Affirmed as Modified and Opinion Filed June 25, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01366-CR

DAVID GARCIA, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Criminal District Court No. 1
Dallas County, Texas
Trial Court Cause No. F-1852886-H

MEMORANDUM OPINION

Before Justices Schenck, Osborne, and Partida-Kipness
Opinion by Justice Partida-Kipness

Appellant David Garcia appeals his conviction for aggravated assault with a deadly weapon. Garcia brings six substantive issues on appeal and, in his seventh issue, asks this Court to reform the judgment to reflect that he pleaded "not true" to the punishment enhancement allegation. We modify the judgment as requested and affirm the judgment as modified.

BACKGROUND

On March 24, 2018, around 4:00 a.m., Dalia Duarte called 911 to report that her "abusive ex-boyfriend" had pistol-whipped her outside her home, was still outside with a gun, and would not leave. Duarte told the operator that the person

who hit her was David Garcia, and she knows he has a gun "because he's putting it to my head." When asked when Garcia put a gun to her head, Duarte responded that he did "right now." She explained that Garcia "used the gun on me. That's why he pistol whipped me on my face" and she reported that her "face is all busted and bleeding." Duarte asked the police to come quickly because "He has a gun, I know he has a gun." Duarte stated that Garcia "pulled out a handgun" in front of her and her friends and that he usually hides the gun in his car. She asked the dispatch operator to have the police "come in silence, because he is going to run and then shoot the house up if he hears sirens." During the initial 911 call, Duarte hid in the back bedroom closet while her roommate, Miriam Hernandez, tried to convince Garcia to leave.

Officer Chappel, a patrol officer with the Dallas Police Department, responded to the major disturbance call with his partner. When they arrived on scene, Hernandez told them that Garcia had fled on foot through the alleyway. The officers checked the alleyway but did not locate Garcia. Officers also did not locate a firearm. According to Officer Chappel, Garcia had enough time to discard a weapon between the time of the initial 911 call and their arrival on scene.

Bodycam footage admitted and published at trial captured Duarte telling the responding officers that she and Garcia had an argument outside of the residence, and Garcia struck her three times with a "pistol" and pointed the weapon at her. Duarte described the gun as black and similar to Officer Chappel's service weapon.

She told Officer Chappel that Garcia had shown her the gun before, and she knew him to carry it in his vehicle. Photographs taken of Duarte that night showed injuries to her face and hands, including large bruises around her left eye and large gashes on her left cheekbone and above her left eyebrow. At trial, Officer Chappel described the injuries to Duarte's left eye and cheek as severe, not the product of a misdemeanor assault, and not consistent with someone being hit with a fist.

After taking Duarte and Hernandez's statements, the officers returned to their patrol vehicle to wait for the crime scene investigator to arrive. While they waited, Duarte called 911 again, this time while hiding in the back bathroom, and reported that Garcia was hiding inside the residence. When Officer Chappel saw on the vehicle computer that another 911 call had come in, he and his partner entered the residence. Although Hernandez told officers that no one had called 911 again, she took them to where Duarte was hiding. Duarte, who was crying and appeared terrified, told Hernandez and the officers that Garcia was still in the house. Hernandez and the officers attempted to reassure Duarte that Garcia was not in the house, but Duarte insisted that she saw him in the house. By then additional officers had arrived on scene and they, along with Officer Chappel, searched the residence room by room for Garcia. Officers found Garcia hiding underneath a bed and arrested him without further incident.

After his arrest, Garcia called Duarte from jail three times the day of his arrest and three more times before trial. On the day of his arrest, Garcia called Duarte at

7:20 a.m., 7:31 a.m., and 1:42 p.m. During those calls, Garcia yelled at and threatened Duarte for "snitchin'" on him. In the 7:20 a.m. call, Garcia called her a "snitch bitch" for pressing charges and berated her for snitching on him. Duarte responded to each of Garcia's statements during that call by simply saying "yeh."

During the 7:31 a.m. call, Garcia's anger toward Duarte for talking to police escalated to threats. Garcia yelled at Duarte and told her she better clear the situation up and he would "murder your bitch ass." His statements during that call included the following:

- "You better clear this mother fuckin' shit up, nigga. You think is a [unintelligible]. You better realize I say this is not a threat. This is me talkin'. You better clear this up. This is my last chance. You better clear this up ASAP. ASAP."
- "I have never been this goddamn serious… I'm not taking this lightly. That's it. If you just think this is a game. Then go ahead. But I'm telling you right now . . . . I need you to clear this up."
- "Listen. I will go to prison for a little bit. And you better enjoy what you're doing now."
- "Why did you snitch? Why did you do that?"
- "What did you tell the cops? What did you tell them?"
- "I'm going to murder your bitch ass if you think this is a game nigga."

Duarte responded to Garcia's statements by repeatedly telling him she would give him their friend Jacob's phone number and asking whether he wanted Jacob's number or not.

When Garcia called Duarte back at 1:42 p.m., he continued to yell at Duarte and demanded she tell him what she told police. This time, Duarte answered Garcia. Duarte told Garcia that she told the police "everything" including that Garcia hit her and had a gun:

> Garcia: What did you tell them people?
>
> Duarte: I told them everything. You hit me.
>
> Garcia: You told them that?
>
> Duarte: Yes! My whole face is fucking swollen, I cannot even see. . . . You don't show up to this nigga's house with a fucking gun . . . . Yes. I am gonna' press charges on you.
>
> Garcia: You are?
>
> Duarte: Yes, nigga. You're going to go to fucking hell for this.
>
> Garcia: Well, then let me know what I gotta' do to you then.
>
> Duarte: Okay that's fine. Go ahead. You already hit me. You only care about your damn self. Did you see what the fuck you did to my face?
>
> . . . .
>
> Duarte: I don't care no more. Kill me . . . . You fucked my whole face up.
>
> Garcia: No you fucked yourself up by running that mouth.
>
> Duarte: No. You fucked yourself up because you can't control your emotions and you want to carry a gun.
>
> Garcia: I don't have no gun. What the fuck you talking about?
>
> . . . .
>
> Duarte: You're wasting your time calling me. . . .
>
> Garcia: You are not going to press charges. . . . You better clear that shit up.

