence and testimony suffices to support the defendant's conviction. (App'x B – Diss. Op., p. 20-24) ("I believe this Court must review all of the evidence that a *reasonable* jury would credit and must determine whether, in light of the state of evidence as a whole, a reasonable jury could have found the essential elements of murder beyond a reasonable doubt and also could have found against appellant on his defensive issues beyond a reasonable doubt.") (emphasis in original) (citing to *Zuliani*, 97 S.W.3d at 595 ("[W]e hold that when a defendant challenges the factual sufficiency of the rejection of a defense, the reviewing court reviews all of the evidence in a neutral light and asks whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence.").

This approach is improper, though, because it directly conflicts with this Court's directives in *Brooks* and its progeny that, when engaged in a legal-sufficiency analysis—such as is required when the jury's rejection of the defenses of self-defense or defense of a third person are at issue[11]—an appellate court must not sit as a "thirteenth juror" and, by subjectively reweighing the evidence,

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[11] *See Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013) (explaining that, where the State bears the burden of proof beyond a reasonable doubt, such as with defenses, the single sufficiency standard of review set out in *Jackson* and *Brooks* applies); *see also* Tex. Penal Code Ann. § 2.03(d) (providing that the State bears the burden of proof beyond a reasonable doubt regarding defenses).

substitute its judgment for that of the factfinder. *See Brooks*, 323 S.W.3d at 899 (recognizing that "[v]iewing the evidence in a 'neutral light' under a factual-sufficiency standard is supposed to mean that the reviewing court is not required to defer to the jury's credibility resolution and weight determinations and that the reviewing court may sit as a 'thirteenth juror' and 'disagree[] with a jury's resolution of conflicting evidence' and with a jury's 'weighing of the evidence[,]'" and, thus, abandoning the "confusing and contradictory *Clewis* factual-sufficiency standard.") (quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982)); *see also Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) ("We should take care...not to act as a 'thirteenth juror' by overturning a jury's duly-delivered verdict simply because we '"disagree" with [that] verdict.'") (quoting *Brooks*, 323 S.W.3d at 901); *Runningwolf v. State*, 360 S.W.3d 490, 494 (Tex. Crim. App. 2012) ("The reviewing court is not to assess the evidence as a 'thirteenth juror.'"); *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007) (showing that, even prior to *Brooks*, this Court cautioned that "[u]nder a legal sufficiency review, 'our role is not to become a thirteenth juror.'") (quoting *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)).

The United States Supreme Court and this Court have repeatedly explained that "[t]his familiar standard gives full play 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; *see Febus*, 2018 WL 850336, at *3 (deferring to the factfinder's resolution of conflicting inferences "because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony."); *Adames*, 353 S.W.3d at 860 ("This standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing reasonable inferences from the evidence."). Thus, as the First Court of Appeals correctly explained in their majority opinion, the proper legal-sufficiency standard of review in this context obligates an appellate court to defer to the jury's implicit credibility determinations and resolutions of the conflicts in the evidence, and to view all of the evidence in the light most favorable to the prosecution to determine whether any rational factfinder could have found the essential elements of murder beyond a reasonable doubt, including that the defendant's conduct was not justified by the defenses or self-defense or defense of a third person. *See Braughton*, 522 S.W.3d at 726-27.

C. Because appellant effectively concedes that the majority opinion of the First Court of Appeals enunciated the correct standard of review, this Court should dismiss appellant's first issue presented as improvidently granted

Though appellant relies upon Justice Keyes's dissenting opinion to argue that the majority opinion of the First Court of Appeals utilized an improper standard of sufficiency review in this case and, thus, frames his first issue

presented as a question as to what standard of review is appropriate for an appellate court to employ when analyzing a jury's rejection of a defendant's claims of self-defense or defense of a third person, appellant actually acknowledges in his brief that the proper standard of review is that which is articulated in *Jackson*, *Brooks*, and *Saxton*—i.e., legal sufficiency, not factual sufficiency. (App. Brf. – 32, 42). Thus, since appellant tacitly concedes that the majority opinion of the First Court of Appeals utilized the correct legal-sufficiency standard of review—though appellant disputes the outcome of the majority's analysis—appellant presents no real question as to what the appropriate standard is, notwithstanding appellant's suppositions to the contrary in appellant's petition for discretionary review and brief on the merits. Accordingly, further consideration of this matter by this Court is unnecessary for the jurisprudence on this issue, and this Court should dismiss appellant's first issue presented as improvidently granted. *See* Tex. R. App. P. 69.3 ("If, after granting discretionary review, five judges are of the opinion that discretionary review should not have been granted, the case will be dismissed.").

Alternatively, to the extent that this Court wishes to indulge appellant's request that this Court "instruct[] the intermediate-appellate courts how to weigh all of the evidence to determine whether a defendant carried his burden of production and whether the State then bore its burden of persuasion" in the self-

defense or defense-of-a-third-person context, this Court should affirm the analysis of the First Court of Appeals and again reiterate that legal-sufficiency review in this scenario is governed by the tenets of *Jackson*, *Brooks*, and *Saxton*—pursuant to which an appellate court should not "re-weigh" the evidence adduced at trial as a "thirteenth juror," but should instead defer to the factfinder's prerogative to weigh the evidence, assess the credibility of witnesses, and resolve any conflicts in the testimony or evidential inferences. *See Febus*, 2018 WL 850336, at *3 ("We may not re-weigh the evidence or substitute our judgment for that of the factfinder."); *Williams*, 235 S.W.3d at 750 ("Under a legal sufficiency review, 'our role is not to become a thirteenth juror. This Court may not re-evaluate the weight and credibility of the record evidence and thereby substitute our judgment for that of the factfinder.'") (quoting *Dewberry*, 4 S.W.3d at 740); *see also Jackson*, 443 U.S. at 318-19 (explaining that legal sufficiency review "does not require a court 'to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'") (emphasis in original) (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966)).

ARGUMENT ON SECOND ISSUE PRESENTED

Issue Two Restated: Whether the intermediate-appellate court erred when it determined that the State met its non-evidentiary burden of persuasion and that Appellant was unjustified in acting in self-defense/defense of others?

A. The First Court of Appeals correctly determined that the evidence is legally sufficient to substantiate the jury's rejection of appellant's defenses of self-defense and defense of a third person

As in nearly all cases involving these issues, here, the answer to whether appellant's act of intentionally shooting Dominguez and causing his death was murder or self-defense or defense of a third person ultimately depended upon the jurors' assessment of the credibility of the testimony and assignment of weight to the various evidence presented at trial. *See Saxton*, 804 S.W.2d at 913-14 ("[T]he issue of self-defense is an issue of fact to be determined by the jury."). As the First Court of Appeals recognized, appellant produced evidence in support of his defenses of self-defense and defense of a third person when appellant and appellant's witnesses testified that appellant "received a frantic phone call from his mother that Dominguez was chasing [appellant's] family on a motorcycle"; that "Dominguez was punching Braughton Sr. in the face" when appellant ran out of the Braughtons' home with his gun; that, when appellant announced, "Stop, I have a gun," Dominguez responded that he had "a gun" or "something" for appellant, and then began reaching towards his motorcycle saddlebags; and that appellant

then shot Dominguez in effort to "defend his dad." *Braughton*, 522 S.W.3d at 731. The appellate court correctly assessed that this evidence—if credited by the jury—would support a rational jury finding that appellant was not guilty of murder because appellant acted in self-defense or in defense of a third person, or both. *Id*.

However, the appellate court also acknowledged that the jury was entirely free to disbelieve and reject all or any part of appellant's defensive evidence. *Braughton*, 522 S.W.3d at 731-32; *see Saxton*, 804 S.W.2d at 914 (stating that the issue of self-defense is a fact issue to be determined by the jury, alone, which is free to accept or reject any defensive evidence on the issue, even when the defensive evidence is uncontroverted); *see also Febus*, No. 2018 WL 850336, at *3 ("A jury may accept one version of the facts and reject another, and it may reject any part of a witness's testimony."). Further, the appellate court validly observed that it is apparent from the jury's verdict that the jury did, in fact, reject appellant's defensive evidence and theories, and that the jury's decision to do so was rational in light of the other evidence presented at trial, which, as clearly credited by the jury, plainly supports appellant's murder conviction. *See Braughton*, 522 S.W.3d at 731-35. Such other evidence includes the evidence and testimony propounded by the State's witnesses, the physical and medical evidence, and the contradictory nature of much of appellant's and appellant's witnesses' testimony—all of which undermined appellant's claims that he shot Dominguez in self-defense or defense

of a third person. For instance, Cavender testified that, although Dominguez owned a hunting rifle and a pistol, those weapons were locked in a gun safe in Dominguez's mother's home on the night of the shooting. (RR V – 30). Further, Cavender testified that Dominguez did not have a firearm or any other type of weapon on his person or in his motorcycle saddlebags that night, and typically never carried weapons of any sort in his saddlebags. (RR V – 29-31). All of the witnesses at the shooting scene, including appellant's parents, testified that they never actually saw any sort of weapon in Dominguez's hands, and the police confirmed that there were no weapons on Dominguez's person or in his saddlebags. (RR III – 28, 152-53, 156, 174); (RR VI – 118-19, 197); (RR VII – 60-63).

Gina averred that she did not hear Dominguez say anything at all to appellant, much less verbally threaten him, when appellant rushed out of the Braughtons' residence to confront Dominguez with appellant's pistol. (RR IV – 93). Gina also clearly described that Dominguez did not reach or grab for his saddlebags upon seeing appellant and appellant's pistol; rather, Dominguez immediately raised his arms and hands in the air, began slowly backing away from appellant, and was in the process of that retreat when appellant abruptly shot him. (RR IV – 93-96, 127-28). Glen Irving, one of appellant's witnesses, also testified that he did not see Dominguez actually reach into his saddlebags, though Irving

stated that, given his vantage point during the shooting, he probably would have been able to see if Dominguez had done so. (RR IV – 118-19).

Bannon and Gina testified that appellant's parents attempted to calm appellant down, and told him to put his gun down and go back inside the Braughtons' house, prior to the shooting. (RR IV – 23, 67, 91-93). Gina also testified that, instead of doing so, appellant said, "No, I got a gun now" and continued to aim his pistol at Dominguez. (RR IV – 91-96, 127-28). Further, Gina testified that, after appellant fatally shot Dominguez, she heard appellant's mother say, "What did you do?" to appellant. (RR IV – 98).

The State also presented evidence that cast doubt on or contradicted appellant's defensive evidence, such as the facts that, though Braughton, Sr. described the events surrounding the shooting to the 911 dispatcher over the phone four times while he entreated the dispatcher to send the police and an ambulance, Braughton, Sr. never told the dispatcher that he thought that Dominguez had been reaching for a firearm or some other weapon in his motorcycle saddlebags when appellant shot him. (RR VI – 210-11, 213-14); (RR VII – 63, 113). Similarly, the State developed that neither appellant's mother nor Braughton, Sr. reported to the police after the shooting that Dominguez had supposedly threatened appellant, "I have something for your ass" or "I have a gun for you." (RR VI – 223); (RR VII – 59). Moreover, while appellant told Deputy Medina, while she was swabbing

appellant's hands to test for the presence of gunshot residue, that appellant "saw a man punching [appellant's] dad so [appellant] shot him[,]" appellant did not tell Medina that Dominguez was reaching into his saddlebags when appellant shot him. (RR VII – 113-14).

Aside from this evidence, the record evinces internal inconsistencies in appellant's and appellant's witnesses' defensive testimony. For example, as previously mentioned and in contradiction to what appellant and appellant's father claimed, Irving admitted that he did not see Dominguez reach into his motorcycle saddlebags, despite that Irving was poised to witness such act if Dominguez had done so. *Compare* (RR VI – 118-19) *with* (RR VI – 155-57, 160, 200-02); (RR VII – 82-83, 86, 98-103). Then, Braughton, Sr., who first was adamant that he did not see appellant come out of the Braughtons' residence, and that he did not see a gun in appellant's hand until Braughton, Sr. was on the ground and appellant got within only a few feet of Dominguez, later, on redirect examination after court recessed for the weekend, changed his testimony and stated that he did see appellant come out of the Braughtons' home, and that he saw appellant holding appellant's pistol in the air at that time. *Compare* (RR VI – 195, 197) *with* (RR VII – 9-10, 16). And finally, appellant's mother testified that she never told appellant to go back inside the Braughtons' house or to put his gun down, despite being confronted with a statement that she had made previously, wherein she

admitted, "I did say, '[appellant], go, you know, take the gun inside. Take the gun inside.'" (RR VII – 53-56).

Taking all of the evidence in the case into consideration, viewed in the light most favorable to the prosecution, the First Court of Appeals appropriately determined that the jury could have rationally rejected appellant's claims of self-defense or defense of a third person *Braughton*, 522 S.W.3d at 731-35. The appellate court's conclusion in this regard is reasonable, given the record, and gives due deference to the jury's prerogatives to weigh the evidence, assess the credibility of the witnesses, and to resolve conflicts in the evidence. *Braughton*, 522 S.W.3d at 731-35; *see Reeves*, 420 S.W.3d at 820 (stating that, when some evidence, if believed, supports a claim of self-defense or defense of a third person, while other evidence, if believed, supports a conviction, an appellate court should defer to the jury's resolution of the conflicting accounts in favor of the prosecution). Further, the court's determination correctly acknowledges that an appellate court "may not 'act as a "thirteenth juror" by overturning a jury's duly-delivered verdict[,]'" even if the court disagrees with the verdict. *See Braughton*, 522 S.W.3d at 734-35 (quoting *Thornton*, 425 S.W.3d at 303); *see also Jackson*, 443 U.S. at 318-19 (explaining that, when conducting a legal sufficiency review, an appellate court must ask whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"—not whether "*it*

believes that the evidence at the trial established guilt beyond a reasonable doubt.") (emphasis in original).

Thus, because the First Court of Appeals properly evaluated and resolved appellant's sufficiency challenge regarding the jury's rejection of appellant's defensive theories of self-defense and defense of a third person, this Court should affirm the reasoning and conclusions of the appellate court.

ARGUMENT ON THIRD ISSUE PRESENTED

Issue Three Restated: Whether the trial court's erroneous decision not to issue a requested-lesser-included offense was harmless as the intermediate-appellate court concluded in its re-issued opinion?

A. This Court should use its authority to grant discretionary review without a petition, per Texas Rule of Appellate Procedure 67.1, to examine the prerequisite issue of whether appellant was entitled to a deadly-conduct instruction to begin with

In its December 29, 2016, original opinion, the First Court of Appeals concluded that the trial court properly denied appellant's request for a lesser-included-offense instruction on felony deadly conduct[12] because that offense was not a valid, rational alternative to murder, per the second prong of the *Royster*-

[12] A person commits the third-degree felony offense of deadly conduct when he "knowingly discharges a firearm at or in the direction of...one or more individuals[.]" Tex. Penal Code Ann. § 22.05(b)(1); Tex. Penal Code Ann. § 22.05(e).

Rousseau test,[13] given that there was no evidence in the record that appellant did not intend to shoot Dominguez and cause him at least serious bodily injury, or that Dominguez did not actually die as a result of appellant's conduct. *See* (App'x A – Maj. Op., p. 43-46) (determining that the evidence does not support an instruction on felony deadly conduct because "[t]he record contains no evidence that 'both raises the lesser-included offense [of deadly conduct] and rebuts or negates an element of the greater offense,' murder.") (quoting *Cavazos v. State*, 382 S.W.3d 377, 385 (Tex. Crim. App. 2012)). In its April 20, 2017, substitute opinion, though, the appellate court skirted the issue of whether the trial court should have given a felony deadly conduct instruction, "conclud[ing] that [it] need not determine whether [appellant] is correct" that he was entitled to the instruction, and holding that appellant was not entitled to reversal, because, even assuming that there was error, the error was not harmful because the jury was provided—and rejected—the intervening lesser-included-offense instruction on manslaughter. *See Braughton*, 522 S.W.3d at 739-42.

