



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-24-00404-CR

LEROY HAROLD WHITE JR., Appellant

v.

THE STATE OF TEXAS

On Appeal from the 432nd District Court
Tarrant County, Texas
Trial Court No. 1834668

Before Sudderth, C.J.; Birdwell and Bassel, JJ.
Opinion by Chief Justice Sudderth

OPINION

Appellant Leroy Harold White Jr. was convicted of unlawful possession of a firearm by a felon, *see* Tex. Penal Code Ann. § 46.04(a)(2), and the trial court entered a finding that he had used a deadly weapon during the commission of the offense, *see* Tex. Code Crim. Proc. Ann. art. 42A.054(b), (c) (authorizing a deadly weapon finding when “it is shown that . . . a deadly weapon . . . was used . . . [by the defendant] during the . . . commission of a felony offense”). White’s two appellate issues primarily focus on the propriety of the deadly weapon finding. *See id.* The question is: Could the trial court enter a deadly weapon finding based on White’s use of his firearm to commit a felony other than unlawful possession of a firearm? In other words, does a deadly weapon’s “use[]” need to facilitate the felony conviction to which the finding is attached, or can it facilitate a different—even an uncharged or dismissed—felony? *Id.*

Although the Court of Criminal Appeals has yet to confront this issue head-on, it has clarified the meaning of the relevant statutory language to answer related questions, and its interpretations leave little doubt that a weapon’s “use[]” must facilitate the felony of conviction to which the deadly weapon finding is attached. *Id.* Our precedent, too, indirectly confirms as much. We will thus reform the trial court’s judgment to delete the deadly weapon finding and affirm the judgment as modified.

I. Background

The relevant facts are undisputed:

- Several decades ago, White was convicted of a felony.

- As a consequence of White’s prior felony conviction, he was statutorily prohibited from possessing a firearm at a location other than his residence. *See* Tex. Penal Code Ann. § 46.04(a)(2).
- In 2022, White carried a firearm to his job as a security guard at a local establishment.
- While at the establishment, White got into an altercation, and during the altercation, White fired his weapon near another man’s head.

The State indicted White for two counts of aggravated assault and one count of unlawful possession of a firearm by a felon. But the State dropped the aggravated assault counts, so when the case went to trial, the jury was asked to decide (1) whether White had committed unlawful possession of a firearm by a felon¹ and (2) if so, whether he had used a deadly weapon in the commission of the offense. White had argued that the deadly weapon issue should not be submitted to the jury because his sole charge was unlawful possession and the mere possession of the firearm did not constitute a “use[.]” Tex. Code Crim. Proc. Ann. art. 42A.054(b). The State, in turn, argued that the deadly weapon jury question was appropriate because the evidence showed that White had—while unlawfully possessing a firearm—“used” the firearm to facilitate another felony: aggravated assault. *Id.* The trial court agreed with the

¹The trial evidence included White’s written stipulations to most—if not all—of the relevant facts, including his stipulations that he had possessed a firearm outside his residence.

State and included the issue in the jury charge. Although White requested jury instructions on two defensive issues as well, the trial court denied his requests.²

The jury found White guilty of unlawful possession, *see* Tex. Penal Code Ann. § 46.04(a)(2); found that he had used a deadly weapon in the commission of the offense, *see* Tex. Code Crim. Proc. Ann. art. 42A.054(b); and after hearing additional punishment evidence, found that he was a habitual offender and assessed his punishment at life in prison, *see* Tex. Penal Code Ann. § 12.42(d). The trial court sentenced him accordingly.

II. Discussion

On appeal, White argues that the trial court erred by (1) entering the deadly weapon finding and (2) failing to charge the jury on his two defenses to the finding. The first issue is dispositive. *See* Tex. R. App. P. 47.1.

A. Legal Context and Issue Presented

By statute, a trial court must enter a deadly weapon finding on the judgment if the jury finds that “a deadly weapon³ . . . was used or exhibited during the . . . commission of a felony offense; or . . . immediate flight from the commission of a felony offense” and “the defendant [was the one who] . . . used . . . the deadly

²White requested jury instructions on necessity and self-defense.