Duarte then told him that she was not going to accept his calls anymore and the next time she sees him will be in court. Garcia responded "You stupid whore" and the call ended.

But Duarte accepted three other calls from Garcia before trial. On March 28, 2018, she and Garcia spoke for twenty minutes. During that call, Garcia told Duarte that he had a parole hearing on another conviction and Duarte's statement that he hit her with a gun was causing him problems in that case: "They trippin out on the gun. They say we already gonna' violate me on the gun." But Garcia told them that he did not have a gun. Garcia asked Duarte to go see the district attorney and sign an affidavit of non-prosecution "the sooner the better." He also told Duarte that she needed to have her story straight and tell the truth:

> You need to have a story lined the fuck up. . . . it was never me, go over there and tell the truth it was never me, you were just mad at me. We can show them proof that we just left the courthouse. You just mad because you got into it with a friend of mine. Whatever. You was mad. Whatever.

Garcia again instructed Duarte to sign an affidavit of non-prosecution during his June 20, 2018 call to her. He also told Duarte that her story needed to match his story:

> My statement was, which is the truth, my statement was that I was there, uh, uh that I was there and I was pushing you off me, because obviously it is true, I was pushing you off me, you was just fucking drunk and I was pushing you off me, and and and and that's about it, and that was it. . . . You just know that you're gonna' tell 'em that uh you're going to get away from 'em and you don't feel right sending me to prison. Cuz that's not the right thing to do. . . . Tell the fucking truth so I can

> beat this case. I can move on with my life and you can move on with yours.

The next day, Duarte signed an affidavit of non-prosecution in which she stated she did not wish to appear in court to testify against Garcia, did not wish to further prosecute the case, and desired the District Attorney's Office to dismiss the case.

The final jail call between Garcia and Duarte admitted into evidence at trial took place on August 24, 2018, which was five days before the case was initially set for trial. During that call, Garcia told Duarte that his attorney needed to talk to Duarte because the length of his sentence was dependent on Duarte. According to Garcia, Duarte had refused to answer his and his attorney's calls. Garcia reminded Duarte that "there was never a gun" and she just "thought there was a gun but there wasn't." He tells Duarte that he needs to see her in person because the district attorney listens to these telephone calls. Duarte tells him that she will go see him at jail on Sunday and then in court on Wednesday.

Garcia also spoke to two friends from jail the day of his arrest. During two calls to Saul Guzman, Garcia told Guzman that Duarte exaggerated what happened and told some lies. Garcia also stated that he is "not through with that bitch," referring to Duarte, and that he "will get back out" and "regulate it" because "that bitch got it coming." Garcia told Guzman that if he had a chance to talk to Duarte, Guzman should tell her that "she had better not come to court."

Garcia also spoke to Jacob Revasay twice the day he was arrested. Garcia wanted Revasay to get his car out of impound. During those calls, Revasay told

Garcia that pictures of Duarte show a black eye, cuts above and under her eye, and it looks like he "beat the shit out of her." Revasay asks how Duarte's face got like that and why Garcia had to take it that far. Garcia told Revasay that he was protecting his car from Duarte: "She started fucking up the car, and I was trying to leave. So I dragged that bitch out of there." During his second call to Revasay that evening, Garcia elaborated on what happened with Duarte. He told Revasay that he and Duarte were arguing and she started damaging the inside of his car and tried to break the windows, "so I grabbed her by the fucking head and I dragged her bitch ass out and she started hitting me again and, guess what, some nigga did what he did." Garcia spoke to Revasay again on April 25, 2018. During that call, Revasay told Garcia that someone named Lauren had "ran some game" on Duarte and convinced her to change her story.

Two weeks before Revasay told Garcia that Duarte had been convinced to change her story, Duarte met with Eileen Garza, a victim advocate in the Family Violence Division of the Dallas County District Attorney's Office. According to Garza, Duarte met with her on April 10, 2018, to discuss dropping the charges against Garcia. Duarte was not permitted to sign an affidavit of non-prosecution at that time, however, because Garcia had not yet been indicted. Garza testified that when she met with Duarte on April 10, she conducted a "witness contact" with Duarte in which they discussed the facts of the case, what happened, what she said happened, and whether there was any previous history of domestic violence between

her and Garcia. She explained to Duarte what services were available to her, but Duarte was not interested in any services from the court. Garza testified that at the April 10 meeting, Duarte's story was not consistent with what Garza read in the police report.

The State indicted Garcia on a charge of aggravated assault with a deadly weapon under section 22.02(a)(2) of the penal code and alleged that on or about March 24, 2018, he

> did unlawfully then and there intentionally, knowingly and recklessly cause bodily injury to DALIA DUARTE, hereinafter called complainant, by STRIKING COMPLAINANT WITH A FIREARM, and said defendant did use and exhibit a deadly weapon, to-wit: a FIREARM, during the commission of the assault, and further, the said defendant has and has had a dating relationship with the said complainant and the said defendant was a member of the complainant's family and household.

The indictment included one enhancement paragraph referencing Garcia's 2001 conviction of aggravated robbery in Dallas County.

THE TRIAL

The case was set for trial on August 28, 2018. The parties filed several pretrial pleadings and motions relating to Duarte's conflicting descriptions of the events of March 24. On August 27, 2018, the State filed its notice of potential *Brady* information. In that notice, the State reported that Duarte signed an Affidavit of Non- Prosecution on June 21, 2018, and made several conflicting statements to the State regarding how and if the offense happened as she reported it happening to officers on March 24, 2018. Those conflicting statements included the following:

- "Relaying to the State that this offense did not happen as she told officers it did on March 24, 2018."

- Telling Garza during the meeting on April 10, 2018, that she was intoxicated at the time of the offense and now wanted to drop the charges because she, not Garcia, was the aggressor.