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[13] The determination of whether a requested lesser-included-offense instruction is warranted requires a two-step analysis, asking (1) whether the lesser offenses is included within the proof necessary to establish the charged offense, and (2) whether there is some evidence from which a rational juror could find the defendant guilty of only the lesser offense, if he is guilty at all. *See Sweed v. State*, 351 S.W.3d 63, 67-68 (Tex. Crim. App. 2011); *see generally Rousseau v. State*, 855 S.W.2d 666 (Tex. Crim. App. 1993); *Royster v. State*, 622 S.W.2d 442, 446 (Tex. Crim. App. 1981).

This Court should *sua sponte* grant discretionary review of the First Court of Appeals's decision on this issue to evaluate the indispensable matter of whether appellant was actually entitled to an instruction on felony deadly conduct in the first place, per the second prong of the *Royster-Rousseau* test—the outcome of which could eliminate any need for this Court to assess the appellate court's harm analysis in its substitute opinion. *See* Tex. R. App. P. 67.1 (describing this Court's authority to conduct discretionary review without a petition, wherein, "[b]y a vote of at least four judges, the Court of Criminal Appeals may grant review of a court of appeals decision at any time before the mandate of the court of appeals issues."); *see also* Tex. R. App. 66.1 ("The Court of Criminal Appeals may review a court of appeals' decision in a criminal case on its own initiative under Rule 67....").

Discretionary review without a petition would be appropriate in this instance because the First Court of Appeals's treatment of this issue in its substitute opinion places that court at odds with many other intermediate appellate courts which have held that, without any affirmative evidence, adduced from any source, that anything other than the defendant's act of shooting the victim caused the victim's death, a rational jury could find the defendant guilty of only some level of homicide, not of deadly conduct. *See Neal v. State*, No. 12-14-00158-CR, 2016 WL 1446138, at *15 (Tex. App.—Tyler Apr. 13, 2016, no pet.) (mem. op., not designated for publication) (affirming that a murder defendant was not entitled to

an instruction on felony deadly conduct when the record was "undisputed that [the defendant] caused [the victim's] death[,] and "[t]herefore, if [the defendant] is guilty, he is guilty of at least some form of homicide."); *Barrios v. State*, 389 S.W.3d 382, 400 (Tex. App.—Texarkana 2012, pet. ref'd) (affirming that a murder defendant was not entitled to an instruction on felony deadly conduct "because [the defendant's] own testimony established he was guilty of murder under Section 19.02(b), [and] 'there was no evidence that [the defendant] was guilty only of anything less than some form of murder.'") (quoting *Forest v. State*, 989 S.W.2d 365, 368 (Tex. Crim. App. 1999)); *Price v. State*, No. 14-11-00378-CR, 2012 WL 1964586, at *2 (Tex. App.—Houston [14th Dist.] May 31, 2012, pet. ref'd) (mem. op., not designated for publication) (affirming that a murder defendant was not entitled to instructions on misdemeanor and felony deadly conduct when the record established that the defendant intentionally shot his gun and there was no evidence that anything other than the defendant's gunshot caused the victim's death); *Daniels v. State*, 313 S.W.3d 429, 432-33 (Tex. App.—Waco 2010, pet. ref'd) (distinguishing the murder defendant's reliance on *Ortiz v. State*, 144 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd), and concluding that the defendant was not entitled to a felony deadly conduct instruction when the evidence, "at best, would raise the lesser-included offense of manslaughter or perhaps criminally negligent homicide."); *Green v. State*, No. 14-06-00155-CR,

2007 WL 1558731, at *8 (Tex. App.—Houston [14th Dist.] May 31, 2007, no pet.) (mem. op., not designated for publication) (finding that a rational jury could not convict the murder defendant of only deadly conduct when the evidence showed that the defendant intentionally shot at a car, knowing that there were four people inside it, thereby killing the victim); *cf. Forest*, 989 S.W.2d at 368 (holding that a defendant was not entitled to a jury instruction on the lesser offense of aggravated assault when evidence showed him to be guilty, at least, of some form of murder, namely, the defendant's testimony that he intentionally shot the victim "in the butt," that he intended to cause the victim serious bodily injury in doing so, and the fact that it was uncontested that the defendant's act caused the victim's death).

As these cases demonstrate, appellate courts have arrived at the conclusion that a felony-deadly-conduct instruction is not warranted when the evidence at least shows that the defendant is culpable of some degree of homicide; that is, when the evidence could establish the elements of the lesser offense of felony deadly conduct, but there is no affirmative evidence to rebut or negate the element of the greater offense of murder that the defendant caused the victim's death. *See, e.g.*, *Neal*, 2016 WL 1446138, at *15; *Barrios*, 389 S.W.3d at 400; *see also Ortiz*, 114 S.W.3d at 234 ("[D]eadly conduct is distinguished from murder...only by relieving the State of proving (1) an intentional act and (2) *the death of an individual*.") (emphasis added). Appellant's case is no different. Relying on

Bullock v. State, 509 S.W.3d 921, 926 (Tex. Crim. App. 2016), for the proposition that the jury can believe portions of the defendant's testimony but disbelieve other portions, appellant supposed that the jury could have rationally found him guilty of only the lesser offense of felony deadly conduct if it "(1) believed [appellant's] testimony that he shot in the general direction of Dominguez's arm but was not aiming at any specific part of his body, (2) disbelieved [appellant's] testimony that he intended to hit Dominguez and cause him serious bodily injury, and (3) inferred from the evidence that [appellant] was inexperienced with firearms and intended to shoot in the general direction of Dominguez but did not intend to actually hit him." *Braughton*, 522 S.W.3d at 740.

Aside from the facts that appellant's argument plucks slivers of appellant's testimony from the record and examines them in isolation, and that appellant's argument is contradicted by the balance of the evidence and appellant's own defenses—which established that deliberately shot Dominguez, intending to cause him at least serious bodily injury in order to "stop him" from "attacking" appellant or Braughton, Sr.—appellant's claim ignores the reality that the record in this case is devoid of any affirmative evidence from any source that anything other than appellant's conduct caused Dominguez's death. And since the mere possibility that the jury could have disbelieved the undisputed evidence that appellant's conduct caused Dominguez's death is legally inadequate to warrant the submission

of a felony-deadly-conduct instruction, the First Court of Appeals rightfully determined in the court's original opinion that felony deadly conduct was not a valid, rational alternative to murder and, thus, was properly omitted from the jury charge. *See* (App'x – Maj. Op., p. 43-44); *see also Sweed*, 351 S.W.3d at 68 (repeating the well-established maxim that, while the evidentiary threshold for entitlement to a lesser-included-offense instruction is low, "'it is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather, there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted.'") (quoting *Skinner v. State*, 956 S.W.2d 532, 543 (Tex. Crim. App. 1997)); *see also Goad v. State*, 354 S.W.3d 443, 446 (Tex. Crim. App. 2011) (explaining that, per the second prong of the *Royster-Rousseau* test for entitlement to a lesser-included-offense instruction, a defendant is not entitled to an instruction on a lesser offense if the evidence merely raises the possibility of the lesser offense; rather, the evidence "must establish the lesser-included offense as a valid, rational alternative to the charged offense.").

Accordingly, in light of these considerations, guidance from this Court via discretionary review without a petition is necessary to settle the apparent conflict between the substitute opinion of the First Court of Appeals, which bypasses the issue of whether appellant was entitled to an instruction on felony deadly conduct

at all, and the decisions of other appellate courts which address this particular matter.

B. The First Court of Appeals correctly determined that appellant was not harmed by any error in omitting a deadly-conduct instruction from the jury charge

This Court should affirm the analysis and conclusion of the First Court of Appeals regarding appellant's third issue presented because the appellate court properly concluded in the court's substitute opinion that appellant was not harmed by any error in omitting an instruction on the lesser-included offense of felony deadly conduct from the jury charge, given that the jury was given an instruction on the intervening lesser-included offense of manslaughter, but rejected that option. In its substitute opinion, the appellate court accurately observed that the fact that the jury chose to convict appellant of murder by either of the charged manners and means,[14] rather than finding him guilty of manslaughter or acquitting him entirely, evinces that the jury disbelieved appellant's defensive evidence and testimony, and, instead, concluded that appellant's conduct was nothing less than the greater, charged offense of murder. *See Braughton*, 522 S.W.3d at 740-42

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[14] Pursuant to Sections 19.02(b)(1) and (b)(2) of the Texas Penal Code, the State charged appellant with murder via the alternative manners and means that: (1) appellant intentionally or knowingly caused the death of Dominguez by shooting Dominguez with a deadly weapon, namely, a firearm; or (2) appellant intended to cause serious bodily injury to Dominguez, and did cause the death of Dominguez, by intentionally or knowingly committing an act clearly dangerous to human life, namely, by shooting Dominguez with a deadly weapon, namely a firearm. (CR III – 18, 176-77); *see* Tex. Penal Code Ann. § 19.02(b)(1); Tex. Penal Code Ann. § 19.02(b)(2).

(citing *Masterson v. State*, 155 S.W.3d 167, 171-72 (Tex. Crim. App. 2005)). The jury's obvious disbelief of appellant's version of events signifies that the jury would similarly have rejected felony deadly conduct as an option because, in light of the evidence, manslaughter was, at least, "just as plausible as the omitted lesser-included offense, deadly conduct." *See Braughton*, 522 S.W.3d at 741 ("Accepting [appellant's] argument that the jury could have concluded that he intended only to scare Dominguez and lacked an intent to actually hit him, it would have been equally plausible for the jury to believe he was reckless about the substantial and unjustified risk that he would actually hit Dominguez and kill him, so as to find him guilty of manslaughter.").

Arguably, felony deadly conduct posed an even-less-plausible scenario than manslaughter, to the point of being an entirely irrational scenario in this case, compared to at least some degree of homicide. This is so because the record—including appellant's own admissions—establishes that appellant intentionally aimed his pistol at Dominguez; that appellant intentionally pulled the trigger and shot Dominguez; that appellant intended to inflict at least serious bodily injury upon Dominguez in doing so; and that appellant's act of shooting Dominguez, and nothing but appellant's act, caused Dominguez's death. *See* (RR IV – 23, 67, 91-98, 127-28); (RR VII – 84, 101-02). Thus, the evidence presented the following realistic options for a verdict: murder by either of the manners and means alleged,

if the jurors believed that appellant intentionally or knowingly killed Dominguez by shooting him, or that appellant intentionally committed an act clearly dangerous to human life by shooting Dominguez, which caused Dominguez's death; manslaughter, if the jurors believed that appellant was reckless about the substantial and unjustified risk that his bullet would actually strike Dominguez and kill him; or outright acquittal, if the jurors believed appellant's defensive evidence and testimony that appellant's act of shooting Dominguez was justified as either self-defense or defense of a third person. But, based on the specific facts of this case, it would not have been reasonable for the jury to conclude that appellant only knowingly discharged his firearm at or in the direction of Dominguez, but did not actually hit Dominguez and cause his death.

Accordingly, although the presence of the manslaughter instruction does not automatically make the omission of a felony deadly conduct instruction harmless, even assuming *arguendo* that such omission was erroneous, the First Court of Appeals properly concluded that, under the fact-intensive circumstances of this case, any such error was nonetheless rendered harmless by the jury's rejection of manslaughter as a viable alternative to murder, as charged. *See Braughton*, 522 S.W.3d at 740-42; *see Masterson*, 155 S.W.3d at 171-72 ("While the existence of an instruction regarding an intervening lesser offense (such as manslaughter interposed between murder and criminally negligent homicide) does not

automatically foreclose harm—because in some circumstances that intervening lesser offense may be the least plausible theory under the evidence—a court can conclude that the intervening offense instruction renders the error harmless if the jury's rejection of that offense indicates that the jury legitimately believed that the defendant was guilty of the greater, charged offense.") (parenthetical in original).

If this Court does not affirm the judgment of the First Court of Appeals on the grounds that appellant was not entitled to a jury instruction on felony deadly conduct to begin with, this Court should affirm the First Court of Appeals's analysis and conclusion that any error from the omission of the requested instruction was harmless.

CONCLUSION AND PRAYER

For the foregoing reasons, the State respectfully submits that the majority opinion of the First Court of Appeals does not present any reversible error. Accordingly, regarding appellant's first issue presented, the State respectfully prays that this Court will dismiss appellant's first issue as improvidently granted or, alternatively, will affirm that the majority opinion of the First Court of Appeals articulated the proper legal-sufficiency standard of review to assess the sufficiency of the evidence to support the jury's rejection of appellant's defenses of self-defense and defense of a third person.

Regarding appellant's second issue presented, the State respectfully prays that this Court will affirm that the majority opinion of the First Court of Appeals properly applied the correct legal-sufficiency standard of review to the facts of this case and, thus, appropriately held that sufficient evidence substantiates appellant's murder conviction.

Finally, regarding appellant's third issue presented, the State respectfully prays that this Court will grant discretionary review without a petition to assess the perquisite question of whether appellant was entitled to a jury instruction on felony deadly conduct in the first place and, if this Court agrees that appellant was not entitled to such an instruction because felony deadly conduct was not a valid, rational alternative to murder, as charged, will affirm the judgment of the First Court of Appeals on those grounds. Alternatively, if this Court opts to not grant discretionary review without a petition, or if this Court finds that appellant was entitled to an instruction on felony deadly conduct, the State respectfully prays that this Court will affirm the analysis and decision of the First Court of Appeals that appellant was not harmed by any error in the omission of a jury instruction on felony deadly conduct because the jury was provided an instruction on the lesser, intervening offense of manslaughter, but rejected that option.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rules of Appellate Procedure 9.4(i) and 70.3, the undersigned attorney certifies that there are 9,192 words in the foregoing computer-generated document, based upon the representation provided by Microsoft Word, the word processing program that was used to create the document, and excluding the portions of the document exempted by Rule 9.4(i)(1).

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CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel has directed the e-filing system eFile.TXCourts.gov to serve a true and correct copy of the foregoing document upon Niles Illich, attorney of record on appeal for Christopher Ernest Braughton, Jr., and upon Stacey Soule, the State Prosecuting Attorney, on February 22, 2018, at the following e-mail addresses, through the electronic service system provided by eFile.TXCourts.gov:

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APPENDIX A

Original majority opinion issued by the First Court of Appeals at Houston on December 29, 2016, formerly available online as *Braughton v. State*, No. 01-15-00393-CR, 2016 WL 7473942 (Tex. App.—Houston [1st Dist.] Dec. 29, 2016, no pet.).

Opinion issued December 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00393-CR

CHRISTOPHER ERNEST BRAUGHTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1389139

O P I N I O N

Appellant, Christopher Braughton, age 21, intentionally shot Emmanuel Dominguez, age 27, on the street outside Chris's parents' home at approximately 10:00 p.m. Dominguez did not have any weapon in his possession. The shooting followed an episode of road rage between Dominguez and Chris's father,

Christopher Braughton Sr., age 40, while Braughton Sr. was driving home with his wife and other son, age 13. According to the statement of Chris's mother, Dominguez "cut us off and then pulled up beside us and followed us home." Although many of the events after that point are disputed, it is undisputed that Dominguez and Braughton Sr. engaged in a physical altercation in which Dominguez punched Braughton Sr., that Chris ran out of the house brandishing a gun in an attempt to protect his father, and that the fight stopped at least momentarily when Dominguez knocked Braughton Sr. to the ground and Chris arrived. It is also undisputed that Chris aimed his gun at Dominguez and shot him once, killing him.

A jury found Chris guilty of murder and assessed his punishment at 20 years' confinement.[1] In three issues, Chris argues that (1) the evidence is legally insufficient to establish that he had the required mental state to commit murder; (2) the evidence is legally insufficient to reject his claims of self-defense and defense of others; and (3) the trial court committed reversible error by denying his request to provide an instruction in the jury charge on the lesser-included offense of deadly conduct.

We affirm.

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[1] *See* TEX. PENAL CODE § 19.02(b)(1)–(2).

Background

A. The Braughton family encounters Dominguez

Emmanuel Dominguez, the complainant, was a United States Marine, preparing to retire from the Marine Corps and using up his vacation time until his discharge. In early May 2013, Dominguez moved to Spring, Texas and rented a house with his girlfriend, Jessica Cavender, who was also a United States Marine and had recently been assigned as a recruiter in Conroe, Texas. Their house was on Greenland Oak Court.