³A firearm is a deadly weapon *per se*. Tex. Penal Code Ann. § 1.07(a)(17)(A) (defining “[d]eadly weapon” to include “a firearm”).

weapon.”⁴ Tex. Code Crim. Proc. Ann. art. 42A.054(b), (c), (d). More than a quarter century ago, the Court of Criminal Appeals clarified that, to “use[]” a deadly weapon within the meaning of this statute, “the deadly weapon must be utilized, employed, or applied in order to achieve its intended result: ‘the commission of a felony offense or during immediate flight therefrom.’” *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989). The Court also explained that “us[ing]” a weapon is not equivalent to possessing it, so simple possession of a firearm is insufficient to constitute a “use[]” unless it “facilitates the associated felony.” *Narron v. State*, 835 S.W.2d 642, 644 (Tex. Crim. App. 1992) (emphasis removed) (reiterating that “[t]his Court has interpreted ‘use’ of a deadly weapon in the context of [the predecessor deadly weapon statute] to include simple possession [only] if such possession facilitates the associated felony” (emphasis removed)); *Ex parte Petty*, 833 S.W.2d 145, 145–46 (Tex. Crim. App. 1992) (same, noting that “the weapon must be utilized to achieve an intended result, namely, the commission of a felony offense separate and distinct from ‘mere’ possession”); *Patterson*, 769 S.W.2d at 941 (agreeing with lower court that the phrase “‘used . . . during the commission of a felony offense’ refers . . . to *any* employment of a deadly weapon, even its simple possession, if such possession facilitates the

⁴The statute provides alternatives as well; for example, it permits a deadly weapon finding based on a defendant’s “exhibit[ion]” of a weapon rather than his “use[]” of it, and it permits a finding if the defendant “was a party to the offense and knew that a deadly weapon would be used or exhibited.” Tex. Code Crim. Proc. Ann. art. 42A.054(b). These alternatives are irrelevant here.

associated felony”); *see Tyra v. State*, 897 S.W.2d 796, 798 (Tex. Crim. App. 1995) (“Our opinions in *Narron* and *Petty* . . . evince a recognition by this Court that, as a matter of semantics, the phrase ‘used or exhibited a deadly weapon’ does not mean the same thing, or merely the same thing, in ordinary English as ‘possessed a deadly weapon.’”).⁵ The Court thus repeatedly struck down deadly weapon findings attached to convictions for unlawful possession of a firearm because “there was no associated felony facilitated” by the possession. *Narron*, 835 S.W.2d at 644 (deleting deadly weapon finding “[b]ecause there was no associated felony facilitated by appellant’s possession” of the firearm when sole conviction was for unlawful possession); *see Petty*, 833 S.W.2d at 145–46 (similar).

The State acknowledges this precedent. It does not claim that White’s possession of his firearm amounted to a “use[],” nor does it claim that White “used” the firearm to facilitate the possession-based offense for which he was convicted.⁶

⁵The State argues that, in *Tyra*, the Court of Criminal Appeals discounted the relevant portions of *Narron* and *Petty* as “dicta.” But *Tyra* merely clarified the holdings in *Narron* and *Petty*; it did not discard them as dicta. *See Tyra*, 897 S.W.2d at 798 (clarifying in involuntary manslaughter case that *Narron* and *Petty* each “involved an offense in which the mere possession of a deadly weapon was criminalized” and that those cases distinguished between “possession of a weapon to facilitate a felony” versus “mere possession of the weapon without putting it to any use or purpose whatsoever”).

⁶Although the State argues that White’s “use[]” facilitated an uncharged felony, in one portion of its argument, it describes White’s firing of the weapon as increasing the risk of harm, and it cites to our sister court’s decision in *Benton*. *See Benton v. State*, No. 05-21-00806-CR, 2023 WL 2300542, at *1 (Tex. App.—Dallas Mar. 1, 2023, no pet.) (mem. op., not designated for publication) (affirming deadly weapon finding in