- Also telling Garza on April 10, 2018, that a person named " 'Jose' came to the offense location with the defendant" and "she thought the defendant punched her, but now believes it was Jose" but "could not be certain because she was drunk" at that time.

- Telling the State that she and Garcia "assault each other," and that she "has made false reports in the past and has been the primary aggressor."

- That Duarte recanted the statements made to Garza in April when she told Assistant District Attorney, Julie Johnson, on August 21, 2018, "that there was a gun used and/or exhibited during the offense."

Also on August 27, 2018, Garcia filed a "Motion to Preclude Testimony of Dalia Duarte" in which he asked the Court to prohibit the State from calling Duarte to testify at trial. Garcia argued that because Duarte first told police and the 911 operator that Garcia struck her with a firearm and then later told the State that Garcia did not strike her with a firearm, the State was barred by Rule 607 of the Texas Rules of Evidence from calling Duarte as a witness to introduce her initial, prior inconsistent statement.

Garcia also subpoenaed Garza to testify at trial and produce all of her files and communications regarding Garcia and Duarte, including all notes, records, and all

material memorializing communications with Duarte. Garza moved to quash the subpoena.

At the August 28, 2018 pretrial hearing, the State and Garcia announced ready for trial and several witnesses, including Duarte, were sworn in. Counsel presented arguments on Garza's motion to quash. Garcia argued that Garza should be required to testify and provide her file because the State's notice of *Brady* material was untimely and counsel believed Garza's file could include additional exculpatory evidence. In response, the State maintained it had timely produced all exculpatory evidence, including Garza's complete file. The trial court agreed to conduct an in camera review of the State's *Brady* production and Garza's file to determine if additional *Brady* materials should be produced. The trial court offered to continue the trial, and Garcia accepted the offered continuance. The case was reset for October 29, 2018.

On August 30, 2018, Garcia filed a motion for sanctions against the State, alleging the State committed *Brady* violations by "willfully" hiding statements made by Duarte to the State's representatives that Garcia never hit her with a gun and never pointed a gun at her. Attached to the sanctions motion was an affidavit signed by Duarte on August 29, 2018. Duarte stated in the affidavit that when she met with Garza on June 21, 2018, she told Garza that Garcia did not hit her with a gun and did not point a gun at her. In her affidavit, she also stated that she met with Garza for about an hour on June 21, 2018, and, during the meeting, Garza tried to intimidate

Duarte by telling Duarte that she was lying and showing Duarte police body cam footage and pictures of her face.

On October 3, 2018, Garcia served Garza with a subpoena to appear the following morning at a hearing on Garcia's motion for sanctions. Garza moved to quash the subpoena, arguing the subpoena did not comply with article 24.03 of the code of criminal procedure, did not provide the required witness fee, and did not provide Garza three days to respond. The court held a hearing on the motion for sanctions and motion to quash on October 4, 2018. During that hearing, Garcia's counsel confirmed that he was requesting the opportunity to depose Garza before trial about "her recollection of the conversation that she had with Dalia Duarte on the 21st day of June at this office. That material, her testimony for her recollection, that conversation, is *Brady* material." The trial court denied the request for sanctions and the request to "essentially depose" Garza.

The case proceeded to trial on Monday, October 29, 2018. Garcia waived his right to a jury trial, was arraigned, and entered a plea of not guilty. Trial was held on October 30, 2018, and November 5, 2018. The State presented Officer Chappel and Garza as witnesses and rested. Garcia called Duarte as his first witness, but she was not present. After a recess, the trial court issued an order to show cause to Duarte ordering her to appear at 9:00 a.m. on November 1, 2018, to show cause why she should not be held in contempt for failing to appear for trial on October 30, 2018. The show cause order was never served on Duarte.

Trial resumed on Monday, November 5, 2018. Garcia presented Officer Jose Garcia as his first witness. He then called Duarte to testify. She was again absent. Garcia's counsel told the court that they had issued a new subpoena on Duarte and the investigator was at what they believed to be her current address "right now trying to get her" served. Garcia asked the court to issue a writ of attachment. The trial court denied that request because Duarte had not yet been served with a subpoena to appear at trial that day. Garcia then requested a continuance "to secure the appearance of Ms. Duarte." The trial court denied that request. Garcia moved to strike Duarte's statements on the body cam because she was not present at trial to be cross-examined. The trial court denied that request. Garcia next offered Duarte's August 29, 2018 affidavit into evidence. The court overruled that offer. Both sides then rested and closed.

The trial judge found Garcia guilty of aggravated assault with a deadly weapon, a firearm, found the enhancement paragraph true, and sentenced Garcia to eight years' confinement in the institutional division of the Texas Department of Criminal Justice. Garcia filed a motion for new trial, which the trial court denied after holding an evidentiary hearing on the motion. This appeal followed.

ANALYSIS

Garcia brings six substantive appellate issues and a request for modification of the judgment. We will address each issue in turn.

I. Sufficiency of the Evidence

In his first two issues, Garcia argues the evidence was insufficient to support the findings that he possessed a firearm and that the firearm was a deadly weapon. When reviewing the sufficiency of the evidence to support a jury finding, we consider all of the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

A defendant commits assault under Section 22.01 if the defendant "intentionally, knowingly, or recklessly causes bodily injury to another." TEX. PENAL CODE § 22.01(a)(1). A defendant commits the offense of aggravated assault with a deadly weapon if the defendant commits assault as defined in Section 22.01 of the Texas Penal Code and uses or exhibits a deadly weapon during the commission of the assault. *Id.* § 22.02(a)(2).

To sustain a deadly-weapon finding, the evidence must show that the object satisfies the definition of "deadly weapon," that it was used or exhibited during the offense, and that someone other than the defendant was put in danger. *Brister v. State*, 449 S.W.3d 490, 494 (Tex. Crim. App. 2014); *Green v. State*, 465 S.W.3d 380, 382 (Tex. App.—Fort Worth 2015, pet. ref'd). The Texas Penal Code defines "deadly weapon" as "(A) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury; or (B) anything

that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PENAL CODE § 1.07(a)(17). "A firearm is per se a deadly weapon." *Wright v. State*, 591 S.W.2d 458, 459 (Tex. Crim. App. 1979); *Stringer v. State*, No. 02-19-00042-CR, 2020 WL 938150, at *2 (Tex. App.—Fort Worth Feb. 27, 2020, pet. ref'd) (mem. op., not designated for publication) (citing *Wright*). "Testimony using any of the terms 'gun', 'pistol' or 'revolver' is sufficient to authorize the jury to find that a deadly weapon was used." *Wright*, 591 S.W.2d at 459.