On May 24, 2013, Dominguez and Cavender went to a restaurant, where they ate, drank beer, and socialized. While there, they met another Marine who invited them to an icehouse, where they continued drinking. Sometime later, yet another veteran invited them to a karaoke bar, where they continued socializing and drinking. While at the karaoke bar, Dominguez and Cavender got into a verbal disagreement, and Cavender refused to accompany him to their home on his motorcycle. Dominguez, who was intoxicated, left alone on his motorcycle.[2]

That same evening, Chris's father ("Braughton Sr."), mother ("Mrs. Braughton"), and younger brother were dining out while Chris, age 21, stayed home at his parents' house. The Braughtons, like Dominguez, lived on Greenland

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[2] At the time of his death, Dominguez had a blood alcohol concentration of 0.17 grams per deciliter, which is more than twice the statutory limit of 0.08 grams per deciliter for driving while intoxicated. *See* TEX. PENAL CODE §§ 49.01(2)(B), 49.04(a).

Oak Court, but Chris had never met Dominguez. After dinner, at approximately 10:00 p.m., Braughton Sr. began driving home, with Mrs. Braughton and their younger son riding in the family vehicle.

Braughton Sr. testified that, as they were nearing their home, he was driving approximately 15 to 18 miles per hour in an area with a 20-mile-per-hour speed limit when he saw a "big bright light" immediately behind his vehicle. He testified that he then heard "a really loud revving sound," and then a vehicle alarm alerted that there was an object very close to the vehicle's rear bumper. He determined from the light, the engine sound, and the vehicle's alarm that a motorcycle was very close behind his car.

According to Braughton Sr., Dominguez, who was driving the motorcycle, came around the side of the car, "tried to swerve into the side of the car," then came around the front of the car and "slam[med] on his brakes." The vehicle's proximity sensors again sounded. Braughton Sr. "slam[med]" on his own brakes to avoid hitting the motorcycle, then sped around the motorcycle and continued heading home. Dominguez followed the Braughton family onto Greenland Oak Court, where, unknown to either driver, they both lived.

As the Braughtons approached their house in their vehicle, Mrs. Braughton called Chris and told him they were being chased. Braughton Sr. testified that his wife said, "Son, there's a guy chasing us. I'm scared," while Mrs. Braughton

recalled saying, “Son, this guy is chasing us. We are right by the house.” The call lasted less than seven seconds, and Mrs. Braughton did not tell Chris to come outside, arm himself, or indeed to do anything at all. Braughton Sr. and Mrs. Braughton testified that they believed that Dominguez was attempting to rob or carjack them. No one, however, called either 9-1-1 or a non-emergency police line at that time.

According to Braughton Sr., the motorcycle “start[ed] coming around the car” again and blocked the Braughtons’ driveway. Braughton Sr. drove around the cul-de-sac at the end of Greenland Oak Court, stopping on the opposite side of the street from his home. Dominguez stopped his motorcycle near the driveway to the home of Robert Bannon, who lived in the home between the Braughton residence and the house rented by Dominguez. Bannon, who was sitting in his driveway at the time, noticed that the motorcycle was only one or two feet away from the Braughtons’ car and “thought [Dominguez] didn’t know how to drive a motorcycle because he looked like he was kind of wobbling.” Dominguez dismounted or fell off of the motorcycle without engaging the kickstand, and then he either threw down the motorcycle or let it fall to its side in the street.

B. Braughton Sr. and Dominguez confront each other

According to Glen Irving, a neighbor who witnessed the events, Dominguez “rather quickly” approached the Braughtons’ car, and Braughton Sr. got out of his

vehicle. But according to Bannon, Braughton Sr. "quickly" got out of the car and "immediately yelled" at Dominguez, demanding to know, "Why the f___ you following me so close for?" Both Bannon and Irving testified that the two men yelled and swore at each other. Irving also testified that Dominguez began punching Braughton Sr. in his face and "beating him up," while Braughton Sr. attempted to defend himself.

Braughton Sr. testified that, while these events were unfolding, he was yelling to his wife, "Get inside," and, "Call 9-1-1," at which point Dominguez began punching him. Braughton Sr. testified that Dominguez hit him two or three times. Dominguez then knocked Braughton Sr. to the ground. This altercation occurred closer to the motorcycle than to the Braughtons' car.[3]

Meanwhile, Chris, who was inside the Braughtons' home, had run to the front door and heard a "loud motorcycle noise." He went to his parents' bedroom, where he kept a 9-millimeter handgun that he had purchased approximately three months earlier. He retrieved the gun and the magazine, which was kept separately, inserted the magazine into the gun, and pulled back the slide to chamber a bullet. At this point, according to Chris, the safety mechanism on the gun was disengaged and the gun was ready to fire.

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[3] Two independent witnesses, Bannon and "Gina" (a pseudonym, as stated in note 4, *infra*), did not see any physical fight between Braughton Sr. and Dominguez. A photograph taken by police showed Braughton Sr. with a bloody lip.

During the altercation between Dominguez and Braughton Sr., Chris came out of his parents' house with the loaded gun, saw Dominguez hitting Braughton Sr., and said two or three times, "I have a gun," or, "Stop, I have a gun." Chris testified that, when he left the house, he had not seen or heard that anyone outside had a weapon of any kind and did not know who had started the fight. There is no evidence in the record that Chris knew that a physical fight was underway before he left the house with a gun. And Chris conceded at trial that the fight was closer to the motorcycle than to the car, indicating that his father had moved farther than had Dominguez. Braughton Sr. did not see Chris exit the house; rather, he first saw him when Chris was three feet away from Dominguez, pointing the gun at Dominguez. According to Mrs. Braughton's sworn statement, she said around this time, "Chris, go, you know, take the gun inside. Take the gun inside."

C. Dominguez reacts to the gun

Witnesses at trial gave conflicting accounts of what happened next. Chris, Braughton Sr., Mrs. Braughton, and Irving all testified that Dominguez then verbally responded to Chris and either moved toward or reached into the saddlebags on the motorcycle. The details of their testimony, however—whether Dominguez mentioned a gun and whether he actually reached his motorcycle, which was some unspecified distance away from the fight—conflicted. Specifically, Chris testified that Dominguez said, "Oh, you have a gun,

m_____f_____. I have a gun for you," then reached into a saddlebag on the motorcycle. He later testified, however, that Dominguez used the word "something," not "a gun."

According to Braughton Sr., Dominguez "reache[d] down and he [said], 'You got a gun, m_____f_____, I have something for your f_____ a__.'" Elsewhere in his testimony, however, Braughton Sr. recalled that Dominguez said, "I got a gun for your a__," not, "I have something for your a__." Braughton Sr. specifically testified that Dominguez "reache[d] in[to]" the saddlebag before he was shot.

Mrs. Braughton testified that Dominguez "reache[d] towards his bike, the boxes on his bike," and quoted him as saying, "You have a gun, m_____f_____. I have something for your a__." Elsewhere in her testimony, she reported the second sentence as, "I have a gun for your a__." She also testified that she saw Dominguez reaching toward his motorcycle while she was running into her home.

Neighbor Irving testified that Dominguez "turned and started back towards the motorcycle, and [Irving] heard a voice say, 'Yeah, I got a gun, too, m_____f_____.'" When pressed to "recall exactly what [he] heard," Irving said that he heard either "I got a gun, too, m_____f_____," or possibly, "I've got something for you, m_____f_____." He testified that he could not "say 100 percent positively" which statement he heard. Although Irving testified that

Dominguez moved toward the motorcycle, he did not see Dominguez reach into the saddlebags. He testified that, if Dominguez had done so, he "should have been able to see it" from his vantage point, but he could not "say positively that [he] would have seen it."

Chris testified that Dominguez was positioned with the saddlebag to his left, reached across his body with his right arm, turning as he did so, and began to straighten up. Similarly, Braughton Sr. testified that Dominguez reached toward a saddlebag on the motorcycle, "just grab[bed] the box and open[ed] it," then reached into it.

Gina,[4] a high-school junior who also lived on Greenland Oak Court, testified with a different account. Gina watched events unfold from her second-story bedroom window in a house across the street. Gina testified that she could not see many details of the scene "clearly" because a light-blocking screen on her window made her view of the street "blurry." She could not see faces clearly and did not see a gun, but testified that she heard Mrs. Braughton tell Chris, "Put the gun down." Gina further testified that, instead of complying, Chris replied, "No, I got a gun now," and walked toward Dominguez, who "stopped and put his hands up" and "slowly back[ed] up." Gina physically demonstrated the shooting at trial on direct examination, but the record does not reflect any testimony regarding the

[4] Because the witness was a minor at the time of the shooting, we use a pseudonym.

orientation of Dominguez's body with respect to either Chris or Chris's gun.[5] Gina did not see Dominguez approach the motorcycle, open a saddlebag, or reach for anything.

D. Chris kills Dominguez

The remaining sequence of events is undisputed. Chris testified that he "pointed [the gun] towards [Dominguez's] arm," without "aiming at a specific area on him," and pulled the trigger. He shot Dominguez one time. The bullet hit Dominguez under his right armpit, toward the back of his body. It traveled right to left, "very slightly upward," and "slightly back to front," puncturing both of Dominguez's lungs and damaging his "aorta, the major artery coming out from the heart," resulting in the loss of at least three liters of blood. The medical examiner who later examined Dominguez, Dr. Morna Gonsoulin, testified that such injuries can kill a person "within seconds."

Dominguez fell to the ground. According to Gina, Mrs. Braughton then said to Chris, "What did you do?"

Mrs. Braughton dialed 9-1-1 on her cell phone and handed the phone over to Braughton Sr., who talked to dispatch. Braughton Sr. explained several times

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5 Chris argues that Gina's testimony "can only be read to say that Dominguez was facing [Chris] when the shot was fired," but she did not expressly give such testimony. The State acknowledges that Dominguez must have turned before he was shot. No witness expressly stated that Dominguez was facing Chris when or just before he was shot.

during the call that a man had chased his family and attacked him, and that his son—that is, Chris—shot the attacker. He did not mention any threats by Dominguez, nor did he say that anyone feared a carjacking or robbery at any time. Although Mrs. Braughton and Bannon attempted to perform CPR, Dominguez died on the scene. Chris placed the gun in the house, waited for the police, and identified himself as the shooter to police when they arrived at the scene.

The investigating officers took statements from a number of witnesses, including Gina. The officers made an audio recording of their interview with Gina. Sergeant A. Alanis of the Harris County Sheriff's Office testified that he attempted to take statements from Braughton Sr. and Mrs. Braughton, but both declined to give statements. Braughton Sr. testified that he attempted to write a statement, but an officer took away the clipboard that he was writing on. Mrs. Braughton gave a written statement in which she wrote that Dominguez "trie[d] to pull something out of his box on his bike" but did not mention any threats by Dominguez. At the time of the shooting, officers did not identify Irving as a witness.

E. Evidence at trial

The State charged Chris with murder. At trial, Gina testified that she did not have a relationship with or know the names of any of the individuals involved, although she recognized them as her neighbors and was able to associate them with their respective homes. She identified the participants by the color of the clothing

that they wore on the night in question and their respective genders. Using those descriptions, she testified that she saw Braughton Sr. and Dominguez arguing when Chris came from the direction of the Braughtons' house "with his right arm stretched out with a gun in his hand." She testified that Chris "just walk[ed] straight to [Dominguez] and then he stop[ped]." Gina stated that Dominguez was backing up with his arms raised when Chris shot him.

Gina confirmed that her memory of events "would be better whenever I made the statement" to police on the night of the shooting than at trial and that everything she had said in her statement was true and correct. Her statement was admitted into evidence and played for the jury. In it, as at trial, she described the participants in the confrontation by clothing and gender, though she stated that the person in black—that is, Chris—argued and engaged in a shoving match with the person in red—that is, Dominguez. She stated that the person in black had a gun and shot the person in red one time. At trial, she testified that she had misspoken and that the person in orange—that is, Braughton Sr.—was the person who had argued with Dominguez.

The State also presented testimony by Bannon, who testified that he did not "see anyone throw a punch or kick at each other," though he was "maybe 20 feet away" from the confrontation and had "a good view" of both men. Rather, he testified that Braughton Sr. and Dominguez were "[j]ust yelling." Bannon heard

Chris say, “I have a gun,” then heard a woman, possibly Mrs. Braughton, say, “‘We’re recording you,’ or ‘We’re recording this.’” He testified that he “thought there was a fight about to break out” at the moment when Chris came out of the house. When Bannon saw that Chris had a gun, he went into his home to retrieve a rifle to “try to [defuse] the situation [and] have [Chris] put his gun down.” He testified that he neither saw nor heard the shot being fired. By the time Bannon returned to his front door, Dominguez was lying on the ground, so Bannon went outside without the rifle.

The State called three investigating law enforcement officers: Corporal J. Talbert of the Constable’s Office, Precinct 4; Sergeant Alanis; and Harris County Sheriff’s Deputy D. Medina. All three had responded to the scene of the shooting. Corporal Talbert authenticated several photographs as fair and accurate representations of the scene as it appeared when he arrived. Several of these photographs show one of the two saddlebags on Dominguez’s motorcycle open. Deputy Medina testified that she found no gun or other weapons on Dominguez’s person or in his saddlebags but that one of the saddlebags was open when she arrived on the scene.

Corporal Talbert specifically noted “a cell phone . . . towards the middle of the cul-de-sac.” He testified, “Somebody tried to pick up the cell phone that was in the cul-de-sac,” but he “told them to leave it where it was.” Sergeant Alanis also

testified that law enforcement collected a cell phone in the cul-de-sac and that he "was advised it was the defendant's father's." He also testified, "The father requested the phone back, and I told him it was going to be evidence until it was downloaded." By the time Alanis attempted to search the phone, it "had been wiped" and "appeared like when you buy a brand new phone." Alanis was not able to recover any information from the phone.

Dr. Gonsoulin, the assistant medical examiner who conducted Dominguez's autopsy, testified that Dominguez died from a single gunshot wound and that the path of the bullet went "basically from the right armpit to the left armpit." For the bullet to follow its trajectory, Dominguez had to have exposed his right armpit and had his left side slightly lower than the right when he was shot. According to Dr. Gonsoulin, this meant that Dominguez could have been shot while bending, reaching, or extending his right arm across his body toward his left side. She testified that the gun could not have been "straight ahead pointing" at Dominguez's chest. Dominguez could have been shot while turning, but it was "impossible" for him to be "shot facing the shooter with his arms up." She also testified, however, that in general reaching down and across the body would not sufficiently expose the armpit, explaining, "There might be an angle where you could just be reaching down and [the wound area] would be exposed, but you would have to at least extend your shoulders slightly to get the differential in the arms." Dr. Gonsoulin's

testimony was supported by photographic evidence showing that the gunshot wound was under Dominguez's right arm, an X-ray image showing the bullet inside the left side of Dominguez's chest, and the autopsy report describing the bullet's trajectory.

The State presented further testimony from Harris County Sheriff's Deputy F. Williams, who unsuccessfully attempted to recover video from the Braughtons' home security system. S. Williams, a forensic chemist, testified that Chris had gunshot residue on both of his hands when samples were taken shortly after the shooting. A firearms examiner testified for the State regarding the operation of Chris's gun. A DNA analyst, Z. Phillips, testified for the State that she found DNA consistent with Braughton Sr.'s DNA on a knuckle on Dominguez's right hand but did not find any DNA consistent with Chris's DNA on Dominguez.

The State presented testimony from Cavender regarding her relationship with Dominguez, their move to Spring, and the time they spent together the day Dominguez died. Cavender testified that Dominguez did not have any weapons on his person or on his motorcycle on the day he died. Her phone and keys, however, were in the motorcycle's saddlebags at the time of the shooting.

The defense presented testimony from Glen Irving, Braughton Sr., and Mrs. Braughton that Dominguez was chasing the Braughtons erratically down the street and riding "almost on [their] bumper." The Braughtons all testified that Mrs.