Tex. Code Crim. Proc. Ann. art. 42A.054(b). Instead, the State asserts that the deadly weapon finding is supported—and more importantly, is legally permitted to be supported—by White’s use of his firearm to facilitate a different felony: aggravated assault. White’s central appellate complaint thus turns on whether a deadly weapon finding is authorized when the weapon’s “use[]” facilitates a felony other than the felony of conviction. *See id.*

unlawful possession case based on defendant’s firing the gun in a residential neighborhood and thereby “increas[ing] the risk of harm associated with unlawfully possessing the gun”); *see also Jurado v. State*, No. 07-97-0102-CR, 1998 WL 537383, at *2–3 (Tex. App.—Amarillo Aug. 25, 1998, pet. ref’d) (not designated for publication) (affirming deadly weapon finding in unlawful possession case, noting that defendant shot someone, and distinguishing *Narron* and *Petty* based on defendant’s “employ[ment] or wield[ing] the weapon[] in connection with [its] illegal possession”); *cf. Collins v. State*, No. 07-24-00151-CR, 2025 WL 1243906, at *1 (Tex. App.—Amarillo Apr. 29, 2025, pet. filed) (mem. op., not designated for publication) (affirming deadly weapon finding in unlawful possession case without specifying offense facilitated when defendant fired weapon); *Searcy v. State*, 115 S.W.3d 628, 630–32 (Tex. App.—Waco 2003, no pet.) (affirming deadly weapon finding in unlawful possession case without specifying offense facilitated when evidence showed that defendant exhibited firearm in threatening manner).

To the extent that the State intends, by its comment and citation, to assert that White “used” his weapon to facilitate his unlawful possession offense, it does not explain how such offense—which turned on mere possession of a firearm outside White’s residence—was advanced or assisted by physical harm or a risk of harm. *See* Tex. Penal Code Ann. § 46.04(a)(2); *cf. Plummer v. State*, 410 S.W.3d 855, 861–65 (Tex. Crim. App. 2013) (elaborating on the facilitation requirement in case involving the “exhibit[ition]” of a deadly weapon; noting that deadly weapon statute accompanies listing of violent offenses involving “physical threat or harm”; and explaining that a weapon’s exhibition likely assists a violent offense through intimidation whereas “if one commits a nonviolent offense that does not involve harm or the threat of harm, the presence of a deadly weapon does not necessarily further or facilitate the offense”).

Our sister courts are split on this issue; some courts understand the facilitation requirement to be tied to the attached felony of conviction while others take a broader view, understanding the requirement to extend to the facilitation of any felony. *Compare, e.g., Medina v. State*, No. 13-23-00198-CR, 2024 WL 4784394, at *3 (Tex. App.—Corpus Christi—Edinburg Nov. 14, 2024, no pet.) (mem. op., not designated for publication), *Spencer v. State*, Nos. 05-11-01565-CR, 05-11-01566-CR, 2013 WL 1282307, at *2 (Tex. App.—Dallas Mar. 6, 2013, no pet.) (not designated for publication), *Harris v. State*, No. 03-96-00427-CR, 1997 WL 348559, at *1 (Tex. App.—Austin June 26, 1997, no pet.) (not designated for publication), *and Smith v. State*, 944 S.W.2d 453, 455–56 (Tex. App.—Houston [14th Dist.] 1997, pet. ref’d), *with Garner v. State*, 864 S.W.2d 92, 103 (Tex. App.—Houston [1st Dist.] 1993, pet. ref’d).⁷

The State urges us to adopt the broader interpretation.

⁷At least four courts of appeals have required the defendant’s use or exhibition of a deadly weapon to facilitate the attached offense, i.e., the offense of conviction on which judgment the deadly weapon finding is entered. *See Medina*, 2024 WL 4784394, at *3 & n.4 (deleting deadly weapon finding because, “[a]lthough a handgun was present, it had not been used to facilitate any other felony because . . . [the defendant] was only tried for felon in possession of a firearm” and “the offense was complete upon possession” notwithstanding his dismissed murder charge); *Spencer*, 2013 WL 1282307, at *2 (deleting deadly weapon finding from unlawful possession judgment; rejecting argument that weapon facilitated both unlawful possession and evading arrest offenses; implying that *Narron* and *Petty* “prohibit” deadly weapon findings in unlawful possession cases; and explaining that “[t]he gravamen of the offense is possession of the firearm and the offense was complete upon possession”); *Harris*, 1997 WL 348559, at *1 (deleting deadly weapon findings attached to unlawful possession convictions and rejecting argument that defendant’s “display[ing] and cock[ing] a firearm in view of a victim, thus committing an aggravated assault by threat” could support findings because “the State did not convict appellant of the

But while the Court of Criminal Appeals has yet to explicitly weigh in on this issue, it has not been silent on the matter either. The Court has addressed numerous other interpretative quandaries involving the deadly weapon statute's language, and in doing so, has laid the foundation for the present issue's resolution.