The "use" element can be satisfied by "any employment of a deadly weapon, even its simple possession, if such possession facilitates the associated felony." *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989) (citation and internal quotation marks omitted); *Hill v. State*, No. 02-16-00306-CR, 2018 WL 2248466, at *2 (Tex. App.—Fort Worth May 17, 2018, pet. ref'd) (mem. op., not designated for publication) (citing *Patterson*). A deadly weapon is "exhibited" if it was consciously shown, displayed, or presented during the commission of a felony offense. *Hall v. State*, No. 05-18-00755-CR, 2019 WL 3773852, at *5 (Tex. App.—Dallas Aug. 12, 2019, no pet.) (mem. op., not designated for publication) (citing *Patterson*, 769 S.W.2d at 941).

A. Issue One: Possession of a Firearm

In his first issue, Garcia argues the evidence was insufficient to show that he possessed a firearm at the time of the alleged assault. He maintains that Duarte's

statements that Garcia struck her with a gun, which she made to the 911 operator, Officer Chappel, and during jail calls with Garcia following his arrest, are insufficient to support the trial court's determination that he possessed a gun during the assault. According to Garcia, other evidence established that he did not possess a gun during the assault. That evidence included Duarte's statements in the August 29, 2018 affidavit that Garcia did not hit her with a gun or point a gun at her, Duarte's failure to dispute Garcia's jail call statements that there was no gun, Hernandez's failure to claim Garcia used a gun, and law enforcement's failure to recover a gun. We disagree.

Although Garcia denies striking Duarte with a firearm and maintains he did not have a firearm with him on the night in question, other evidence contradicts his assertions. Duarte unequivocally told the 911 operator and responding officers that Garcia had a gun and had pistol-whipped her face with the gun. She even asked the dispatch operator to have the police "come in silence, because he is going to run and then shoot the house up if he hears sirens." Bodycam video shows Duarte telling officers that Garcia hit her with the gun three times on her face. One of those officers, Officer Chappel, testified that he listed the offense as "Ag Assault, Family Violence" on his report and alleged a deadly weapon, a handgun, "because the complainant said that there was a handgun." Duarte described the gun used by Garcia as black and similar to Officer Chappel's service weapon. Further, during jail calls, Duarte accused Garcia of hitting her with a gun.

Although a "firearm" is, by definition, a deadly weapon, "'[g]un,' on the other hand, is a broad term that includes both firearms and nonlethal instruments such as BB guns." *Stringer*, 2020 WL 938150, at *2 (internal citations omitted). "However, testimony using the term 'gun' or 'revolver' is sufficient to authorize the jury to find that a deadly weapon was used when there is no evidence indicating the use of a toy gun or a nonlethal instrument." *Id.*; *Joseph v. State*, 681 S.W.2d 738, 739 (Tex. App.—Houston [14th Dist.] 1984, no pet.) (absent any specific indication to the contrary at trial, a "gun" is a firearm). Duarte's description of the weapon used to strike her as a "gun" was, therefore, sufficient to satisfy the element that a deadly weapon was used to commit the offense. *See Wright*, 591 S.W.2d at 459 (jury may draw reasonable inference that a deadly weapon has been used from witness testimony using the terms "gun," "pistol," or "revolver"); *Leadon v. State*, 332 S.W.3d 600, 610 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citing *Wright* and holding that when there was testimony that described the weapon as a "gun" and a "revolver," and there was no evidence indicating that it could have been fake or a toy, the testimony was sufficient to satisfy the element that a deadly weapon was used); *Riddick v. State*, 624 S.W.2d 709, 711 (Tex. App.—Houston [14th Dist.] 1981, no pet.) (where a witness has positively identified a weapon as a pistol, nothing more is required to support a conviction of the use of "a deadly weapon, to wit, a firearm."); *see also Caldwell v. State*, No. 05-11-01501-CR, 2013 WL 2726037, at *4 (Tex. App.—Dallas Jan. 11, 2013, pet. ref'd) (not designated for publication)

("There can be sufficient evidence to support a finding a deadly weapon was used even if the weapon is not introduced into evidence.") (citing *Romero v. State*, 331 S.W.3d 82, 84 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd); *Morales v. State*, 633 S.W.2d 866, 868 (Tex. Crim. App. [Panel Op.] 1982)).

The trial court was free to believe Officer Chappel's testimony and Duarte's statements to the dispatch operator and responding officers that Garcia had a "gun" and struck Garcia with the gun, and to disbelieve both Garcia's statements that he did not have a gun or use a gun to assault Duarte and her later statements that there was no gun. *See Chambers v. State*, 805 S.W.2d 459, 461 (Tex. Crim. App. 1991) ("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."); *Wright*, 591 S.W.2d at 459; *Stringer*, 2020 WL 938150, at *3; *Leadon*, 332 S.W.3d at 610. Indeed, the timing of Duarte's statements is relevant to evaluate her credibility. Duarte's insistence that Garcia struck her in the face with a gun changed only after jail calls with Garcia in which he instructed her to "have a story lined the fuck up" that matched his story, and to "[t]ell the fucking truth so I can beat this case. I can move on with my life and you can move on with yours," and threatened to "murder your bitch ass" if she did not clear this up. Duarte's statements to Garza on April 10 and June 21 and in her August 29 affidavit that Garcia never hit her with a gun and never pointed a gun at her were made after Garcia told Guzman to let Duarte know "she better not come to court" and around the time "Lauren"

purportedly "ran some game" on Duarte and convinced her to change her story. From this evidence, the trial court could reasonably conclude that Duarte recanted her allegation that Garcia struck her with a gun because of Garcia's pressure and threats. The trier-of-fact "is the sole arbiter when assessing the credibility of the witnesses, weighing the evidence, and resolving any conflicts." *Simpson v. State*, 227 S.W.3d 855, 861 (Tex. App.—Houston [14th Dist.] 2007, no pet.). We presume the trial court did not accept Garcia's explanations here.

