NO. 01-24-01003-CR

IN THE COURT OF APPEALS
FOR THE FIRST DISTRICT OF TEXAS
AT HOUSTON, TEXAS

HOWARD TURK
Appellant
v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 1791284
From the 174th Judicial District Court of Harris County, Texas
Hon. Hazel Jones, Judge Presiding

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

On October 14, 2022, a Harris County grand jury returned an indictment charging Mr. Howard Turk with the felony offense of unlawful possession of a firearm, alleged to have occurred on or about March 24, 2021. [C.R. 6]. On December 6, 2024, a jury found Mr. Turk guilty of the offense of felon in possession of a weapon as charged in the indictment. [C.R. 144; 9 R.R. 4]. On December 6, 2024, the jury assessed Mr. Turk's punishment at 30 years confinement in the Texas Department of Criminal Justice – Institutional Division. [C.R. 144; 10 R.R. 198]. No motion for new trial was filed. The trial court certified Mr. Turk's right to appeal and he timely filed his notice of appeal on December 6, 2024. [C.R. 148; 150]. This Court ordered Mr. Williams's brief due by July 17, 2025, and it is timely filed.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Turk requests oral argument. The first issue hinges on a nuanced question of statutory construction which has not been taken up before, and the deadly weapon issue is a novel application of precedent from the Court of Criminal Appeals. Mr. Turk therefore respectfully requests oral argument.

ISSUES PRESENTED

1. **Evidence is insufficient if the record contains no evidence probative of an element of the offense. Texas Penal Code section 46.04 is a "status" offense, defining the proscribed conduct with respect to a felon's time-since-release. The record contains no evidence about when Mr. Turk was released from custody or supervision. Was the evidence insufficient to convict?**

2. **The State sought a special issue, asking the jury to find that Mr. Turk used a deadly weapon, a motor vehicle, during the commission of the offense. To support such a finding, the evidence must show that the deadly weapon facilitated the charged offense. Was the evidence sufficient to support the jury's finding that Mr. Turk used a deadly weapon to facilitate the possession of a firearm?**

STATEMENT OF FACTS

Mr. Howard Turk was accused of unlawfully possessing a weapon as a felon. [C.R. 6]. The State of Texas tried Mr. Turk for one count of felon in possession of a weapon. [3 R.R. 35]. Mr. Turk pleaded not guilty to the charge. [7 R.R. 32-33]. A jury trial commenced on December 4, 2024. [7 R.R. 32-33].

I. The incident

This case arose out of a police chase and single-car accident which occurred on March 24, 2021. [7 R.R. 87; C.R. 6]. Mr. Turk and Rodrick Davis were in a vehicle together. [7 R.R. 180]. An HPD sergeant in an unmarked police car radioed that the vehicle was suspicious. [7 R.R. 53]. The officer in the unmarked police car began to surveil the vehicle. [7 R.R. 53] The sergeant lost sight of the vehicle, and another officer began surveillance. [7 R.R. 58]. The unmarked vehicles were superseded by marked

police vehicles who attempted a traffic stop. [7 R.R. 58]. The vehicle sped up, drove ahead of police for less than a mile, and stopped after striking a median. [7 R.R. 63-65]. The two occupants, Mr. Turk and Rodrick Davis, fled on foot. [7 R.R. 181-82]. Mr. Turk stopped at a nearby gas station and was tackled by police as he was surrendering himself. [7 R.R. 96].

Mr. Turk was arrested and placed in the back of a police car. [7 R.R. 163]. The police conducted an inventory search of the vehicle while still on scene. [7 R.R. 144]. Police found a handgun in the center console of the vehicle. [7 R.R. 144]. While in custody, Mr. Turk asked police who they were going to charge with the possession of the firearm. [7 R.R. 163]. The officer said that both Mr. Turk and Rodrick Davis would be charged, to which Mr. Turk responded "Nah, it's mine." [7 R.R. 163].

II. Deadly Weapon special issue.

Prior to trial, the State gave notice that it was seeking a special issue of a deadly weapon finding. [C.R. 21]. Specifically, the State sought a finding that Mr. Turk used and exhibited a motor vehicle as a deadly weapon during the commission of the offense of unlawful possession of a weapon by a felon. [C.R. 21]. The testimony showed that the firearm allegedly in Mr. Turk's possession was located in the center console of the vehicle. [7 R.R. 144].

A police officer stated the vehicle "was bobbing and weaving, changing lanes real quick to get around traffic." [7 R.R. 64]. The witness went on to testify that the vehicle's "accelerating and moving at a high rate of speed" was "dangerous driving,"

although he acknowledged that it is common to see people speeding in Houston. [7 R.R. 64-65]. The witness opined that the degree to which the vehicle was speeding was "unusual." [7 R.R. 65]. He also opined the manner in which the vehicle was traveling, specifically the way it was weaving through traffic on the interstate, placed other motorists in danger. [7 R.R. 65].