B. Court of Criminal Appeals' Precedent

The Court of Criminal Appeals has clarified the meanings of the two key, dispositive portions of the deadly weapon statute's language: the word "used" and the phrase "a felony offense." Tex. Code Crim. Proc. Ann. art. 42A.054(b).

offense of aggravated assault or any other felony offense in which he 'used' the weapon he was convicted of possessing"); *Smith*, 944 S.W.2d at 455–56 (deleting deadly weapon finding when defendant was convicted of possessing a firearm at a protected location and explaining that "the gravam[e]n of the offense is the mere carrying of a weapon with no associated felony" and that "[a]n affirmative deadly weapon finding will not be supported where the crime is mere possession"); *see also Plummer*, 410 S.W.3d at 860 n.29 (citing *Smith* with approval); *cf. Comiskey v. State*, No. 09-06-221-CR, 2007 WL 2791479, at *1 (Tex. App.—Beaumont Sept. 26, 2007, no pet.) (mem. op., not designated for publication) (deleting deadly weapon finding and explaining that the "sole charge against [the defendant] was possession of a gun on the premises of a public school" so the defendant "did not use the weapon in furtherance of any collateral felony" but not commenting on whether weapon could be used to facilitate another felony).

Meanwhile, at least one court of appeals has upheld a deadly weapon finding based on evidence that the defendant used the weapon to facilitate a different felony. *See, e.g., Garner*, 864 S.W.2d at 103 (affirming deadly weapon finding when defendant's sole conviction was unlawful possession because the evidence "that appellant fired the handgun toward [a witness] and others was sufficient evidence that appellant committed an associated collateral felony facilitated by his possession of the handgun").

As previously discussed, in *Patterson*, the Court interpreted “used” in the deadly weapon statute to require that the relevant deadly weapon be “employed or utilized in order to achieve its purpose” of “facilitat[ing] the associated felony.” *Patterson*, 769 S.W.2d at 941. A few years later, the Court reiterated this holding and emphasized that simple possession of a weapon was insufficient to constitute “use[]” unless the possession “facilitate[d] the *associated* felony . . . separate and distinct from ‘mere’ possession.” *Narron*, 835 S.W.2d at 644 (emphasis in original) (deleting deadly weapon finding “[b]ecause there was no associated felony facilitated by appellant’s possession” of the firearm when sole conviction was for unlawful possession); *Petty*, 833 S.W.2d at 145–46 (similar); *cf. Ex parte Nelson*, 137 S.W.3d 666, 666–68 (Tex. Crim. App. 2004) (holding in case involving unlawful carrying at a protected location that the habeas applicant had not preserved his challenge to the deadly weapon finding but acknowledging that “[t]he entry of that finding could have been a ground of complaint on appeal” based on *Petty*).

Then, in a different case—*Ex parte Jones*—the Court clarified the meaning of “a felony offense.” 957 S.W.2d 849, 849–51 (Tex. Crim. App. 1997). There, the trial court revoked the defendant’s two deferred adjudication community supervisions based on his commission of a new offense, and the court entered deadly weapon findings because the defendant had used a weapon in the new, revocation-warranting crime. *Id.* at 849. In other words, the trial court effectively interpreted the statutory phrase “a felony offense” to extend to any felony offense—the defendant’s “use[]” of

the weapon did not need to facilitate the felony conviction to which the finding was attached. *See id.* at 850–51. The Court of Criminal Appeals held that this was error. *See id.*