Based on the evidence, viewed in the light most favorable to the verdict, the trial court could reasonably find beyond a reasonable doubt that Garcia used or exhibited a firearm while committing the offense of assault. *See Jackson*, 443 U.S. at 318–19. Consequently, the evidence is legally sufficient to support the finding that Garcia used or exhibited a firearm. *See Hall*, 2019 WL 3773852, at *6. We overrule Garcia's first issue.

B. Issue Two: Deadly Weapon Finding

In his second issue, Garcia argues that the State cannot rely on the "*per se* option for establishing a 'gun' as a deadly weapon" because there is no allegation or evidence that Garcia shot a firearm or that it was "used to expel a projectile." We disagree. Under Texas law, a firearm used to strike a complainant, as alleged here, maintains its status as a per se deadly weapon because striking someone with a firearm can cause serious bodily harm or death. *Simpson*, 227 S.W.3d at 861 (semi-automatic handgun used by defendant to strike complainant in the head was a per se

deadly weapon and "[t]he fact that Galentine's injury was caused by the butt of the gun instead of a bullet is of no consequence."); *Richardson v. State*, No. 05-02-00786-CR, 2003 WL 21525315, at *2 (Tex. App.—Dallas July 8, 2003, pet. ref'd) (mem. op., not designated for publication) ("Even a simulated metal handgun, can cause serious bodily harm when used to club or bludgeon a victim.") (citing *Delgado v. State*, 986 S.W.2d 306, 309 (Tex. App.—Austin 1999, no pet.)).

Further, contrary to Garcia's briefing, *Mosley v. State*, 545 S.W.2d 144 (Tex. Crim. App. 1977) does not support his contention that to be a per se deadly weapon a firearm must be fired or shown to have the attributes of a gun. In *Mosley*, the issue before the court was whether an unloaded B.B. gun pointed at the complainant during an assault was a deadly weapon under the penal code. *Id.* at 145–46. Expert testimony from the State and the defense established that the B.B. gun projectile could not penetrate skin and had a very low velocity and strike range. *Id.* at 145. Although the B.B. gun could cause loss of sight if a person were shot in the eye or cause serious bodily injury if used as a bludgeon, it was undisputed that neither scenario was present in *Mosley*. *Id.* The court concluded that the BB gun as used by Mosley did not meet the definition of deadly weapon "because it would be unreasonable to conclude, on the basis of the evidence, that the weapon was 'designed, made or adapted for the purpose of inflicting death or serious bodily injury'" and the weapon "as used, was not calculated to produce death or serious bodily injury." *Id.* at 146.

Here, in contrast, the only allegation regarding how Garcia used the firearm was that he used it as a bludgeon to strike Duarte's face. Duarte told the 911 operator and responding officers that Garcia "pistol whipped" her face and reported that her "face is all busted and bleeding." Photographs of Duarte following the incident and Officer Chappel's testimony supported Duarte's statements. Photographs taken of Duarte that night showed injuries to her face and hands, including large bruises around her left eye and large gashes on her left cheekbone and above her left eyebrow. Officer Chappel described the injuries to Duarte's left eye and cheek as severe, not the product of a misdemeanor assault, and not consistent with someone being hit with a fist.

We concluded above that the evidence was sufficient to establish that Garcia used or exhibited a firearm during the offense. And the record lacks any evidence that the firearm used or exhibited by Garcia was anything but a firearm capable of causing death or serious bodily injury as it was used here—as a bludgeon. Accordingly, we conclude there is legally sufficient evidence to prove the firearm, as it was used in this case, was a deadly weapon. *See Simpson*, 227 S.W.3d at 861; *see also Richardson*, 2003 WL 21525315, at *2. We overrule Garcia's second issue.

II. Complainant's Failure to Return to Court and Testify

In his next three issues, Garcia challenges three rulings related to Duarte's failure to appear to testify at trial.

A. Denial of Writ of Attachment

Garcia complains that the trial court abused its discretion by rescinding a writ of attachment and abandoning its order for the complainant to return to court to testify. As a preliminary matter, the record includes no evidence that the trial court issued and rescinded a writ of attachment. Although the trial judge stated on the record that he "had signed a writ of attachment," there is no evidence of such a writ in the record. The trial court did, however, issue a show cause order on October 30, 2018. But a show cause order is not a writ of attachment; such orders serve different purposes. *See, e.g., In re Easton*, 203 S.W.3d 438, 441 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (trial issued writ of attachment for party's arrest after the party failed to appear at show cause hearing); *see also Ex parte Cardwell*, 416 S.W.2d 382, 384 (Tex. 1967) (party "was deprived of his liberty without due process of law" when he was arrested on writ of attachment without first being served with a show cause order and was not given ten days' notice of contempt hearing); TEX. R. CIV. P. 692 (writ of attachment and show cause order are separate means of dealing with a party's disobedience of an injunction).

The trial court did, however, deny Garcia's request for a writ of attachment. We review the trial court's decision to deny the writ of attachment for an abuse of discretion. *Lowrey v. State*, 469 S.W.3d 318, 323 (Tex. App.—Texarkana 2015, pet. ref'd); *Emenhiser v. State*, 196 S.W.3d 915, 921 (Tex. App.—Fort Worth 2006, pet. ref'd).