Braughton frantically called Chris while Dominguez was chasing them. Irving and the Braughtons testified that Dominguez and Braughton Sr. fought. According to Irving, Dominguez was "punching and beating up" Braughton Sr. The Braughtons each testified that at that time they were afraid for their lives. Irving and the Braughtons testified that Chris warned Dominguez as the latter was hitting Braughton Sr., "Stop, I have a gun." They all testified that Dominguez knocked down Braughton Sr. and went toward his motorcycle, cursing and threatening that he had "a gun" or "something for" Chris. Each of these witnesses also testified, however, that they never saw a gun or other weapon in Dominguez's possession.

Braughton Sr. testified that he lost his phone on the evening in question. Specifically, he testified that it fell out of his back pocket when Dominguez punched him. He testified that the police took the phone, and that the Braughton family "kept asking" where the phone was, but the Braughtons never regained possession of it. Mrs. Braughton tracked the phone belonging to her youngest son, which was also missing, using an app on her own phone and found that it was "on the next street and was driving away." An officer returned with that phone but said he did not have Braughton Sr.'s phone. According to Braughton Sr., when the Braughtons tracked his phone, they found that it was in Pasadena, assumed it was stolen, and remotely reset it to its factory state.

The defense also presented Gary Gross, who installed the solar screen in Gina's bedroom window. He testified that the screen was a "90 percent Suntex solar screen," meaning that it would "block 90 percent of visible light," was designed to provide privacy, and would be difficult to see through at night. According to Gross, at 10:00 p.m., it would be possible to see "some visible light" through the screen and to "see something," but not to "make out what it is." He confirmed that it would "probably not" be possible for anyone looking through the screen at that time to "make out what they are seeing."

Chris testified that he "was just pointing [the gun] at [Dominguez's] arm" and "just wanted to stop him." According to Chris, he had the gun in the air initially, but he brought it down to his hip to fire. He testified that is not the same way that he would "fire at a gun range." He testified that he was "[n]ot behind [Dominguez but] on the side of him" when he fired the shot. He conceded that he pointed the gun at Dominguez, pulled the trigger, and thought "that a bullet was going to hit" Dominguez. He also testified as follows:

> Q. You're aware that a bullet hitting somebody can cause serious bodily injury, correct?
>
> A. Sometimes, yes, sir.
>
> Q. So you were aware that—you were aware that you were intending to cause serious bodily injury to Manny Dominguez?
>
> A. Yes, sir.

He also explained that he had "receive[d] some basic information about the operation of the gun" from the salesperson and had fired it at a shooting range on two occasions.

The trial court charged the jury, instructing it on the offense of murder and the lesser-included offense of manslaughter. Additionally, the trial court instructed the jury on the law of self-defense, defense of a third person, and defense of property. Chris requested that the trial court also include an instruction on the lesser offenses of misdemeanor and felony deadly conduct, but the trial court refused.

The jury convicted Chris of murder and assessed his punishment at 20 years' confinement. This appeal followed.

Sufficiency of the Evidence

In his first two issues, Chris argues that the evidence was legally insufficient to support his conviction. In the first issue, he argues that no evidence, whether direct or circumstantial, establishes that he possessed the required mental state to commit murder. In the second issue, he argues that the evidence was insufficient to prove beyond a reasonable doubt that he did not act in self-defense or in defense of others.

A. Standard of review

When reviewing the sufficiency of the evidence, we view all of the evidence in the light most favorable to the prosecution to determine whether any rational factfinder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see Adames v. State*, 353 S.W.3d 854, 859 (Tex. Crim. App. 2011) (holding that *Jackson* standard is only standard to use when determining sufficiency of evidence); *Nelson v. State*, 405 S.W.3d 113, 122 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd). The jury is the exclusive judge of the facts and the weight to be given to the testimony. *Bartlett v. State*, 270 S.W.3d 147, 150 (Tex. Crim. App. 2008). A jury, as the sole judge of credibility, may accept one version of the facts and reject another, and it may reject any part of a witness's testimony. *See Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986); *see also Henderson v. State*, 29 S.W.3d 616, 623 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) ("Even when a witness's testimony is uncontradicted, the jury can choose to disbelieve a witness.").

We afford almost complete deference to the jury's credibility determinations. *Lancon v. State*, 253 S.W.3d 699, 705 (Tex. Crim. App. 2008). We may not re-evaluate the weight and credibility of the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex.

Crim. App. 2007) (citing *Dewberry v. State*, 4 S.W.3d 735, 740 (Tex. Crim. App. 1999)). Rather, we determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014). We resolve any inconsistencies in the evidence in favor of the verdict. *Curry v. State*, 30 S.W.3d 394, 406 (Tex. Crim. App. 2000); *see Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007) ("When the record supports conflicting inferences, we presume that the factfinder resolved the conflicts in favor of the prosecution and therefore defer to that determination.").

Circumstantial evidence is as probative as direct evidence in establishing guilt, and circumstantial evidence alone can be sufficient to establish guilt. *Sorrells v. State*, 343 S.W.3d 152, 155 (Tex. Crim. App. 2011); *Clayton*, 235 S.W.3d at 778. "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." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). "Evidence is legally insufficient when the 'only proper verdict' is acquittal." *Nelson v. State*, 405 S.W.3d 113, 122 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd) (quoting *Tibbs v. Florida*, 457 U.S. 31, 41–42, 102 S. Ct. 2211, 2218 (1982)).

The jury's ultimate conclusion must be rational in light of all the evidence. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Matlock v. State*, 392 S.W.3d 662, 673 n.45 (Tex. Crim. App. 2013); *Adames*, 353 S.W.3d at 860; *Nelson*, 405 S.W.3d at 122–23. In reviewing the sufficiency of the evidence when a jury has rejected claims of self-defense or defense of others, we must "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 murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton v. State*, 804 S.W.2d 910, 914 (Tex. Crim. App. 1991).[6] When some evidence, if believed, supports a self-defense claim, but other evidence, if believed, supports a conviction, we, as an appellate court, "will not weigh in on this fact-specific determination, as that is a function reserved for a properly instructed jury." *Reeves v. State*, 420 S.W.3d 812, 820 (Tex. Crim. App. 2013).

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[6] We agree with the dissent's summary of this standard as requiring us to determine whether it was "rational *both* for the jury to have found appellant guilty of murder, looking at the evidence in the light most favorable to the verdict, *and* for it to have rejected the defenses of self-defense and defense of a third person." Accordingly, we consider whether the jury could rationally have made both such findings, taking all the evidence in the light most favorable to the prosecution.

B. Mens Rea

In his first issue, Chris argues that the evidence was insufficient to support a finding that he possessed the required mental state to have committed the offense of murder.

1. Applicable law

A person has the requisite mens rea for the offense of murder when he "intentionally or knowingly causes the death of an individual" or "intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual." TEX. PENAL CODE § 19.02(b)(1)–(2). A person acts "intentionally" with respect to the nature or result of his conduct "when it is his conscious objective or desire to engage in the conduct or cause the result." *Id.* § 6.03(a). A person acts "knowingly" "with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result." *Id.* § 6.03(b). When, as in this case, the charge presents two legal theories of murder—knowingly causing death or intending to cause serious bodily injury and committing an act clearly dangerous to human life that causes death—the theories are alternative manners and means of committing the offense of murder, rather than distinct offenses. *See Aguirre v. State*, 732 S.W.2d 320, 326 (Tex. Crim. App. 1982) (en banc) (op. on rehearing).

A conviction may be based upon circumstantial evidence, which is just "as probative as direct evidence in establishing the guilt of an actor." *Temple v. State*, 390 S.W.3d 341, 359 (Tex. Crim. App. 2013) (quoting *Hooper*, 214 S.W.3d at 13). As explained by the Court of Criminal Appeals, "a jury may infer intent from any facts which tend to prove its existence . . . [and a] jury may also infer knowledge from such evidence." *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (quoting *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999)). This evidence may include acts, words, and conduct of the accused. *Id.*; *see Robbins v. State*, 145 S.W.3d 306, 309 (Tex. App.—El Paso 2004, pet. ref'd) ("[T]he jury may infer the intent to kill from the defendant's words or conduct.").

Further, a "jury may infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon." *Jones v. State*, 944 S.W.2d 642, 647 (Tex. Crim. App. 1996); *see Pitonyak v. State*, 253 S.W.3d 834, 844 (Tex. App.—Austin 2008, pet. ref'd) ("When, as in this case, the evidence shows that a deadly weapon was used in a deadly manner, 'the inference is almost conclusive that [the defendant] intended to kill.'" (quoting *Godsey v. State*, 719 S.W.2d 578, 581 (Tex. Crim. App. 1986))). A firearm is a deadly weapon *per se*. TEX. PENAL CODE § 1.07(a)(17)(A). In consideration of the evidence, "[i]ntent may also be inferred from the means used and the wounds inflicted, and is a factual matter to be

determined by the jury from all the facts and circumstances." *Ervin v. State*, 333 S.W.3d 187, 200 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

2. Analysis

The State and Chris agree—and Chris testified—that he came out of the house with a gun and ultimately shot Dominguez with a firearm, killing him. Chris does not challenge the evidentiary support of these undisputed facts. Rather, Chris points to the following evidence to argue there was no mens rea evidence: (1) Chris feared for his father's safety upon seeing the fight; (2) he pointed the gun in the air and told Dominguez to stop because he had a gun; (3) Dominguez threatened to pull a gun on him; (4) the forensic examiner's testimony that Chris shot Dominguez at an angle, not facing face-to-face; (5) Chris's testimony that the only reason that he discharged the gun was "to stop" Dominguez; and (6) Chris did not flee the scene but instead waited for the police, voluntarily identified himself as the shooter, and directed police to the gun he used.

But this evidence is not relevant to the mental state of intent to kill or cause serious bodily injury; rather, it supports his defenses of self-defense and defense of another person. The evidence shows that Chris came out of the house with a loaded weapon and inserted himself into a dispute between Braughton Sr. and Dominguez in which no deadly force had been used or threatened and which had not caused any serious injury to his father. And he ultimately fired that gun with the intention

of striking Dominguez. The "jury [could] infer the intent to kill from the use of a deadly weapon unless it would not be reasonable to infer that death or serious bodily injury could result from the use of the weapon." *Jones*, 944 S.W.2d at 647; *see Pitonyak*, 253 S.W.3d at 844.

Chris also argues that evidence about his cooperation with police after the shooting coupled with a lack of prior animosity between the two demonstrates insufficient circumstantial evidence of the requisite mental state for murder under Penal Code Sections 19.02(b)(1) and 19.02(b)(2). But Chris used a firearm, a deadly weapon *per se*, to kill Dominguez. TEX. PENAL CODE § 1.07(a)(17)(A). Intent is determined by the jury from all the facts and circumstances in evidence. *Ervin*, 333 S.W.3d at 200. Thus, purposeful use of a deadly weapon could reasonably lead a jury to conclude that Chris possessed the required mental state. *See id*; *Jones*, 944 S.W.2d at 647; *Pitonyak*, 253 S.W.3d at 844.

To support his contention that the jury reached an irrational conclusion here, Chris points to the "robbery-at-a-convenience-store" illustration in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.). The court explained the hypothetical as follows:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

323 S.W.3d at 906–07 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)). The court identified this example as "a proper application of the *Jackson v. Virginia* legal-sufficiency standard." *Id.*

This case is not analogous. There is no evidence that "clearly" contradicts the jury's conclusion that Chris killed Dominguez with the requisite intent. Nor does a review of all the evidence in the light most favorable to the verdict demonstrate that the jury's finding was irrational. Even were we to agree with Chris that the medical examiner's findings regarding the trajectory of the gunshot—the bullet traveling from one armpit to the other—were incontrovertible and that Gina's testimony regarding Dominguez's orientation could be completely disregarded because it conflicted with those findings, the jury rationally could have concluded that Chris acted with the required culpable mental state for murder. And Chris himself acknowledges that there is some evidence indicating a culpable mental state, such as his use of a firearm at close range and his own acknowledgments that he was "intending to cause serious bodily injury to" Dominguez.

Viewing the evidence in the light most favorable to the jury's finding, we conclude that a rational jury could have found that Chris intentionally or knowingly caused Dominguez's death. *See Jackson*, 443 U.S. at 319; *see also* TEX. PENAL CODE §§ 6.03(a)–(b) (definitions of "intentionally" and "knowingly"),

19.02 (elements of murder). The evidence is thus legally sufficient to support the jury's finding that Chris acted with the required mental state to commit murder. We overrule Chris's first issue.

C. Defenses of self-defense and defense of others

In his second issue, Chris argues that "the State failed to carry its burden of persuasion on his claims that he acted in self-defense and in defense of others."

1. Applicable law

Both self-defense and defense of a third party are statutorily defined and provide a defense to prosecution when the conduct in question is "justified." TEX. PENAL CODE § 9.02. Under Chapter 9, "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 . . . ." *Id.* § 9.31(a). Similarly, "[a] person is justified in using *deadly* force against another . . . when and to the degree the actor reasonably believes the deadly force is immediately necessary . . . to protect the actor against the other's use or attempted use of unlawful deadly force." *Id.* § 9.32(a) (emphasis added); *see Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd).

A person is justified in exercising deadly force in defense of others "[s]o long as the accused reasonably believes that the third person would be justified in

using [deadly force] to protect himself." *Smith*, 355 S.W.3d at 145 (quoting *Hughes v. State*, 719 S.W.2d 560, 564 (Tex. Crim. App. 1986); *see* TEX. PENAL CODE § 9.33. Both of these defenses—self-defense and defense of others—may be raised as justifications for a defendant's actions and in support of an acquittal against a charge of murder or manslaughter. *See, e.g.*, TEX. PENAL CODE §§ 9.31–.33; *Alonzo v. State*, 353 S.W.3d 778, 779–81 (Tex. Crim. App. 2011) (self-defense is defense to both murder and manslaughter charges); *Smith*, 355 S.W.3d at 145 (defense of third person as defense to murder).

The use of force against another is not justified in response to verbal provocation alone[7] or when the person using force provoked the person against whom the force was used.[8] And the use of deadly force is only appropriate under these defenses to protect the actor or a third person from another's "use or attempted use of unlawful deadly force" or "to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery." *See* TEX. PENAL CODE §§ 9.32(a), 9.33.

In a claim of self-defense or defense of others, "a defendant bears the burden of production," while "the State . . . bears the burden of persuasion to disprove the raised defense." *Zuliani v. State*, 97 S.W.3d 589, 594 (Tex. Crim. App. 2003). The

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[7] *See* TEX. PENAL CODE § 9.31(b)(1).

[8] *See id.* 9.31(b)(4) (providing general rule and exception).

defendant's burden of production requires the defendant to adduce some evidence that would support a rational jury finding for the defendant on the defensive issue. *See Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007); *see also* TEX. PENAL CODE § 2.03(c) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."). "[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic*, 393 S.W.3d at 286 (citing *Shaw*, 243 S.W.3d at 657–58). "[A] defense is supported (or 'raised') if there is evidence in the record making a prima facie case for the defense." *Shaw*, 243 S.W.3d at 657. "A prima facie case is that 'minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.'" *Id.* (quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987), *aff'd*, 490 U.S. 754, 109 S. Ct. 2180 (1989)). 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." *Zuliani*, 97 S.W.3d at 594 (citing *Saxton*, 804 S.W.2d at 913–14).

In light of these burdens of production and proof, "[w]hen a jury finds the defendant guilty, there is an implicit finding against the defensive theory." *Id.* A jury, however, is not permitted to reach a speculative conclusion. *Elizondo v. State*,

487 S.W.3d 185, 203 (Tex. Crim. App. 2016). Nor is it permitted to disregard undisputed facts that allow only one logical inference. *Evans v. State*, 202 S.W.3d 158, 162 (Tex. Crim. App. 2006); *Satchell v. State*, 321 S.W.3d 127, 132 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

2. Analysis

Chris adduced evidence that he acted in self-defense or in defense of his family. According to multiple witnesses, Chris received a frantic phone call from his mother that Dominguez was chasing his family on his motorcycle. By several accounts, when Chris came out of the house, Dominguez was punching Braughton Sr. in the face. Braughton Sr. ultimately had a bloody lip. Chris relies on his own testimony and testimony of his family members and Irving that when he came out of the house with a gun and told Dominguez, "Stop, I have a gun," Dominguez responded by acknowledging, "[Y]ou have a gun," stating that he had "a gun" or "something for" Chris, and moving towards his motorcycle, which prompted Chris to shoot him. In addition, Bannon testified that the overall situation was one in which Chris was "just trying to defend his dad." This testimony was consistent with the physical evidence presented. As Dr. Gonsoulin testified, the bullet trajectory was at least plausibly consistent with a shot fired while Dominguez was bending or reaching downward with his right hand, as that would expose his armpit if his shoulders were sufficiently extended.