The Court noted that “a felony” could be read two ways: to mean either that (1) “the use of a deadly weapon in *any* felony is sufficient to allow the entry of an affirmative finding in another case, without any connection between the two offenses” or that (2) “the word ‘a’ as a part of the phrase ‘a felony,’ [is] used to distinguish the case at trial from misdemeanor offenses and that the felony offense referred to is the same as that being tried.” *Id.* at 850. After sifting through the deadly weapon statute’s legislative history,⁸ the Court observed that the legislature’s “focus[was] on the punishment for the offense for which the defendant [wa]s being tried and the use or exhibition of a deadly weapon during the commission of that offense.” *Id.* at 850–51. This focus corresponded to the statute’s effect: “under the [deadly-weapon] statute[,] the penalty for the offense will be more onerous when the offense is committed with a firearm.” *Id.* at 851. The Court thus reasoned that, “[b]ecause a defendant is punished for the crime for which he is tried, the use or

⁸The Court examined the legislative history only after concluding that the statutory language was ambiguous. *Jones*, 957 S.W.2d at 850–51 (noting that “[o]nly if the plain language of the statute would lead to absurd results or if the language is not plain but ambiguous may this Court permissibly consider . . . the legislative history”).

exhibition of a deadly weapon must be during the commission of that crime,” i.e., “during the transaction from which a conviction for a felony offense is obtained.”⁹ *Id.*

Reading *Patterson* and *Jones* together thus establishes that, for “a deadly weapon . . . [to be] used . . . during the . . . commission of a felony offense,” Tex. Code Crim. Proc. Ann. art. 42A.054(b), (1) the weapon “must be utilized, employed, or applied in order to achieve its intended result: ‘the commission of a felony offense,’” *Patterson*, 769 S.W.2d at 941; and (2) “the felony offense referred to is the same as that being tried,” *Jones*, 957 S.W.2d at 850–51. Contrary to the State’s argument, the statute does not authorize a deadly weapon finding if “a deadly weapon . . . was used [to facilitate one felony offense] . . . during the . . . commission of [a different] felony offense.” Tex. Code Crim. Proc. Ann. art. 42A.054(b); *see Tyra*, 897 S.W.2d at 800 (Baird, J., concurring) (summarizing “[t]he general rule established in *Patterson* . . . as follows: if a deadly weapon is used or exhibited in order to facilitate the commission of the charged offense, a deadly weapon finding is permissible”). And were we to interpret the statute in such a manner, we would be resurrecting the

⁹Arguably, the Court’s concluding reference to “the transaction” could be understood to authorize a deadly weapon finding based on the weapon’s use to facilitate an unattached felony committed in the same transaction as the felony of conviction. *See id.* at 851. But such an overreading would miss the forest for the trees. The Court was deciding between two competing interpretations, and its reference to “the transaction” was shorthand for one of those: the interpretation that limited “the felony offense referred to [in the deadly weapon statute] . . . [to] that being tried.” *Id.* at 850. Regardless, the State does not make this argument, rely upon this phrase, or discuss *Jones*.

debates that *Patterson* and *Jones* laid to rest long ago.¹⁰ See *Jones*, 957 S.W.2d at 850–51; *Patterson*, 769 S.W.2d at 941.

C. This Court’s Precedent

This court’s precedent, too, reflects the statutory interpretation that *Patterson* and *Jones* enunciated. Although we have not expressly addressed whether a deadly weapon finding can be supported by the weapon’s facilitation of a different felony, we—much like the Court of Criminal Appeals—have indirectly weighed in on the matter.