An accused is guaranteed, under both the United States and Texas Constitutions, the right to compulsory process to compel the attendance of a witness at trial. U.S. CONST. amend. VI; TEX. CONST. art. I, § 10. The Texas Code of Criminal Procedure, however, requires a defendant to file an application for a subpoena with the trial court clerk if the defendant wants to ensure the witness' presence. TEX. CODE CRIM. PROC. arts. 24.03, 24.12. The defendant must then cause the subpoena to be properly served on the witness. *Ford v. State*, 14 S.W.3d 382, 391–92 (Tex. App.—Houston [14th Dist.] 2000, no pet.). When a witness who has been duly subpoenaed fails to appear, the State or the defendant may request that the trial court issue an attachment for the witness by filing the request with the trial court clerk that includes "an affidavit stating that the affiant has good reason to believe, and does believe, that the witness is a material witness." TEX. CODE CRIM. PROC. art. 24.12. Article 24.12's plain language "makes it clear that attachment of a witness who has been duly served with a subpoena is a matter of right." *Sturgeon v. State*, 106 S.W.3d 81, 90 (Tex. Crim. App. 2003).

Here, Duarte was never served with a subpoena to appear for the October 29, 2018, or November 5, 2018, trial settings. Before the October 29 trial date, the State applied for a subpoena ordering Duarte to appear for trial at 9:00 a.m. on October 29, 2018, but the record includes no evidence that she was served with that subpoena. At the hearing on Garcia's motion for new trial, Garcia's counsel and Duarte informed the trial court that Duarte had appeared for trial on October 29, 2018, and

was instructed by defense counsel to return the following day. She did not return on October 30, 2018, as purportedly instructed by Garcia's counsel. The trial court issued its show cause order on October 30, 2018, but that was never served on Duarte. On November 1, 2018, the trial court reset the case to Monday, November 5, 2018. Also on November 1, 2018, Garcia applied for a subpoena ordering Duarte to appear at 8:30 a.m. on November 2, 2018. That subpoena was never served on Duarte, and no subpoena was applied for, issued, or served on Duarte directing her to appear for trial on November 5, 2018.

When a subpoena issues, it "inure[s] to the benefit of the opposite party in such case in the event such opposite party desires to use such witness on the trial of the case." *Id.* art. 24.03(a); *Gentry v. State*, 770 S.W.2d 780, 785 (Tex. Crim. App. 1988). A writ of attachment is the proper remedy when, after being subpoenaed, a witness fails to appear as directed. *Gentry*, 770 S.W.2d at 785; *see Campbell v. State*, 551 S.W.3d 371, 377 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (stating that Code of Criminal Procedure "requires a defendant to properly serve a subpoena on a witness before the defendant has a right to compulsory process to compel the witness's attendance at trial if the witness has failed to appear"). "One disobeys a subpoena if he fails to appear on the date noted in the subpoena or fails to be present any day subsequent thereto." *Gentry*, 770 S.W.2d at 785. Where, as here, a case is continued, however, the witness is no longer subject to the original subpoena. *Id.* at 785–86. And, to be entitled to a writ of attachment for a witness to appear at the new

trial setting, the witness must first be served with a subpoena to appear for the new trial setting. *Id.* at 786, 788 (no error to deny writ of attachment because the witness "was no longer subject to the subpoena issued by the state" after the case was continued from its original trial setting and, therefore, "was not in disobedience of a subpoena when he was not present to testify" on the new trial date); *Kinnett v. State*, No. 01-18-01128-CR, – S.W.3d –, 2020 WL 7502498, at *16 (Tex. App.—Houston [1st Dist.] Dec. 22, 2020, no pet.) (citing *Gentry* and concluding trial court did not err in denying request for writ of attachment where case was continued beyond original trial setting and defendant failed to serve the witness with a subpoena to appear on the continued trial date).

Here, the State rested its case on October 30, 2018, and, when Duarte did not appear when called by the defense, the trial court continued the case to November 5, 2018. Because the case was continued from its October 29, 2018 setting and Garcia did not serve a subpoena on Duarte for attendance on the new trial date of November 5, 2018, Duarte was not in disobedience of a subpoena when she failed to appear on November 5. As such, Garcia failed to meet the threshold requirement to obtain a writ of attachment. TEX. CODE CRIM. PROC. art 24.12; *see also Gentry*, 770 S.W.2d at 786; *Kinnett*, 2020 WL 7502498, at *16–17. Without establishing that Duarte had been served with a subpoena to appear on November 5, 2018, Garcia has failed to show that he was entitled to compel Duarte's appearance by writ of attachment. *See, e.g.*, *Ford*, 14 S.W.3d at 391–92 ("A trial court will not be found in error for refusing

to issue a writ of attachment for a witness who was not duly and properly served with a subpoena."); *see also Hedgecock v. State*, No. 05-07-01315-CR, 2008 WL 4756990, at *3 (Tex. App.—Dallas Oct. 31, 2008, no pet.) (not designated for publication) (same); *see also Gentry*, 770 S.W.2d at 786; *Kinnett*, 2020 WL 7502498 at *16–17. We conclude the trial court did not abuse its discretion by denying Garcia's request for a writ of attachment, and we overrule Garcia's third issue.

B. Denial of Continuance During Trial

In his fourth issue, Garcia argues the trial court abused its discretion by denying his motion for continuance when Duarte failed to appear at trial on November 5, 2018. Garcia argues that without Duarte's testimony, he "was unable to show that she disavowed her claim that Appellant hit her with a gun, pointed a gun at her, or otherwise used a gun." Garcia contends denying the continuance caused him actual prejudice by "leaving him unable to show that Appellant was guilty only of 'bodily injury' assault."

We review a trial court's denial of a mid-trial continuance for an abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007). To establish an abuse of discretion, there must be a showing that the defendant was actually prejudiced by the denial of his motion. *Id.* "A continuance or postponement may be granted on the motion of the State or defendant after the trial has begun, when it is made to appear to the satisfaction of the court that by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated, the

applicant is so taken by surprise that a fair trial cannot be had." TEX. CODE CRIM. PROC. art. 29.13.