In light of the above testimony, Chris met his burden of production. *See* TEX. PENAL CODE § 2.03(c); *Krajcovic*, 393 S.W.3d at 286; *Shaw*, 243 S.W.3d at 657–58. That is, this evidence, if credited by the jury, would support a rational jury finding that Chris was not guilty because (1) he justifiably acted in self-defense in response to the statement "I got a gun for you," and Dominguez's subsequent motions; (2) he justifiably acted in defense of others, in particular in defense of his father, mother, and younger brother; or (3) both defenses applied.

Because Chris met his burden of production, the State was required to prove beyond a reasonable doubt that his actions were not justified under either defensive theory. *Zuliani*, 97 S.W.3d at 594; *Saxton*, 804 S.W.2d at 913–14. Although the State was not required to produce evidence refuting Chris's theories, it still had the obligation to present evidence sufficient to permit the jury to reach its verdict of guilty, implicitly rejecting those theories. *E.g.*, *Alonzo*, 353 S.W.3d at 781 ("If there is some evidence that a defendant's actions were justified under one of the provisions of Chapter 9 [of the Penal Code], the State has the burden of persuasion to disprove the justification beyond a reasonable doubt."); *Zuliani*, 97 S.W.3d at 594–95; *Saxton*, 804 S.W.2d at 913–14.

The jury rationally could have rejected Chris's self-defense or defense-of-others theories. The use of deadly force for defense of third parties is justified only "when and to the degree the actor reasonably believes the deadly force is

immediately necessary . . . to protect the [third party] against [another's] use or attempted use of unlawful deadly force." TEX. PENAL CODE §§ 9.32(a)(2), 9.33. Taking the evidence in the light most favorable to the prosecution, the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony that was undermined by the absence of any phone records demonstrating that it occurred or any data retrieved from any phone found at the scene. Although no witness testified that the call did not occur, the jury was free to disbelieve all or any part of any witness's testimony and was not required to accept the testimony of Chris's witnesses, even when those witnesses were not contradicted. *See Sharp*, 707 S.W.2d at 614; *Henderson*, 29 S.W.3d at 623.

In the same light, the cut on Braughton Sr.'s lip and presence of Braughton Sr.'s DNA on Dominguez's hand indicates only that Dominguez punched Braughton Sr. once. Even were we to credit the testimony of Braughton Sr. that he was punched three times, the jury rationally could have concluded that Chris's use of deadly force was not immediately necessary for Chris to protect his father. By all accounts, Braughton Sr. was on the ground after the third punch, and Dominguez had no weapon, was not using his hands as deadly weapons, and was not kicking or jumping on Braughton Sr. And Braughton Sr.'s injuries—a bloody lip—were not serious—indeed, Braughton Sr. did not receive any medical treatment for his injuries. The defense-of-others theory is also undermined by

Chris's mother's statement to him to put the gun down and go back inside and her immediate reaction to observing Chris shoot Dominguez: "What did you do?"

Indeed, at the moment of the shooting, Dominguez had ceased using any force at all, and the punches he had landed on Braughton Sr. up to that point do not amount to deadly force that could create a reasonable belief that deadly force was necessary. *See Bedolla v. State*, 442 S.W.3d 313, 317 (Tex. Crim. App. 2014) (distinguishing between purportedly defensive punching as force and running over victim with car as deadly force); *see also Bundy v. State*, 280 S.W.3d 425, 435 (Tex. App.—Fort Worth 2009, pet. ref'd) (stating that "attempt to punch appellant . . . was not deadly force" justifying defensive deadly force); *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008, pet. ref'd) (holding that reasonable jury could not have found that actor was justified in using deadly force when other person's only use of force was striking with fist); *cf. Rue v. State*, No. 01-11-00112-CR, 2012 WL 3525377, at *3 (Tex. App.—Houston [1st Dist.] Aug. 16, 2012, pet. ref'd) (mem. op., not designated for publication) ("Hands are not deadly weapons per se, but they can become deadly weapons depending on how the actor uses them."). In sum, Chris adduced no evidence that Dominguez used his hands in a deadly manner or used or threatened to use deadly force of any kind before Chris brought a gun to the encounter.

We next turn to whether the jury likewise could have rationally found that Chris was not justified in using deadly force in light of evidence that Dominguez appeared to be reaching for a gun in the saddlebag of his motorcycle. Chris, Braughton Sr., and Mrs. Braughton each testified that, in response to Chris's announcement that he had a gun, Dominguez responded that he also had "a gun." But each of these witnesses also testified that Dominguez might have said, instead, that he had "something." No witness ever saw a gun in Dominguez's possession, and law enforcement did not recover any weapon other than Chris's gun. Thus, although the jury could have credited testimony that Chris reasonably believed that deadly force was immediately necessary, it was also free to reject the testimony that Dominguez threatened Chris with and attempted to retrieve a gun, particularly when no gun other than Chris's was ever recovered.[9] *Saxton*, 804 S.W.2d at 914.

Chris next assails the testimony of Gina, the neighbor who observed the events unfold from her bedroom window. First, Chris points out inconsistencies between her statement to police and her trial testimony. He also argues that her testimony is unreliable because the window covering obstructed her vision.

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[9] We note that the dissent states that the defensive witnesses described a scenario in which "Dominguez purported to reach for a gun," and asserts that this is the only scenario "supported by the evidence and not rendered impossible by the physical evidence." On the contrary, there is no evidence that Dominguez "purported to reach for a gun," though there is some evidence that Dominguez said he had a gun and some evidence that Dominguez reached toward or into his motorcycle's saddlebags. The jury was not required to accept that evidence, nor did that evidence, if accepted, require the jury to find that there was a reasonable doubt as to Chris's defenses.

Second, through his examination of Dr. Gonsoulin, the assistant medical examiner, he attacked Gina's contention that Dominguez was backing up with his arms raised above his head and was not reaching towards his motorcycle's saddlebag when he was shot. Dr. Gonsoulin conceded that—given the path of the bullet which went "basically from the right armpit to the left arm pit" in a "very slightly upward" direction[10]—it was "possible" that that Dominguez was "slightly bent" and "reaching" with his right arm when he was shot. Dr. Gonsoulin also testified that the bullet, which came primarily from a shooter facing Dominguez's right side, entered "slightly" from Dominguez's back, not from a gun pointing "straight ahead" at Dominguez's chest. While this possibility was consistent with Chris's testimony that Dominguez was reaching into his motorcycle's saddlebags when Chris fired the gun, this does "not render the State's evidence insufficient [because] the credibility determination of such evidence is solely within the jury's province and the jury is free to accept or reject the defensive evidence." *Id.*[11]

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[10] She also described the path as "almost straight across" and that the left side was "down by just a hair" or "minimally."

[11] The dissent asserts that Gina's testimony was "irreconcilable with the physical evidence," specifically Dr. Gonsoulin's testimony about the bullet's trajectory. We disagree. As explained above, Dr. Gonsoulin testified that she could not exclude the possibility that Dominguez had his hands up, but could only say that the gun could not have been pointed at his chest from the front. And Gina did not specifically testify that the gun was in front of Dominguez.

Indeed, Dr. Gonsoulin's testimony was in some ways supportive of Gina's account. The area of the bullet's entry under the right armpit generally "is covered whenever that person's arm is down." She testified:

> Q: So let's go back and talk about the gunshot wound. What does the position of the gunshot wound on Emmanuel Dominguez being about right here; is that correct?
>
> A. A little higher.
>
> Q. What does that tell you as far as the position of his right arm whenever the bullet entered his body?
>
> A. At the time of the discharge, his armpit was exposed, which means that his shoulders were at least raised to expose that area of the body.

She also testified that while the armpit would be exposed if someone was reaching far enough, it would not be exposed if someone was reaching across and down because reaching down "cover[s] up that armpit." The inference from this testimony, combined with testimony and photographic evidence that Dominguez's motorcycle was laid on the ground, was that Dominguez likely was not reaching down when he was shot. Chris did not present any expert witness to support his contention that Dominguez was reaching down when he was shot.

Chris urges us to discredit Gina's testimony because Gina was mistaken when she apparently testified that Dominguez was facing Chris when he was shot. But a jury may disregard mistakes by a witness on one portion of the witness's testimony and still credit other portions of the witness's testimony—here that

Dominguez had his hands up. Moreover, Dr. Gonsoulin testified that Dominguez could have turned shortly before the shooting.

To the extent that the evidence conflicted regarding Dominguez's orientation with respect to Chris when the shot was fired, the resolution of such conflicts is the province of the jury, and the jury could have resolved such conflicts in a number of ways, including by crediting other parts of Gina's testimony or Chris's own testimony that he was standing to Dominguez's side. *See Bartlett*, 270 S.W.3d at 150 (jury is exclusive judge of facts proved and weight to be given to testimony); *Sharp*, 707 S.W.2d at 614 ("[A] witness may be believed even though some of his testimony may be contradicted and part of his testimony recorded, accepted, and the rest rejected."); *Henderson*, 29 S.W.3d at 623. With the testimony presented, the jury could have believed that Dominguez backed away at an angle to Chris or that, while Dominguez was backing directly away, he turned before the bullet struck him.[12]

As we observed in another case involving a claim of self-defense,

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[12] The dissent states that Gina's testimony that Dominguez put his hands up and backed away without making any threats is "[t]he only evidence that is inconsistent with [Chris's] defensive theories." We disagree. The evidence shows that Chris had little to no knowledge of unfolding events when he emerged from the house with a gun, that the physical confrontation between Dominguez and Braughton Sr. ended before Chris fired a shot, that Bannon did not see a fight at all, and that Mrs. Braughton made numerous statements from which a reasonable jury could infer that Chris's use of deadly force was unnecessary. These facts, among others, are also inconsistent with Chris's theory that defensive, deadly force was immediately necessary.

> The jury's decision to reject [the] defensive claims . . . ultimately hinges on the credibility of the witnesses. As factfinder, the jury is entitled to judge the credibility of witnesses, and can choose to believe all, some, or none of the testimony presented by the parties. The statements of the defendant and his witnesses do not conclusively prove a claim of self-defense or defense of a third party.

Smith v. State, 355 S.W.3d 138, 146 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (citations and internal quotation marks omitted).

In conclusion, taking the evidence in the light most favorable to the verdict, the jury rationally could have chosen not to believe Chris and his family's testimony that would support a finding that Chris reasonably believed deadly force was immediately necessary to protect himself or third persons from Dominguez's impending attempted use of deadly force. We cannot substitute our view of these witnesses' credibility based on a cold record for that of the factfinder. *Smith*, 355 S.W.3d at 144; *see also Brooks*, 323 S.W.3d at 899 (jury is sole judge of witnesses' credibility and weight to be given their testimony). Nor can we conclude that the imperfections in Gina's testimony by themselves are sufficient to conclusively establish a reasonable doubt. *See Williams*, 235 S.W.3d at 750. Even without Gina's testimony, the jury was not required to accept Chris's defensive claims. Indeed, additional testimony—from Gonsoulin, Bannon, and even the Braughtons—cast doubt on Chris's claim that he had a reasonable belief in the need to use deadly force.

As an appellate court, our review is limited. First, we review the evidence in the light most favorable to the prosecution. *Saxton*, 804 S.W.2d at 914. Second, we may not "act as a 'thirteenth juror' by overturning a jury's duly-delivered verdict simply because we 'disagree with [that] verdict.'" *Thornton*, 425 S.W.3d at 303. We may set aside the jury's guilty verdict only if no reasonable juror could reach the verdict the jury reached. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914. We must affirm, however, if, "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 murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914. Applying these standards, after reviewing all of the evidence, we conclude that legally sufficient evidence supports the verdict, and therefore overrule Chris's second issue.

Charge Error

In his third issue, Chris argues that the trial court committed reversible error by refusing his request for an instruction on the lesser-included offense of misdemeanor or felony deadly conduct.

A. Standard of Review

Pursuant to Article 36.14 of the Code of Criminal Procedure, in a jury trial, a trial court must prepare a jury charge that includes and accurately describes all the

law applicable to the case. TEX. CODE CRIM. PROC. art. 36.14. When a criminal defendant asserts that the trial court committed error in preparing the charge, an appellate court must first determine whether the trial court actually erred. *Barrios v. State*, 283 S.W.3d 348, 350 (Tex. Crim. App. 2009); *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). If it did, we must then determine whether the error resulted in sufficient harm to warrant reversal of the conviction. *Ngo*, 175 S.W.3d at 743. The degree of harm required depends on whether the defendant preserved the error for appeal. *Id.* If error was properly preserved, the defendant must show only that he suffered "some harm." *Barrios*, 283 S.W.3d at 350. This standard is met if the error "is calculated to injure the rights of the defendant." *Id.* (quoting *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)). If the defendant did not preserve error, then reversal is required only if the defendant suffered "egregious" harm, that is, harm which is "fundamental" and has deprived the defendant of a fair and impartial trial. *Id.*; *Almanza*, 686 S.W.2d at 171.

Under Texas law, an offense is a lesser-included offense if it satisfies any of four conditions:

> (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. art. 37.09.

Trial courts apply a two-prong analysis to determine when to include instructions on a lesser-included offense in the jury charge. *Cavazos v. State*, 382 S.W.3d 377, 382–83 (Tex. Crim. App. 2012). The first prong requires that the lesser-included offense "must be included within the proof necessary to establish the offense charged." *Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993); *see Cavazos*, 382 S.W.3d at 382; *Hall v. State*, 225 S.W.3d 524, 536 (Tex. Crim. App. 2007). This is a question of law, which does not depend on the evidence raised at trial, and we review the trial court's decision with respect to this prong *de novo*. *See Cavazos*, 382 S.W.3d at 382; *Hall*, 225 S.W.3d at 535 (cited with approval in *Goad v. State*, 354 S.W.3d 443, 451 (Tex. Crim. App. 2011) (Alcala, J., concurring)).

The second prong of the lesser-included offense analysis requires that there be some evidence in the record that would permit the jury rationally to find the defendant guilty of only the lesser charge. *Cavazos*, 382 S.W.3d at 383. That is, the evidence must allow the jury to find that the defendant committed the lesser offense without requiring that it find him guilty of the greater offense. *Id.* This is a

question of fact, requiring us to review all the evidence presented at trial, and we review the trial court's determination with respect to this prong for an abuse of discretion. *Id.*; *Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994); *Palmer v. State*, 471 S.W.3d 569, 570 (Tex. App.—Houston [1st Dist.] 2015, no pet.). "In this step of the analysis, anything more than a scintilla of evidence may be sufficient to entitle a defendant to a lesser charge." *Hall*, 225 S.W.3d at 536. As the Court of Criminal Appeals has explained,

> While it is true that the evidence may be weak or contradicted, the evidence must still be directly germane to the lesser-included offense and must rise to a level that a rational jury could find that if Appellant is guilty, he is guilty only of the lesser-included offense. Meeting this threshold requires more than mere speculation—it requires affirmative evidence that both raises the lesser-included offense and rebuts or negates an element of the greater offense.

Cavazos, 382 S.W.3d at 385.

A person commits Class A misdemeanor deadly conduct if he "recklessly engages in conduct that places another in imminent danger of serious bodily injury." TEX. PENAL CODE § 22.05(a); *see id.* § 22.05(e). "Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded." *Id.* § 22.05(c). He commits third-degree felony deadly conduct if he "knowingly discharges a firearm at or in the direction of . . . one or more individuals." *Id.* § 22.05(b)(1), (e).