¹⁰The Court of Criminal Appeals’ dicta in other cases implicitly endorses this understanding of the deadly weapon statute as well. In *Plummer*, for example, the defendant committed unlawful possession of a firearm in the same transaction as unlawful possession of body armor, and he was convicted of both offenses. 410 S.W.3d at 856–57. The Court considered whether the defendant’s display of his firearm supported a finding that he had exhibited a deadly weapon in his commission of unlawful possession of body armor, and in so considering, the Court extended *Patterson*’s facilitation requirement for “use[]” of a firearm to “exhibition” of a firearm. *Id.* at 856–65. But in the Court’s discussion of the case’s procedural history, it observed that “the trial judge [had] declined to enter a deadly-weapon finding in the possession-of-a-firearm-by-a-felon case,” and it noted that this action was taken by “[r]eferring to our precedent”—citing *Petty* and *Narron* as support. *Id.* at 857 & n.5; see *Medina*, 2024 WL 4784394, at *2 (noting same). Such implicit approval of the trial court’s action makes sense only if a deadly weapon finding is offense-specific; otherwise, a defendant’s use of a deadly weapon to facilitate a felony would support a deadly weapon finding for all felony convictions committed in the same transaction. See generally *Plummer*, 410 S.W.3d at 862–63 (noting that other states have adopted similar facilitation requirements and describing them as requiring, e.g., evidence that the possession “facilitate[d] commission of the predicate offense” or of “a ‘nexus between the crime charged and possession of a gun’”); *McCain v. State*, 22 S.W.3d 497, 502–03 (Tex. Crim. App. 2000) (recognizing that *Patterson*’s facilitation requirement also applies to the “use or exhibit[ition]” of a deadly weapon as an element of aggravated robbery and stating that, “the determining factor is that the deadly weapon was ‘used’ in facilitating the underlying crime” (emphasis removed)).

In *Williams v. State*, 889 S.W.2d 687 (Tex. App.—Fort Worth 1994, no pet.), for example, the defendant left a fully loaded firearm on a coffee table, and after his young daughter took hold of it, he attempted to grab the gun, and in doing so, shot the girl in the face. *Id.* at 688. Rather than seeking medical attention, the father fled with the gun while the child’s injuries grew worse. *Id.* at 688–89. He was indicted for both injury to a child by act and injury to a child by omission, but the State later dismissed the first count, and the father pleaded guilty to the second—injury to a child by omission. *Id.* at 689. On appeal, we held that there was insufficient evidence to support the deadly weapon finding that accompanied this conviction. *Id.* at 690–91.

We noted that the record showed “that a handgun was involved in the shooting,” but we emphasized that the defendant “was not charged with shooting the child[; i]nstead, he was charged with injury by omission, i.e., failing to immediately, timely, and adequately provide medical care.” *Id.* (italics removed). Though the defendant had “possessed a handgun when he left the injured child in the house[,] . . . mere possession of the gun, absent a showing that it was used to facilitate the associated offense (injury by omission), d[id] not support an affirmative deadly weapon finding.” *Id.* The fact that the father had used the gun to facilitate the dismissed felony of injury to a child by act did not save the deadly weapon finding attached to the father’s conviction for injury to a child by omission. Rather, we understood and applied the deadly weapon statute to require the weapon’s use to

facilitate the attached felony offense of conviction—just as *Patterson* and *Jones* prescribed.

D. Application and Holding

Both the Court of Criminal Appeals’ precedent and this court’s precedent reflect that, to support a deadly weapon finding, the weapon must be used to facilitate the commission of the felony offense of conviction to which the finding is attached. The deadly weapon finding in this case is attached to White’s conviction for unlawful possession of a firearm by a felon. White committed that offense by simply “possess[ing] a firearm . . . at any location other than the premises at which [he] live[d].” Tex. Penal Code Ann. § 46.04(a)(2); *cf. Medina*, 2024 WL 4784394, at *3 (explaining that “the gravamen of the offense is possession of the firearm, and the offense was complete upon possession”); *Spencer*, 2013 WL 1282307, at *2 (similar); *Lashley v. State*, No. 05-05-00055-CR, 2006 WL 2408046, at *4–5 (Tex. App.—Dallas Aug. 22, 2006, pet. ref’d) (not designated for publication) (similar, distinguishing defendant’s conviction for unauthorized discharge of sewage from possession-based offenses in *Narron* and *Petty* in part because “the gravamen of the [*Narron* and *Petty*] offenses were possession of the firearm, and the offenses were complete upon possession”). The State does not claim that White fired his weapon to prevent others from taking it or that he employed it in some other manner to facilitate his continued