When the defendant's motion for continuance is based on an absent witness, the defendant must show (1) that the defendant has exercised diligence to procure the witness's attendance, (2) that the witness is not absent by the procurement or consent of the defense, (3) that the motion is not made for delay, and (4) the facts expected to be proved by the witness. *Harrison v. State*, 187 S.W.3d 429, 434 (Tex. Crim. App. 2005) (citing TEX. CODE CRIM. PROC. art. 29.06). It must appear to the trial court that the facts are material. *Id.* Mere conclusions and general averments are not sufficient for the court to determine their materiality, and the motion for continuance must show on its face the materiality of the absent testimony. *Id.*

Here, Garcia did not show that he exercised diligence to procure Duarte's attendance. Nor did he show that he was so taken by surprise "by some unexpected occurrence since the trial began, which no reasonable diligence could have anticipated," that he could not have a fair trial without a continuance. Garcia's counsel was in contact with Duarte before trial and purportedly spoke with her at the courthouse on October 29, 2018 and instructed her to return to testify the next day. When Duarte failed to appear on October 30, 2018, the trial court issued a show cause order to help Garcia secure the witness's testimony. But the address the defense gave to the court for service did not exist. Although Garcia's counsel told the court that he provided the court with six additional addresses for service, neither

the constable nor the defense's investigator served the show cause order, and Garcia's Thursday, November 1, 2018 subpoena application listed Duarte's address as "UNKNOWN." That subpoena remained unserved and inaccurately listed the trial date as November 2, 2018, rather than the actual date of November 5, 2018. Garcia made no effort to have Duarte served on November 1, 2018, November 2, 2018, November 3, 2018, or November 4, 2018. When asked why no attempts were made to serve the witness on Thursday, Friday, or the entire weekend before the trial setting, counsel told the court that they were in communication with the witness's sister and were waiting to obtain a correct address. Counsel further stated that he understood from Duarte's sister that Duarte was staying at 9958 Constance Street, the offense location, with Hernandez. Yet, counsel did not send his investigator to attempt service at the Constance Street address until trial began on November 5, 2018. Service was never accomplished.

We conclude the record lacks sufficient evidence to meet the requirements of article 29.13 and fails to show that Garcia made diligent efforts to secure Duarte's attendance. Accordingly, the trial court did not abuse its discretion by denying the motion for continuance. We overrule Garcia's fourth issue.

C. Denial of Motion for New Trial

In his fifth issue, Garcia complains of the trial court's denial of his motion for new trial. Specifically, Garcia contends the trial court was required to grant a new trial under rule 21.3(e) of the rules of appellate procedure because Duarte was

prevented from appearing and testifying at trial by intimidation from Garza. We disagree.

Rule 21.3(e) provides that a defendant must be granted a new trial "when a material defense witness has been kept from court by force, threats, or fraud, or when evidence tending to establish the defendant's innocence has been intentionally destroyed or withheld, thus preventing its production at trial." TEX. R. APP. P. 21.3. We review the denial of a motion for new trial for an abuse of discretion. *State v. Gutierrez*, 541 S.W.3d 91, 97–98 (Tex. Crim. App. 2017); *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016); *State v. Boyd*, 202 S.W.3d 393, 401 (Tex. App.—Dallas 2006, pet. ref'd). In ruling on a motion for new trial, we apply a deferential standard of review. *Najar v. State*, 618 S.W.3d 366, 371 (Tex. Crim. App. 2021). The trial court is the exclusive judge of the credibility of the evidence presented at the motion for new trial hearing. *Id.* We also defer to the trial court's credibility choices and presume that all reasonable fact findings in support of the ruling have been made. *State v. Thomas*, 428 S.W.3d 99, 104 (Tex. Crim. App. 2014).

In doing so, we "afford almost total deference to a trial court's fact findings, view the evidence in the light most favorable to the trial court's ruling, and reverse the ruling only 'if no reasonable view of the record could support' it." *Id.* (quoting *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013)). In the absence of express findings, we must presume all findings in favor of the prevailing party.

Najar, 618 S.W.3d at 371 (citing *Okonkwo*, 398 S.W.3d at 694). We will reverse the trial judge's ruling "only if we discern an abuse of discretion, that is, if the ruling is arbitrary or unsupported by any reasonable view of the evidence." *Id.*

Duarte testified at the hearing on Garcia's motion for new trial. She told the court that she did not return to court on October 30, 2018, to testify because she felt intimidated or threatened by the State when she met with Garza on June 21, 2018. She explained that when she met with Garza on June 21 to sign an affidavit of non-prosecution, Garza called Duarte a liar and intimidated her by showing her photographic and video evidence of the offense. On direct examination, Duarte testified that she did not return as instructed because of her experience with Garza and being at court on October 29, 2018, made her feel intimidated again. But on cross-examination, Duarte explained that what she meant by feeling threatened was that she felt "stressed" and "overwhelmed" by the many calls she received when she did not want to talk:

> Q: Just in general, how would you define a threat?
>
> A. Just by everyone blowing me up at once. I was getting calls from 8:00 a.m. up until 5:00 p.m., and when I said I didn't want to talk, I still got calls over and over again. I just felt, like, stressed. I felt overwhelmed; like, I already told you-all once; why do I have to keep going on and on about it?

Duarte then confirmed that no one from the State told her not to come to trial. This was consistent with her acknowledgment on direct that she did not feel threatened or intimidated or coerced by any of the prosecutors in the case.

Based on the record before us and the deferential review standards we are to apply, we conclude that the trial court did not abuse its discretion in denying Garcia's motion for new trial. Duarte conceded that she was not prevented from attending trial by any representative of the State. Her testimony that her prior contact with Garza caused her stress and made her feel intimidated and overwhelmed does not show any action by the State to intimidate Duarte into not testifying at trial. Under this record, there is no indication that the trial court acted without reference to any guiding rules or principles or reached any conclusions outside the zone of reasonable disagreement. We overrule Garcia's fifth issue.