B. Analysis

Chris argues, and the State concedes, that deadly conduct is a lesser-included offense of murder as charged in this case. We agree. Chris was charged with committing murder by intentionally and knowingly shooting Dominguez with a firearm, killing him. Murder requires both a more culpable mental state and a more serious injury to Dominguez than either misdemeanor or felony deadly conduct. Thus, deadly conduct by recklessly or knowingly discharging a firearm in the direction of an individual is a lesser-included offense of intentional murder by means of discharging a firearm. *See* TEX. CODE CRIM. PROC. art. 37.09; *Ortiz v. State*, 144 S.W.3d 225, 233–34 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

We turn to the second prong of the lesser-included offense analysis: whether the evidence supports an instruction on deadly conduct. Having reviewed the record, we conclude that it does not. The record contains no evidence that "both raises the lesser-included offense [of deadly conduct] and rebuts or negates an element of the greater offense," murder. *See Cavazos*, 382 S.W.3d at 385. As the Fourteenth Court of Appeals has explained, when a person intentionally points a firearm at or in the direction of one or more people, fires it, and kills a person, "deadly conduct is distinguished from murder . . . only by relieving the State of proving (1) an intentional act and (2) the death of an individual." *Ortiz*, 144 S.W.3d at 234. But the undisputed evidence, including Chris's own testimony,

shows that Chris intentionally pointed a firearm at Dominguez and intentionally fired it at him, hitting and killing him, thereby satisfying both elements necessary to elevate the lesser offense to murder.

Chris conceded that he was "intending to cause serious bodily injury to Manny Dominguez" when he fired the fatal shot. He defended himself at trial not by arguing that the shot was unintentional or that Dominguez did not actually die, but by arguing that the shooting was justified. Because the record in this case contains no evidence that Chris did not intend to shoot Dominguez (in other words, that he only recklessly fired his weapon) or that Dominguez did not actually die, it does not permit a jury to find that Chris committed only deadly conduct and not murder.

Chris makes much of the facts that we discussed in connection with his first issue—his fear and intention to "stop" Dominguez, Dominguez's alleged threat, and Chris's behavior after the shooting—as well as evidence that he fired only one shot. In particular, he argues that he did not aim at any specific part of Dominguez's body and only pointed the gun "toward" Dominguez's arm. He argues that a jury could rationally conclude that he did not intend to cause serious bodily injury or death but, due to his inexperience with firearms, nonetheless killed Dominguez.

Chris argues repeatedly that the jury could have rationally "believed that [he] pointed the gun towards—or in the direction of—*but not at* Dominguez." But he testified that he anticipated that a bullet would hit Dominguez and that he was "intending to cause serious bodily injury," testimony that is incompatible with the idea that he intended to shoot "towards" but not hit Dominguez. Chris's testimony refuted the possibility that a reckless discharge occurred or that the shooting was less than an intentional act.

Chris next argues that the jury rationally could conclude that he committed only deadly conduct by finding that he intended a result other than death or serious bodily injury. He relies on *Ortiz v. State*, 144 S.W.3d 225 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd), in which a partygoer fired into the air some distance away from a group of people, but a bullet nonetheless struck and killed a person. *Id.* at 227. The appellate court held that "a rational jury could conclude that appellant did not intend to commit serious bodily injury, but due to his poor aim or the falling trajectory of a bullet fired a block or more away, the victim was nevertheless fatally injured." *Id.* at 234. Accordingly, the trial court properly instructed the jury on deadly conduct as a lesser-included offense of murder. *Id.*

Chris also relies on *Goad v. State*, 354 S.W.3d 443 (Tex. Crim. App. 2011), in which the defendant was convicted of burglary of a habitation with intent to commit theft. *Id.* at 445. Evidence showed that Goad had spoken to the resident of

the house in question, explained that he was looking for a lost dog, and asked for permission to search the house. *Id.* When the resident refused permission, an argument ensued, and Goad attempted to enter the house by climbing through a window but was intercepted by the resident and did not take anything from the house. *Id.* at 445–46. The Court of Criminal Appeals explained, "The evidence supports an inference that Goad was looking for his dog, and a jury that accepted this inference could rationally believe Goad lacked intent to commit theft." *Id.* at 449. Thus, an instruction on the lesser-included offense of criminal trespass was appropriate. *Id.*

Chris's reliance on these cases is misplaced. Unlike in *Ortiz*, there is no evidence that Chris did not intend to shoot Dominguez but did so only because of bad aim or inexperience. Instead, he testified that he "pointed" the gun "at [Dominguez's] arm," thought that a bullet would hit Dominguez, and "intend[ed] to cause serious bodily injury." And unlike in *Goad*, there is no evidence that Chris acted without the required mental state or might have intended some result other than shooting Dominguez. While there is some evidence that he was not trying to kill Dominguez, there is no evidence from which the jury could infer that Chris did not intend to shoot and seriously injure Dominguez. The evidence did not support submission of an instruction on deadly conduct, and the trial court therefore did not err by denying Chris's request for such an instruction.

We overrule Chris's third issue.

Conclusion

We affirm the judgment of the trial court.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).

APPENDIX B

Dissenting opinion issued by Justice Keyes of the First Court of Appeals at Houston on December 29, 2016, formerly available online as *Braughton v. State*, No. 01-15-00393-CR, 2016 WL 7473942, at *18 (Tex. App.—Houston [1st Dist.] Dec. 29, 2016, no pet.).

Opinion issued December 29, 2016

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00393-CR

CHRISTOPHER ERNEST BRAUGHTON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Case No. 1389139

DISSENTING OPINION

The majority affirms the trial court's judgment convicting appellant, Christopher Ernest Braughton, of the offense of murder, implicitly affirming the jury's rejection of appellant's defenses of self-defense and defense of a third person. I believe both the majority's application of the standard of review of the jury's rejection of these defenses and its judgment are erroneous. I also believe the

issue is one of fundamental importance to the criminal law of this state. Accordingly, I respectfully dissent.

To my knowledge, the Texas Court of Criminal Appeals has not addressed the standard of review of the sufficiency of the evidence for rejecting the defenses of self-defense and defense of a third person since it adopted the single standard of review for legal and factual sufficiency set out in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979), and in 2010 in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (plurality op.). I believe the standard for making this determination remains that set out prior to *Brooks* in *Zuliani v. State*, 97 S.W.3d 589 (Tex. Crim. App. 2003) and *Saxton v. State*, 804 S.W.2d 910 (Tex. Crim. App. 1991). I further believe no reasonable jury could rationally have rejected appellant's defenses on that standard. The majority, however, opines that it is not allowed to sit as a "thirteenth juror." Thus, it refuses to evaluate the reasonableness of the jury's rejection of these defenses, and it affirms appellant's murder conviction. I would acquit.

Background

The majority opinion provides an extensive statement of the facts of this case. However, I repeat the facts pertinent to appellant's claims of self-defense and defense of a third person in order to put those facts in their proper perspective in light of all of the evidence adduced at trial.

On May 24, 2013, the complainant, Emmanuel Dominguez, who was a United States Marine preparing to retire from the Marine Corps, fought with his fiancée while they were out drinking. Dominguez—who was intoxicated with a blood alcohol concentration more than twice the legal limit—left the bar alone on his motorcycle.[1]

That same evening, appellant's father ("Braughton Sr."), mother ("Mrs. Braughton"), and younger brother Devin were dining out while appellant, age twenty-one, stayed home at his parents' house. The Braughtons, like Dominguez, lived on Greenland Oak Court, but appellant had never met Dominguez. At approximately 10:00 p.m., Braughton Sr. began driving home, with Mrs. Braughton and Devin riding in the family vehicle. As they neared their home, Braughton Sr. was driving approximately fifteen to eighteen miles per hour in an area with a twenty-mile-per-hour speed limit. Braughton Sr. saw a "big bright light" immediately behind the vehicle. He then heard "a really loud revving sound," and a vehicle alarm alerted that there was an object very close to the vehicle's rear bumper. Braughton Sr. determined from the light, the engine sound, and the vehicle's alarm that a motorcycle was very close to his car.

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[1] At the time of his death, Dominguez had a blood alcohol concentration of 0.17 grams per deciliter, which is more than twice the statutory limit of 0.08 grams per deciliter for driving while intoxicated. *See* TEX. PENAL CODE ANN. § 49.01(1)(A), (2)(B) (West 2011). A test of his urine showed an even higher blood alcohol concentration of 0.22 grams per deciliter.

According to Braughton Sr., Dominguez, who was driving the motorcycle, drove around the side of the Braughton's car, "tried to swerve into the side of the car," then drove around in front of the Braughtons and "slam[med] on his brakes." The vehicle's proximity sensors again alarmed. Braughton Sr. had to "slam" on his own brakes to avoid hitting the motorcycle. He then passed the motorcycle and continued home. Dominguez followed the Braughton family onto Greenland Oak Court.

As this was occurring, Mrs. Braughton called appellant and told him they were being chased. According to Braughton Sr., as he approached his driveway, Dominguez "start[ed] coming around the car" again and blocked the Braughtons' driveway. Braughton Sr. drove around the cul-de-sac at the end of Greenland Oak Court, stopping on the opposite side of the street from the Braughton home. Dominguez stopped the motorcycle near the driveway to the home of Robert Bannon, who lived in the house between the Braughton residence and the house rented by Dominguez and his fiancée. Bannon, who was sitting in his driveway at the time, noticed that the motorcycle was only one or two feet away from the Braughtons' car and "thought [Dominguez] didn't know how to drive a motorcycle because he looked like he was kind of wobbling."

Dominguez dismounted the motorcycle and "rather quickly" approached the car, and Braughton Sr. got out of his vehicle. The men began yelling at each other,

with Braughton Sr. demanding to know, “Why the [expletive] you following me so close for?,” and Dominguez yelling back and “cussing” at Braughton Sr. Dominguez began punching Braughton Sr. in his face and “beating him up,” while Braughton Sr. attempted to defend himself. Dominguez knocked Braughton Sr. to the ground. This altercation occurred near the motorcycle.

Meanwhile, appellant had gone to his parents’ bedroom, where he kept a 9-millimeter handgun that he had purchased approximately three months earlier. He retrieved the gun and loaded it. During the altercation between Dominguez and Braughton Sr., appellant came out of his parents’ house with the loaded gun, saw Dominguez beating Braughton Sr., and said several times, “Stop, I have a gun.”

Witnesses at trial gave conflicting accounts of what happened next. Appellant, Braughton Sr., Mrs. Braughton, and Glen Irving (a neighbor) all testified that Dominguez then threatened that he had either a gun or “something for” appellant. Specifically, appellant testified that Dominguez said, “Oh, you have a gun, m_____f_____. I have a gun for you,” then reached into a saddlebag on the motorcycle. Other witnesses corroborated that Dominguez threatened appellant. For example, Irving, the neighbor, testified that Dominguez “turned and started back towards the motorcycle, and [Irving] heard a voice say, ‘Yeah, I got a gun, too, m_____f_____,’” or possibly, “I’ve got something for you, m_____f_____.” Another neighbor, Bannon, saw Braughton Sr. being followed

closely by Dominguez, an argument between the two, appellant coming out with a gun, and Dominguez lying on the ground after being shot.

Appellant testified that Dominguez, who was positioned with the saddlebag to his left, reached across his body with his right arm, turning as he did so, and began to straighten up. Similarly, Braughton Sr. testified that Dominguez reached toward a saddlebag on the motorcycle, "just grab[bed] the box and open[ed] it," then reached into it.

Gina,[2] a high-school junior who also lived on Greenland Oak Court, testified and gave a very different account. Gina watched events unfold from her second-story bedroom in a house across the street. Gina testified that she did not have a relationship with or know the names of any of the individuals involved in the fight and subsequent shooting, although she recognized them as her neighbors and was able to associate them with their respective homes. She identified the participants by the color of the clothing that they wore on the night in question and their respective genders. She testified that she could not see a gun, faces, or many details of the scene "clearly" because a light-blocking screen on her window made her view of the street "blurry."

Nonetheless, Gina testified that she saw Braughton Sr. and Dominguez arguing when appellant came from the direction of the Braughtons' house "with

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[2] For purposes of consistency, I use the same pseudonym assigned to this witness by the majority.

his right arm stretched out with a gun in his hand." She testified that appellant "just walk[ed] straight to [Dominguez] and then he stop[ped]." Gina stated that Dominguez was backing up with his arms raised when appellant shot him. Gina testified that she heard Mrs. Braughton tell appellant to put his gun down and go back in the house. Gina further testified that, instead of complying, appellant replied, "No, I got a gun now," and walked toward Dominguez, who "stopped and put his hands up" and "slowly back[ed] up." Gina testified that she did not see Dominguez approach the motorcycle, open a saddlebag, or reach for anything.

However, on cross-examination, appellant's attorney questioned Gina regarding portions of her trial testimony that were contradicted by her statement to police on the day of the shooting. In that statement, Gina told police that she saw appellant and Dominguez—rather than Braughton Sr. and Dominguez—arguing and engaging in a shoving match prior to the shooting. Gina further told police, in her statement on the night of the shooting, that after appellant and Dominguez engaged in their shoving match, appellant pulled out a gun and shot Dominguez. Gina testified on cross-examination that her memory of events "would be better whenever [she] made the statement" to police on the night of the shooting than at trial, and she reiterated that everything she had said in her statement on the night of the shooting was true and correct despite the contradictions between that statement and her testimony at trial.

The remaining sequence of events is undisputed. Appellant testified that he "pointed [the gun] towards [Dominguez's] arm," without "aiming at a specific area on him," and pulled the trigger, shooting Dominguez one time. The bullet hit Dominguez under his right armpit, toward the back of his body. The bullet traveled right to left, "very slightly upward," and "slightly back to front," puncturing both of Dominguez's lungs and damaging his "aorta, the major artery coming out from the heart," resulting in the loss of at least three liters of blood. The medical examiner who later examined Dominguez, Dr. Morna Gonsoulin, testified that such injuries can kill a person "within seconds."

Additional evidence, in the form of testimony by investigating officers, physical evidence collected at the scene, and evidence admitted through the medical examiner, is pertinent here. Specifically, one of the officers, Corporal J. Talbert of the Constable's Office, Precinct 4, authenticated several photographs as fair and accurate representations of the scene as it appeared when he arrived. Several of these photographs show one of the two saddlebags on Dominguez's motorcycle open. Another officer, Deputy Medina, testified that she found no weapons on Dominguez's person or in his saddlebags, but that one of the saddlebags was open when she arrived on the scene.

Dr. Gonsoulin, the assistant medical examiner who conducted the autopsy of Dominguez, testified that Dominguez died from a single gunshot wound and that

the path of the bullet went "basically from the right armpit to the left armpit." For the bullet to follow its trajectory required Dominguez to expose his right armpit and have his left side slightly lower than the right when he was shot. According to Dr. Gonsoulin, this meant that Dominguez could have been shot while bending, reaching, or extending his right arm across his body toward his left side. She testified that the gun could not have been "straight ahead pointing at the chest of the deceased, Emmanuel Dominguez." According to Dr. Gonsoulin, Dominguez could have been shot while turning, but it was "impossible" for Dominguez to be "shot facing the shooter with his arms up." She later clarified that a claim that Dominguez "was shot [while] facing the shooter with his hands in the air" would be physically impossible and "inconsistent with the gunshot wound." Dr. Gonsoulin's testimony was supported by photographic evidence showing that the gunshot wound was under Dominguez's right arm, an X-ray image showing the bullet inside the left side of Dominguez's chest, and the autopsy report describing the bullet's trajectory.

Finally, the DNA analyst, Z. Phillips, testified that she found DNA consistent with Braughton Sr.'s DNA on a knuckle on Dominguez's right hand but did not find any DNA consistent with appellant's DNA on Dominguez.