possession of it.¹¹ *Cf. Plummer*, 410 S.W.3d at 860 n.29 (summarizing *Smith*, 944 S.W.2d at 455–56, with approval; noting that *Smith* deleted deadly weapon finding from judgment for unlawful possession in prohibited location; and highlighting that “the handgun [in *Smith*] was only carried . . . and never used in a threatening display to protect the possession of a weapon in the liquor store”); *Nelson*, 137 S.W.3d at 667 (citing *Petty* and noting that “there is some question whether an offense of carrying a firearm will support [a deadly weapon] affirmative finding”); *Tyra*, 897 S.W.2d at 801 (Baird, J., concurring) (contemplating that a deadly weapon finding might be permissible in an unlawful possession of a firearm case if the felon “exposed the weapon to prevent others from taking it”); *Jimenez v. State*, No. 08-17-00124-CR, 2019 WL 2022092, at *7 (Tex. App.—El Paso May 8, 2019, no pet.) (not designated for publication) (affirming deadly weapon finding when defendant’s sole conviction was possession of prohibited item in correctional facility because the defendant “employed the sharpened wire, i.e. shank, in such a manner as to . . . prevent[the detention officers] from dispossessing him of the weapon”). And without more, White’s mere possession of the firearm was insufficient standing alone to constitute a “use[]” of the weapon. Tex. Code Crim. Proc. Ann. art. 42A.054(b). Therefore, the

¹¹Although White makes the categorical assertion that “[t]he [d]eadly weapon special issue does not apply to possession cases,” because the State does not claim that White “used” his weapon to facilitate his unlawful possession of a firearm offense, we need not decide whether a firearm could ever be “used” to facilitate that offense. Tex. Code Crim. Proc. Ann. art. 42A.054(b); *see* Tex. R. App. P. 47.1.

deadly weapon finding entered here has no basis. We reform the judgment to delete it. *See Drichas v. State*, 175 S.W.3d 795, 798 (Tex. Crim. App. 2005) (“If the court of appeals properly determines that the state failed to show that a defendant used a deadly weapon in the commission of an offense, that court may delete the deadly weapon finding.”).

And because we do so, we need not reach White’s remaining appellate complaint regarding his proffered defenses to the now-deleted finding.¹² *See* Tex. R. App. P. 47.1.

III. Conclusion

For “a deadly weapon . . . [to be] used . . . during the . . . commission of a felony offense” within the meaning of the deadly weapon statute, (1) the weapon

¹²On appeal, White frames both of his proffered defenses—necessity and self defense—as defenses to the deadly weapon special issue. But in the trial court, White requested the necessity instruction as a defense to the unlawful possession offense rather than as a defense to the deadly weapon special issue. The State thus construes White’s necessity-related complaint as an attempt to re-urge his trial court objection.

Regardless, the trial court did not err by declining to charge the jury on necessity as a defense to unlawful possession. We have repeatedly held that “when a defendant possesses a firearm for an extended period of time, not just in those moments he felt himself in imminent danger, he is not entitled to a necessity instruction.” *Deleon v. State*, No. 02-23-00270-CR, 2025 WL 421245, at *5–6 (Tex. App.—Fort Worth Feb. 6, 2025, pet. ref’d) (mem. op., not designated for publication) (summarizing court’s holding in *Conn* and applying same rule to hold that defendant was not entitled to necessity instruction); *see Conn v. State*, No. 02-12-00616-CR, 2014 WL 2809062, at *2–3 (Tex. App.—Fort Worth June 19, 2014, no pet.) (mem. op., not designated for publication) (holding defendant not entitled to necessity instruction in unlawful possession case when “he possessed the firearm in question long before the perceived threat of imminent harm arose”).

“must be utilized, employed, or applied in order to achieve its intended result: ‘the commission of a felony offense,’” *Patterson*, 769 S.W.2d at 941; and (2) “the felony offense referred to is the same as that being tried,” *Jones*, 957 S.W.2d at 850–51. Because White was tried for and convicted of unlawful possession of a firearm by a felon, the trial court could not enter a deadly weapon finding based on his “use[]” of the weapon to facilitate a different, dismissed felony offense. *See* Tex. Code Crim. Proc. Ann. art. 42A.054(b). We reform the judgment to delete the deadly weapon finding, and we affirm the judgment as modified. *See* Tex. R. App. P. 43.2(b).

/s/ Bonnie Sudderth

Bonnie Sudderth
Chief Justice

Publish

Delivered: November 20, 2025