III. Exclusion of Certain Testimony of Victim Advocate

In his sixth issue, Garcia complains of an evidentiary ruling. Specifically, he contends the trial court abused its discretion by sustaining the State's hearsay objection to the victim advocate's testimony regarding whether the complainant told the victim advocate that the complainant was the initial aggressor. We review a trial court's rulings on objections and its decision to admit evidence under an abuse of discretion standard *Wyatt v. State,* 23 S.W.3d 18, 28 (Tex. Crim. App. 2000). A trial judge abuses her discretion when her decision falls outside the zone of reasonable disagreement. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016). Before a reviewing court may reverse the trial court's decision, "it must find the trial court's ruling was so clearly wrong as to lie outside the zone within which reasonable people might disagree." *Id.*

The following exchange occurred during the cross-examination of Garza regarding Garza's meeting with Duarte on April 10, 2018:

> Q. And she came to the office and you-all had a lengthy conversation, correct?
>
> A. Yes.
>
> Q. And during that conversation, she said that she was the initial aggressor?
>
> PROSECUTOR: Judge, I'm going to object to hearsay.
>
> THE COURT: Sustained.
>
> DEFENSE COUNSEL: Judge, I've got the same – the same problems that they have.
>
> THE COURT: That's not a legal reason to --
>
> DEFENSE COUNSEL: And they also -- Judge, they also opened the door when they asked her whether or not -- what Ms. Duarte reported to Ms. Garza -- was in harmony or disharmony with the offense report.
>
> PROSECUTOR: Judge, I didn't open the door to hearsay.
>
> DEFENSE COUNSEL: They opened the door to hearsay.
>
> THE COURT: No, let's move on. The witness is available, right? She was here. I assume you're calling her, right? I mean -- let's move on. Or somebody is going to call her. But either way, it's still not admissible. It's just not.

Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. TEX. R. EVID. 801(d). Hearsay is generally not admissible. TEX. R. EVID. 802. Garcia sought to elicit testimony from Garza of a statement purportedly made by another witness, Duarte, for the truth of the matter asserted by Duarte (i.e., that she was the initial

aggressor on March 24). This was inadmissible hearsay. At trial, Garcia presented the trial court with no exception to the hearsay rule that would permit the admission of the statement. On appeal, Garcia argues the statement was a statement against Duarte's interest that was admissible under Rule 803(24).

A statement against interest is not excluded by the hearsay rule regardless of the declarant's availability when it is a statement that:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability or to make the declarant an object of hatred, ridicule, or disgrace; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

TEX. R. EVID. 803(24). Garcia maintains that Duarte's statement to Garza that she was the initial aggressor on March 24 exposed her to criminal liability because the statement materially contradicts the police report and establishes that she made a false statement to police on March 24. *See* TEX. PENAL CODE § 37.08(c) (stating that making a false statement material to a criminal investigation is a Class B misdemeanor). We disagree.

A person commits an offense under section 37.08 of the penal code "if, with intent to deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to: (1) a peace officer or federal special investigator conducting the investigation; (2) any employee of a law enforcement

agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation; or (3) a corrections officer or jailer." TEX. PEN. CODE § 37.08(a). Duarte's purported statement to Garza that she was the initial aggressor does not speak to, let alone establish, a culpable mental state. Further, this alleged statement is consistent with her statements to Officer Chappel on March 24 that "I confronted him . . . and we started fighting" and, therefore, does not support a conclusion that her statements to Officer Chappel were false. Garcia has not shown that this was a statement against Duarte's interest.

Garcia further argues that the trial court's ruling precluded him from presenting his defense that he did not strike Duarte with a gun. This is incorrect. The identity of the initial aggressor does not concern how Duarte was injured or whether Garcia used a firearm during the offense. Garcia has not shown that this ruling affected his substantial rights.

We conclude Duarte's purported statement to Garza is inadmissible hearsay, which the trial court properly sustained. *See* TEX. R. EVID. 801(d), 802. We overrule Garcia's sixth issue.

IV. Reformation of Judgment

Finally, Garcia asks the Court to reform the judgment to reflect that he pleaded "not true" to the punishment enhancement allegation. The State does not oppose reformation.

This Court has the power to correct and reform the judgments of the court below to make the record speak the truth when it has the necessary information to do so. TEX. R. APP. P. 43.2(b); *Bigley v. State*, 865 S.W.2d 26, 27–28 (Tex. Crim. App. 1993); *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd). Appellate courts have the power to reform whatever the trial court could have corrected by a judgment nunc pro tunc when the evidence necessary to correct the judgment appears in the record. *Asberry*, 813 S.W.2d at 530. Appellate courts may reform judgments to correct improper recitations or omissions relating to punishment, delete affirmative findings improperly entered into the judgment, and correct statutory references. *See id*.; *Medlock v. State*, No. 05-11-00668-CR, 2012 WL 4125922, at *1 (Tex. App.—Dallas Sept. 20, 2012, no pet.) (mem. op., not designated for publication).

Here, Garcia was convicted of aggravated assault with a deadly weapon and sentenced to eight years' imprisonment. In the judgment, the trial court indicated that Garcia pleaded "TRUE" to the enhancement paragraph. However, the record reflects that Garcia pleaded "Not true." Based on the record before the Court, we sustain Garcia's seventh issue and modify the judgment to reflect that Garcia pleaded "NOT TRUE" to the enhancement paragraph. *See Asberry*, 813 S.W.2d at 530. We otherwise affirm the judgment as modified.

CONCLUSION

We overrule Garcia's first six appellate issues and reform the judgment as requested in his seventh issue. Accordingly, we affirm the judgment as modified.

/Robbie Partida-Kipness/
ROBBIE PARTIDA-KIPNESS
JUSTICE

Do Not Publish
TEX. R. APP. P. 47.2(b)
181366F.U05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

DAVID GARCIA, Appellant	On Appeal from the Criminal District Court No. 1, Dallas County, Texas
No. 05-18-01366-CR V.	Trial Court Cause No. F-1852886-H.
THE STATE OF TEXAS, Appellee	Opinion delivered by Justice Partida-Kipness. Justices Schenck and Osborne participating.

Based on the Court's opinion of this date, the judgment of the trial court is **MODIFIED** to reflect that Garcia pleaded "NOT TRUE" to the enhancement paragraph. As **REFORMED**, the judgment is **AFFIRMED**.

Judgment entered this 25th day of June 2021.