The defense presented testimony from Glen Irving, Braughton Sr., and Mrs. Braughton that Dominguez was chasing the Braughtons erratically down the street

and riding "almost on [their] bumper." The Braughtons all testified that Mrs. Braughton frantically called appellant while Dominguez was chasing them. Irving and the Braughtons testified that Dominguez was "punching and beating up" Braughton Sr. The Braughtons each testified that at that time they were afraid for their lives. Irving and the Braughtons testified that appellant warned Dominguez as the latter was attacking Braughton Sr., "Stop, I have a gun." They all testified that Dominguez then knocked down Braughton Sr. and went toward his motorcycle, cursing and threatening that he had a gun or "something for" appellant. Each of these witnesses also testified, however, that they never saw a gun or other weapon in Dominguez's possession. They also testified that appellant fired only one shot, and Dominguez fell.

The defense also presented Gary Gross, who installed many of the solar screens in the neighborhood, including the screen in Gina's bedroom window. He testified to the increased difficulty of seeing through these windows at night, stating that the screen was a "90 percent Suntex solar screen," meaning that it would "block 90 percent of visible light," was designed to provide privacy, and would be difficult to see through at night. According to Gross, at 10:00 p.m., it would be possible to see "some visible light" through the screen and to "see something," but not to "make out what it is." He confirmed that it would

"probably not" be possible for anyone looking through the screen at that time to "make out what they are seeing."

Appellant testified that he "was just pointing [the gun] at [Dominguez's] arm" and "just wanted to stop him." He confirmed, under cross-examination, that he pointed the gun at Dominguez, pulled the trigger, and thought "that a bullet was going to hit Manny Dominguez."

The trial court charged the jury, instructing it on the offense of murder and the lesser-included offense of manslaughter. Additionally, the trial court instructed the jury on the law of self-defense, defense of a third person, and defense of property. Appellant requested that the trial court also include an instruction on the lesser offense of felony deadly conduct, but the trial court declined that request.

The jury convicted appellant of murder and assessed his punishment at twenty years' confinement. This appeal followed.

Legal Sufficiency of the Evidence Supporting the Jury's Rejection of Defenses of Self-Defense and Defense of a Third Person

A. Standard of review of sufficiency of the evidence to support conviction beyond a reasonable doubt

The standard of review of the sufficiency of the evidence to support a murder conviction was established by the United States Supreme Court in *Jackson*, 443 U.S. 307, 99 S. Ct. 2781, and adopted by the Texas Court of Criminal Appeals in *Brooks*, 323 S.W.3d 893, and *Adames v. State*, 353 S.W.3d 854 (Tex. Crim.

App. 2011). When reviewing the sufficiency of the evidence under the *Jackson* and *Adames* standard, we must view all of the evidence in the light most favorable to the verdict to determine whether any rational fact finder could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859 (holding that "the *Jackson* standard is the 'only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the State is required to prove beyond a reasonable doubt'") (quoting *Brooks*, 323 S.W.3d at 912).

In *Brooks*, the Court of Criminal Appeals abolished the distinction between legal sufficiency review and factual sufficiency review for evidentiary issues that must be decided beyond a reasonable doubt. It held that, in finding guilt beyond a reasonable doubt, the reviewing court must not sit as a "thirteenth juror," "disagree with a jury's resolution of conflicting evidence," or disagree "with a jury's weighing of the evidence." *Brooks*, 323 S.W.3d at 899 (internal quotations omitted) (contrasting legal sufficiency review—done in light most favorable to verdict—with factual sufficiency review—done in neutral light—and quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S. Ct. 2211, 2218 (1982)). It opined,

> [T]he difference between a factual-sufficiency standard and a legal-sufficiency standard is that the reviewing court is required to defer to the jury's credibility and weight determinations (i.e., it must view the evidence in the light most favorable to the verdict) under a legal-

> sufficiency standard while it is not required to defer to a jury's credibility and weight determinations (i.e., it must view the evidence in a "neutral light") under a factual-sufficiency standard.

Id. at 899–900.

In *Adames*, the Court of Criminal Appeals further explained the standard of review of sufficiency of the evidence. That standard requires that a reviewing court view *all of the evidence* in the light most favorable to the verdict—*not* just the evidence supporting the verdict. *Adames*, 353 S.W.3d at 860. It opined that "[t]his standard recognizes the trier of fact's role as the sole judge of the weight and credibility of the evidence after drawing *reasonable* inferences from the evidence." *Id.* (emphasis added). The reviewing court then "determines whether the necessary inferences made by the trier of fact are reasonable, based upon the cumulative force of all of the evidence." *Id.* (emphasis added). This determination is made "by measuring the evidentiary sufficiency with 'explicit reference to the substantive elements of the criminal offense as defined by state law.'" *Id.* (quoting *Jackson*, 443 U.S. at 324 n.16, 99 S. Ct. at 2792 n.16). The jury's ultimate conclusion must be *rational* in light of all of the evidence. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 860; *Nelson v. State*, 405 S.W.3d 113, 122–23 (Tex. App.—Houston [1st Dist.] 2013, pet. ref'd).

When an appellate court reverses a conviction for legally insufficient evidence, this has the same effect as an acquittal by a jury. *Tibbs*, 457 U.S. at 41,

102 S. Ct. at 2218; *Brooks*, 323 S.W.3d at 903 & n.21 (citing *Burks v. United States*, 437 U.S. 1, 17–18, 98 S. Ct. 2141, 2150–51 (1978), and *Greene v. Massey*, 437 U.S. 19, 24, 98 S. Ct. 2151, 2154 (1978)); *McGuire v. State*, 493 S.W.3d 177, 204 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd) (if evidence is insufficient under *Jackson* standard, we must reverse and enter judgment of acquittal). Accordingly, "[i]f, based on all the evidence, a reasonably minded jury must necessarily entertain a reasonable doubt of the defendant's guilt, due process requires that we reverse and order a judgment of acquittal." *Fisher v. State*, 851 S.W.2d 298, 302 (Tex. Crim. App. 1993) (quoting *Narvaiz v. State*, 840 S.W.2d 415, 423 (Tex. Crim. App. 1992)); *see Guevara v. State*, 152 S.W.3d 45, 49 (Tex. Crim. App. 2004).

Although we must presume that the jury resolved conflicts in the evidence in favor of its verdict, that dictate applies only when the record supports conflicting inferences. *See Temple v. State*, 390 S.W.3d 341, 360 (Tex. Crim. App. 2013). A fact-finder is permitted "to draw multiple reasonable inferences as long as each inference is supported by the evidence presented at trial." *Hooper v. State*, 214 S.W.3d 9, 15 (Tex. Crim. App. 2007). However, "[t]he jury is not permitted to draw conclusions based on speculation because doing so is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt." *Temple*, 390

S.W.3d at 360; *Hooper*, 214 S.W.3d at 16 ("Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented.").

The Court of Criminal Appeals has explained the proper analysis for evidentiary sufficiency and the requirement of a rational outcome using a hypothetical example. In *Brooks*, that court discussed a hypothetical "robbery-at-a-convenience-store case." 323 S.W.3d at 906–07 (quoting *Johnson v. State*, 23 S.W.3d 1, 15 (Tex. Crim. App. 2000) (McCormick, P.J., dissenting)). The court explained the hypothetical as follows:

> The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on *all* the evidence the jury's finding of guilt is not a rational finding.

Id. at 907 (internal citation omitted). The court identified this example as "a proper application of the *Jackson v. Virginia* legal-sufficiency standard." *Id.*

In reviewing the sufficiency of the evidence when a jury has rejected claims of self-defense or defense of a third person, the court must "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 murder beyond a reasonable doubt *and also would have found against appellant on the self-defense issue beyond a reasonable doubt*." *Saxton*, 804 S.W.2d at 914 (emphasis added).

B. Application of standard of review by the majority

In determining the sufficiency of the evidence supporting the jury's rejection of appellant's claims of self-defense and defense of a third person, the majority states that it is compelled to "review the evidence in the light most favorable to the prosecution" and that it may not "act as a 'thirteenth juror' by overturning a jury's duly-delivered verdict simply because [it] disagree[s] with that verdict." Slip Op. at 39 (citing *Saxton*, 804 S.W.2d at 914 and *Thornton v. State*, 425 S.W.3d 289, 303 (Tex. Crim. App. 2014) (internal quotations omitted)). And it stops its analysis there.

The majority, however, ignores the principle that the jury's ultimate conclusion *must be rational* in light of all of the evidence. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789. And it ignores the mandate that the reviewing court must determine *both* that such a rational trier of fact "would have found the essential elements of murder beyond a reasonable doubt and also would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914. It does not even try to determine whether it was rational for the jury to reject appellant's defenses of self-defense and defense of a third person after reviewing all the evidence—including the evidence in support of appellant's defenses. *See Adames*, 353 S.W.3d at 860. Worse, as shown below, it indulges in its own speculation as to how the jury might have reached its

conclusion by going outside the record, by irrationally crediting testimony, and by disregarding unrebutted physical evidence. It thus provides itself no rational basis for determining that a rational jury would have found against appellant on the defenses of self-defense and defense of a third person. Instead, it approves the jury's irrational evaluation of the evidence supporting appellant's defenses and, accordingly, irrationally affirms the judgment of the trial court. But the error goes even beyond that.

The majority's reasoning undermines the purpose behind a court of appeals' review of the evidence. Although we defer to a jury's determinations "when the record evidence paints conflicting pictures of innocence and guilt," an appellate court must still "act as a procedural failsafe against irrational verdicts." *Dawkins v. State*, —S.W.3d—, No. 08-13-00012-CR, 2016 WL 5957311, at *7 (Tex. App.—El Paso Oct. 14, 2016, no pet. h.) (citing *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010), and *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007)). We may reverse a conviction on legal sufficiency grounds when "no rational juror could find guilt beyond a reasonable doubt based on the evidence presented at trial," including in situations "in which some evidence exists on every element, but no reasonable person could convict in light of the state of evidence was a whole, even when viewed most favorably to the prosecution." *Id.* (citing *Jackson*, 443 U.S. at 320, 99 S. Ct. at 2789 (holding that constitutional legal

sufficiency standard in criminal cases is higher than "mere modicum" of evidence standard), and *Brooks*, 323 S.W.3d at 906–07 (explaining that jury is not permitted to irrationally disregard evidence under *Jackson* standard)). The majority disregards that mandate.

C. Review of reasonableness of jury's finding of murder and rejection of self-defense and defense of a third person

A person commits the offense of murder if he intentionally or knowingly causes the death of an individual, or if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual. *See* TEX. PENAL CODE ANN. § 19.02(b)(1)–(2) (West 2011). A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. *Id.* § 6.03(a) (West 2011). A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result. *Id.* § 6.03(b). "Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death." *Schroeder v. State*, 123 S.W.3d 398, 400 (Tex. Crim. App. 2003).

Intent may be proven by circumstantial evidence. *See Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (holding that direct evidence of requisite intent is not required). "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." *Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999).

Both self-defense and defense of a third person are statutorily defined and provide a defense to prosecution when the conduct in question is "justified." TEX. PENAL CODE ANN. §§ 9.02, 9.31, 9.33 (West 2011). Under Penal Code Chapter 9, "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." *Id.* § 9.31(a).

Likewise, "[a] person is justified in using deadly 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 deadly force." *Id.* § 9.32 (West 2011) (emphasis added); *see Smith v. State*, 355 S.W.3d 138, 145 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd). A person is justified in exercising deadly force in defense of a third person "[s]o long as the accused reasonably believes that the third person would be justified in using [force] to protect himself." *Smith*, 355 S.W.3d at 145; *see* TEX. PENAL CODE ANN. § 9.33. Both of these defenses—self-defense and defense of a third person—may be raised as justifications for a defendant's actions and in support of an acquittal against a charge of murder or manslaughter. *See, e.g.*, TEX. PENAL CODE ANN.

§§ 9.31–.33; *Alonzo v. State*, 353 S.W.3d 778, 781–82 (Tex. Crim. App. 2011) (self-defense is defense to both murder and manslaughter charges); *Smith*, 355 S.W.3d at 145 (defense of third person is defense to murder).

In a claim of self-defense or defense of a third person, "a defendant bears the burden of production," while "the State then bears the burden of persuasion to disprove the raised defense." *Zuliani*, 97 S.W.3d at 594 (citing *Saxton*, 804 S.W.2d at 913–914). The defendant's burden of production requires the defendant to adduce some evidence that would support a rational jury finding as to the defense. *See* TEX. PENAL CODE ANN. § 2.03(c) (West 2011) ("The issue of the existence of a defense is not submitted to the jury unless evidence is admitted supporting the defense."); *Krajcovic v. State*, 393 S.W.3d 282, 286 (Tex. Crim. App. 2013); *Shaw v. State*, 243 S.W.3d 647, 657–58 (Tex. Crim. App. 2007).

"[E]ven a minimum quantity of evidence is sufficient to raise a defense as long as the evidence would support a rational jury finding as to the defense." *Krajcovic*, 393 S.W.3d at 286 (citing *Shaw*, 243 S.W.3d at 657–58). "[A] defense is supported (or 'raised') if there is evidence in the record making a prima facie case for the defense." *Shaw*, 243 S.W.3d at 657. "A prima facie case is that 'minimum quantum of evidence necessary to support a rational inference that [an] allegation of fact is true.'" *Id.* (quoting *Tompkins v. State*, 774 S.W.2d 195, 201 (Tex. Crim. App. 1987)).

If the defendant meets his burden of production, the burden of persuasion shifts back to the State. *Zuliani*, 97 S.W.3d at 594. 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." *Id.* (citing *Saxton*, 804 S.W.2d at 913).

In light of these burdens of production and proof, "[w]hen a jury finds the defendant guilty, there is an implicit finding against the defensive theory." *Id.* A jury, however, is not permitted to reach a speculative conclusion. *Elizondo v. State*, 487 S.W.3d 185, 203 (Tex. Crim. App. 2016). Nor is it permitted to disregard undisputed facts that allow only one logical inference. *Evans v. State*, 202 S.W.3d 158, 162–63 (Tex. Crim. App. 2006); *Satchell v. State*, 321 S.W.3d 127, 132 (Tex. App.—Houston [1st Dist.] 2010, pet. ref'd).

The problem for a reviewing court is how to determine whether the jury *rationally* found the defendant guilty of the offense beyond a *reasonable* doubt and *rationally* rejected the defendant's evidence in support of his defenses of self-defense and defense of a third person. This problem is exacerbated by the legal principles providing that the defendant's burden of production is an *evidentiary* burden, while the State's burden of persuasion is a *non*-evidentiary burden. And in light of these burdens, the reviewing court's task is to "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 murder beyond a reasonable doubt *and also* would have found against appellant on the self-defense issue beyond a reasonable doubt." *Saxton*, 804 S.W.2d at 914 (emphasis added).

No post-*Adames* case, to my knowledge, has instructed the appellate courts on how to determine whether a reasonable jury would have found against the defendant on the issue of self-defense beyond a reasonable doubt or whether, to the contrary, the jury's rejection of the appellant's defense of self-defense or defense of a third person was irrational without conducting an analysis of the evidence supporting the defense and the evidence rebutting that evidence. In other words, no post-*Adames* Texas Court of Criminal Appeals case appears to have instructed the appellate courts how to weigh all the evidence to determine the strength of a defense on which the defendant bore the burden of production but the State bore the ultimate burden of persuasion. It did, however, instruct the appellate courts on how to make this determination *prior* to *Adames*, in *Zuliani*.

In *Zuliani*, the Court of Criminal Appeals held that when reviewing the sufficiency of the evidence supporting the rejection of a defense, "the reviewing court reviews all of the evidence in a *neutral* light and asks whether the State's evidence taken alone is too weak to support the finding and whether the proof of guilt, although adequate if taken alone, is against the great weight and preponderance of the evidence." *Zuliani*, 97 S.W.3d at 595. There is no indication

in the case law that this standard of review for the defenses of self-defense and defense of a third person was overturned by the Court of Criminal Appeals's adoption of the *Jackson* standard as the sole sufficiency of evidence standard in *Brooks* and *Adames*. Rather, the holdings of the Court of Criminal Appeals in the analogous situation of affirmative defenses is to the contrary. *See Matlock v. State*, 392 S.W.3d 662, 667 (Tex. Crim. App. 2013) (discussing standard for reviewing affirmative defenses).

Thus, I would apply the standard for reviewing the sufficiency of the evidence as set out in *Jackson*, *Brooks*, *Saxton*, and *Zuliani*. I believe this Court must review all of the evidence that a *reasonable* jury would credit and must determine whether, in light of the state of evidence as a whole, a reasonable jury could have found the essential elements of murder beyond a reasonable doubt and also could have found against appellant on his defensive issues beyond a reasonable doubt. *See, e.g.*, *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914; *Dawkins*, 2016 WL 5957311, at *7.

To apply any other test for the sufficiency of the evidence on appellant's defenses, on which he had the burden of making a prima facie case and the State had the burden of persuasion, or the burden of overcoming that prima facie case, would be to ignore the State's burden of persuading a reasonable jury that its rejection of the defenses of self-defense and defense of a third person would be

rational in light of all the evidence, as required by *Saxton*, *Zuliani*, and *Adames*. And it would make the jury's determination of the sufficiency of the evidence to reject appellant's defenses of self-defense and defense of a third person impervious to review by this appellate court. No matter how irrational the jury's rejection of the defense, its conclusion would be *ipso facto* correct so long as evidence supported the murder conviction once the defenses were irrationally discounted. That is what I think the majority has disregarded here.

The proper standard of review does require that we defer to the jury's credibility determinations. However, that standard does not require that a reviewing court accept both the jury's determination of the sufficiency of the evidence supporting the conviction and its determination finding the evidence supporting the defense insufficient beyond a reasonable doubt without asking whether the jury's rejection of the defense was rational in light of the evidentiary burdens of both the defendant and the State with respect to that defense. This Court's job is to review the evidence that a *rational* jury could have credited in rejecting the defense as insufficiently supported by the evidence beyond a reasonable doubt and to determine whether that evidence was, in fact, sufficient to support rejection of the defense—not to rubber-stamp the findings of juries or trial courts.

Thus, for the jury's verdict to be rational, it must have been rational *both* for the jury to have found appellant guilty of murder, looking at the evidence in the light most favorable to the verdict, *and* for it to have rejected the defenses of self-defense and defense of a third person. In this case, that means that we must examine the evidence as a whole in the light most favorable to the verdict, and we must reverse the judgment of conviction if the State failed to meet its burden (1) of presenting sufficient evidence that appellant was guilty of murder beyond a reasonable doubt, including evidence that he acted with the requisite intent, or (2) of persuading the jury that appellant did not act in self-defense or defense of a third person beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Saxton*, 804 S.W.2d at 914.

As set out below, I would hold that the only credible evidence establishes that appellant acted in self-defense and defense of a third person, which necessitates a conclusion that the State failed to establish beyond a reasonable doubt that appellant was guilty of murder. It was irrational of the jury to conclude otherwise, even when viewing the evidence in the light most favorable to its verdict. And it is irrational for the majority to conclude that a rational jury would have rejected appellant's defenses beyond a reasonable doubt on the facts of this case. Consequently, the majority opinion is contrary to both *Jackson* and *Adames*.

See Jackson, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859; *Saxton*, 804 S.W.2d at 914.

D. Application of the standard of review to facts of this case

I agree with the majority that appellant carried his burden of producing evidence that he acted in self-defense or in defense of his family. But I would hold that the jury's verdict implicitly rejecting appellant's defenses and convicting him of murder is based entirely on its drawing irrational inferences. Therefore, both the finding that appellant murdered Dominguez and the implied finding rejecting appellant's defenses must be rejected as unreasonable in light of all of the evidence. *See Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859.

Appellant received a frantic phone call from Mrs. Braughton that Dominguez was chasing his family on his motorcycle. When appellant came out of the house, Dominguez was punching appellant's father in the face. Braughton Sr. had a bloody lip after being punched in the face by Dominguez. Appellant relies on his own testimony and testimony by his family members and Irving that when appellant came out of the house with a gun and told Dominguez, "Stop, I have a gun," Dominguez responded by acknowledging that "you have a gun" and by stating that he had "a gun" or "something for" appellant and reaching towards his motorcycle, which prompted appellant to shoot him. In addition, Bannon testified

that the overall situation was one in which appellant was "just trying to defend his dad."

This testimony was consistent with the physical evidence presented. As Dr. Gonsoulin testified, the bullet trajectory was consistent with a shot fired while Dominguez was bending or reaching downward with his right hand, as that would expose his armpit. The physical evidence was inconsistent with Dominguez being shot with his hands in the air and his body facing appellant, as Gina—the only witness who contradicted appellant's version of events—had described the scene. Gina was not explicit about the orientation of Dominguez's body relative to appellant; rather, her testimony was that Dominguez was backing away from appellant. The State, however, concedes in its appellate briefing that Dominguez was initially facing appellant and argues that the jury could have believed that Dominguez turned just as he was shot. However, this argument does not change the fact that the physical evidence demonstrates that Dominguez was turning when appellant shot him, consistent with appellant's testimony.

In light of the above testimony, appellant met his burden of production. *See* TEX. PENAL CODE ANN. § 2.03(c); *Krajcovic*, 393 S.W.3d at 286; *Shaw*, 243 S.W.3d at 657–58. That is, as the majority acknowledges, the evidence supports a rational jury finding that appellant was not guilty of murder because "(1) he justifiably acted in self-defense in response to the statement 'I got a gun for you,'

and Dominguez's subsequent motions; (2) he justifiably acted in defense of others, in particular in defense of his father, mother, and younger brother; or (3) both defenses applied." *See* Slip Op. at 31.

Because appellant met his burden of production, the State was required to carry the burden of persuasion by proving beyond a reasonable doubt that appellant's actions were not justified under either defensive theory. And, "after viewing all the evidence in the light most favorable to the prosecution," this Court was required to determine whether "any rational trier of fact would have found the essential elements of murder beyond a reasonable doubt and *also* would have found *against appellant* on the self-defense [or defense of a third person] issue *beyond a reasonable doubt*." *Saxton*, 804 S.W.2d at 914 (emphasis added); *see Zuliani*, 97 S.W.3d at 594. I disagree with the majority's conclusion that the State met its burden.

Although the State was not required to produce evidence specifically refuting appellant's theories, it still had the obligation to present evidence sufficient to permit the jury to reach its verdict of guilty, implicitly rejecting those defensive theories beyond a reasonable doubt. *See, e.g.*, *Alonzo*, 353 S.W.3d at 781 ("If there is some evidence that a defendant's actions were justified under one of the provisions of Chapter 9 [of the Penal Code], the State has the burden of persuasion to disprove the justification beyond a reasonable doubt."); *Zuliani*, 97

S.W.3d at 594–95; *Saxton*, 804 S.W.2d at 914. And the State's evidence had to establish all of the elements of murder beyond a reasonable doubt.

The only evidence that is inconsistent with the defensive theories is Gina's testimony that Dominguez put his hands up and backed away without making threats, while appellant refused to lower his weapon, saying, "No, I got a gun now." Her testimony is the only evidence as to what happened between the moment when Dominguez became aware that appellant had a gun and the moment when he was shot that does not support the defensive theory that appellant shot Dominguez because of the perceived threat that Dominguez was reaching for a gun.

But the jury could not rationally have believed Gina's testimony in light of the other evidence. Most importantly, her testimony was irreconcilable with the physical evidence. Gina was adamant in her trial testimony that appellant "just walk[ed] straight to [Dominguez] and then he stop[ped]," that Dominguez was backing away from appellant with his hands up when he was shot, and that appellant remained stationary. But, as Dr. Gonsoulin testified, the gun could not have been "straight ahead pointing at [Dominguez's] chest," nor was it possible for Dominguez to be "shot facing the shooter with his arms up." Such a shot was "impossible" and "inconsistent with the gunshot wound." Dr. Gonsoulin's testimony was supported by photographic evidence showing the bullet wound, a

post-mortem X-ray image of Dominguez showing the bullet inside the left side of his chest, and the autopsy report. The jury could not rationally have concluded, given this evidence, that Dominguez was shot while facing appellant, rather than while turned relative to appellant. *See Evans*, 202 S.W.3d at 163 & n.16 (evidence "becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied") (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 815 (Tex. 2005)); *Satchell*, 321 S.W.3d at 132. And this evidence supporting appellant's defenses could not rationally be rebutted by the inconsistent testimony of a bystander at a distance viewing what happened through a solar panel at night, as the expert testimony showed.

Gina's testimony also contained numerous internal contradictions and conflicted with her witness statement that she gave to investigating law enforcement officers the night of the shooting. For example, she testified that she had seen a gun before she heard Mrs. Braughton say, "Put the gun down." She later testified, however, that she could not actually see that appellant had a gun and "didn't know what kind of weapon it was exactly, but when [she] heard the shot, [she] knew it was a gun." She testified that she saw Braughton Sr. and Dominguez fighting, but later testified that she did not see any physical fight at all and simply "assume[d] they were fighting because they were just yelling at each other." She also testified that she told investigating officers that the initial verbal altercation

and subsequent physical fight were between appellant and Dominguez, even though the undisputed physical evidence and the testimony of every other witness showed that the physical fight was between Braughton Sr. and Dominguez. Gina told the officers on the night of the shooting that appellant and Dominguez argued regarding the amount of noise made by the motorcycle at night and began shoving each other, at which point appellant "pulled out a gun." That scenario conflicts with not only her own testimony but also with that of every other witness to the shooting.

Moreover, all of Gina's testimony is overshadowed by the fact that she viewed all the events through a screen on her window, a screen that she testified made everything "blurry" and obscured details to the point that one could not determine whether a person on the other side was wearing glasses. Gary Gross, who installed the screen, testified that the screen was designed to "block 90 percent of visible light" and that it would not be possible to "make out what [one was] seeing" through it at night. Even Gina initially agreed that Defendant's Exhibit 8—a photograph taken through her window that is nearly entirely black, with only intermittent areas of dark gray—fairly and accurately depicted what she could see on the night of the shooting, though she later stated that her view was better than that shown in the exhibit.

Considering all of the evidence in the light most favorable to the verdict, the jury could not rationally have believed Gina's testimony that Dominguez was shot while backing away with his hands up. Even assuming that it was possible for Gina to see whether Dominguez had his hands up, the physical evidence shows that it would have been impossible for appellant to shoot Dominguez in the manner that Gina described. While it is hypothetically possible that Dominguez faced appellant but turned his body in the moment immediately before he was shot, there is no evidence that he did so, and juries are not permitted to reach speculative conclusions unsupported by the evidence. *See Elizondo*, 487 S.W.3d at 203 ("[J]uries are not permitted to reach speculative conclusions" or engage in speculation regarding essential facts not in evidence).

Given that the jury could not have believed Gina's account of the shooting and could not contrive its own version untethered from the trial evidence, I would conclude that all of the credible evidence as to how the shooting transpired supports appellant's defensive theories. There was only one scenario given that explains how appellant shot Dominguez that was supported by the evidence and not rendered impossible by the physical evidence: that is the account given by appellant, Braughton Sr., Mrs. Braughton, and neighbor Glen Irving that appellant shot Dominguez as Dominguez purported to reach for a gun. While the jury was free to reject some or all of any witness's testimony, it was not free to speculate or

to reach a conclusion that is irrational in light of all of the evidence. *See id.*; *see also Jackson*, 443 U.S. at 319–20, 99 S. Ct. at 2789; *Adames*, 353 S.W.3d at 859; *Nelson*, 405 S.W.3d at 122–23.

The majority, however, explains away the credible witness evidence and physical evidence by indulging in its own speculation as to how the jury's verdict might be justified by what was *not* in evidence. It holds that "the jury could have discredited the testimony that Mrs. Braughton called Chris before the fight began—testimony that was undermined by the absence of any phone records demonstrating that it occurred or any data retrieved from any phone found at the scene." Slip Op. at 32. However, the jury was required to consider the evidence that was presented at trial in determining whether the State met its burden of persuasion—the jury was *not* entitled to draw inferences *not* supported by the evidence to support the jury's verdict. Here, the uncontradicted evidence—including testimony from appellant and Mrs. Braughton—indicated that Mrs. Braughton called appellant during the road-rage incident. And regardless of how appellant learned of the conflict, the undisputed evidence demonstrates that appellant did not know Dominguez prior to the confrontation, that appellant came out of the house in close proximity to his family's arrival near their home, and that appellant observed Dominguez physically harming his father at that time.

Likewise, the majority asserts, based on the nature of Braughton Sr.'s injuries, the DNA evidence "indicat[ing] only that Dominguez punched Braughton Sr. once," and Braughton Sr.'s own testimony "that he was punched three times," that the jury could have rationally determined that appellant's use of deadly force was not immediately necessary. *See* Slip Op. at 32–33. But this view of the evidence disregards the fact that appellant saw Dominguez—a man who had military training and was very intoxicated—assault his father outside the family home and in the presence of the rest of the Braughton family. Multiple witnesses testified to the altercation between Braughton Sr. and Dominguez, the DNA evidence showed that Dominguez had struck Braughton Sr., and photographs showed Braughton Sr.'s injuries. The fact that these injuries might have been worse, as the majority argues, is again speculative, contrary to fact, and irrelevant. The fact that appellant saw the assault occur supports his assertion that he acted in defense of a third person.

And the fact that Dominguez did not ultimately have a weapon in his possession is not relevant here. The jury, and this Court, were required to consider whether appellant "reasonably believe[d] the force [wa]s immediately necessary to protect [himself] against the other's use or attempted use of unlawful deadly force"—not whether the threat turned out to be supported or unsupported after the fact. *See* TEX. PENAL CODE ANN. § 9.32; *Smith*, 355 S.W.3d at 145. The only

credible evidence adduced at trial established that Dominguez struck Braughton Sr., verbally threatened appellant when he stepped in to protect his father, and reached for his motorcycle as if reaching for a weapon. Thus, in light of this evidence, the only rational inference supported by the evidence is that appellant believed it was immediately necessary for him to use force against Dominguez. *See* TEX. PENAL CODE ANN. § 9.32; *Smith*, 355 S.W.3d at 145.

By contrast, the State offered no credible evidence that appellant acted with the requisite intent to commit murder. *See* TEX. PENAL CODE ANN. § 19.02(b) (providing that intent is element of murder); *Schroeder*, 123 S.W.3d at 400 ("Murder is a 'result of conduct' offense, which means that the culpable mental state relates to the result of the conduct, i.e., the causing of the death."). The evidence here all demonstrates that appellant acted with the intent to protect himself and his family. Appellant did not know Dominguez or have any interactions with him prior to the confrontation between Dominguez and the Braughtons. Dominguez, and not appellant, was the initial aggressor in the confrontation between Dominguez and the Braughton family. Appellant warned Dominguez prior to shooting, but Dominguez responded with a threat, and appellant fired a single shot. Appellant testified that he aimed at Dominguez's arm, and the physical evidence demonstrates that the bullet in fact hit Dominguez in his armpit. Bannon testified that appellant was "just trying to defend his dad." After

the shooting, appellant remained at the scene and cooperated with the law enforcement investigation. Considering appellant's acts and words, the circumstances surrounding the commission of the crime, and the nature of the wound inflicted on Dominguez, even when viewed in the light most favorable to the jury's finding, the evidence does not support an inference beyond a reasonable doubt that appellant acted with the requisite criminal intent to cause Dominguez's death and that, beyond a reasonable doubt, appellant did *not* act with the intent to defend himself or his family. *See Manrique*, 994 S.W.2d at 649.

In light of all of the evidence, I would hold that no rational juror could have found all essential elements of murder beyond a reasonable doubt *and* also have found against appellant on his defensive theories beyond a reasonable doubt. *See Saxton*, 804 S.W.2d at 914. I would hold that it is irrational to conclude beyond a reasonable doubt based on the totality of the evidence in this case that appellant did not shoot Dominguez in self-defense or in defense of a third person. Therefore, I would hold that legally insufficient evidence supported the jury's rejection of appellant's justification theories.

I would sustain appellant's second issue, and I would render a judgment of acquittal without reaching his first or third issues.

Conclusion

I would reverse the judgment of the trial court, render a judgment of acquittal, and order that appellant be released from custody.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Brown, and Huddle.

Justice Keyes, dissenting.

Publish. TEX. R. APP. P. 47.2(b).