III. Trial

During guilt-innocence, the State presented evidence that Mr. Turk had been previously convicted of one felony offense: endangering a child. [8 R.R. 23; 11 R.R. 179]. The judgment, in the record as State's Exhibit 40, reflects that Mr. Turk was sentenced to two years confinement in TDCJ pursuant to a plea agreement. [11 R.R. 179]. His sentence in that case was imposed July 31, 2013, seven years and seven months prior to March 24, 2021, the date of the alleged conduct in this case. [11 R.R. 179; C.R. 6]. The State presented no evidence of the date of Mr. Turk's release from custody or supervision.

The jury found Mr. Turk guilty as charged in the indictment. [9 R.R. 5, C.R. 140]. The jury also found the special issue to be true. [9 R.R. 7; C.R. 142]. Mr. Turk went to the jury for punishment. [10 R.R. 7-8]. The jury heard testimony from six witnesses, and thereafter assessed punishment at 30 years confinement in TDCJ. [10 R.R. 198; C.R. 130]. This appeal followed.

SUMMARY OF THE ARGUMENT

Issue One:

The record is silent as to the date of Mr. Turk's release from custody or supervision in his prior conviction, the only conviction that the State presented to the jury to prove his status as a felon at the time of possession. The penal code sets out two alternatives for the offense of felon in possession of a firearm in Texas Penal Code sections 46.04(a)(1) and 46.04(a)(2). Both of these alternatives were included in the jury charge. Under (a)(1), it is an offense to possess a firearm within five years of conviction or release from custody or supervision, whichever is later. Under (a)(2), the penal code defines the offense as occurring **after the period described in (a)(1)**, and makes possession of a firearm anywhere outside the home a criminal offense. In either case, the date of release is an essential element, and here, the date of release was not proven. The evidence is therefore insufficient to sustain a conviction.

Issue Two:

A deadly weapon finding is only appropriate when a deadly weapon is used to facilitate the associated offense. Here, the jury made a deadly weapon finding, specifically that Mr. Turk used a motor vehicle as a deadly weapon to facilitate his possession of a firearm. While the manner of driving may have been a separate offense, the motor vehicle did not facilitate the possession of a firearm because it did not make the possession of the firearm any more dangerous. The evidence is therefore insufficient to sustain the deadly weapon finding.

ARGUMENT

Issue One: Evidence is insufficient if the record contains no evidence probative of an element of the offense. Texas Penal Code section 46.04 is a "status" offense, defining the proscribed conduct with respect to a felon's time-since-release. The record contains no evidence about when Mr. Turk was released from custody or supervision. Was the evidence insufficient to convict?

I. Standard of Review

The sufficiency requirement is rooted in Constitutional due process. The Court of Criminal Appeals has held that the Fourteenth Amendment's guarantee of due process of law prohibits a criminal defendant from being convicted of an offense and denied his liberty except upon proof sufficient to persuade a rational trier of fact beyond a reasonable doubt of every fact necessary to constitute the offense. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Swearingen v. State*, 101 S.W.3d 89, 95 (Tex. Crim. App. 2003).

Evidence is insufficient under the *Jackson* standard in four circumstances: (1) the record contains no evidence probative of an element of the offense; (2) the record contains a mere "modicum" of evidence probative of an element of the offense; (3) the evidence conclusively establishes a reasonable doubt; and (4) the acts alleged do not constitute the criminal offense charged. *Mottin v. State*, 634 S.W.3d 761, 765 (Tex. App.—Houston [1st Dist.] 2020, pet. ref'd) (citing *Jackson*, 443 U.S. at 314, 318 n.11, 320; *Laster v. State*, 275 S.W.3d 512, 518 (Tex. Crim. App. 2009)).

To sustain a conviction, the evidence must be adequate for a fact finder to rationally find "the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. The sufficiency of the evidence is measured by the essential elements as defined by the hypothetically correct charge. *Cada v. State*, 334 S.W.3d 766, 773 (Tex. Crim. App. 2011).

A hypothetically correct jury charge "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). "[B]efore something may be an element of the offense in the hypothetically correct jury charge, it must be 'authorized by the indictment.'" *Cada*, 334 S.W.3d at 773. "Thus, if the State pleads one specific element from a penal offense that contains alternatives for that element, the sufficiency of the evidence is measured by the element that was actually pleaded, not any other statutory alternative element." *Cada*, 334 S.W.3d at 774.

When the sufficiency of the evidence turns on the meaning of a statute, the Court reviews the statutory construction question *de novo*. *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015). The reviewing court must give effect to the plain meaning of the statute's language "unless the statute is ambiguous or the plain meaning would lead to absurd results that the legislature could not have possibly intended." *Id.* The plain meaning is discerned by reading the statute in context, giving effect to each word,

phrase, clause, and sentence if reasonably possible, and construing them according to applicable technical definitions and according to the rules of grammar and common usage. *Lopez v. State*, 600 S.W.3d 43, 45 (Tex. Crim. App. 2020). It is presumed that the legislature intended each word to have a purpose. *Sims v. State*, 569 S.W.3d 634, 640 (Tex. Crim. App. 2019). The evidence is legally sufficient if "any rational juror could have found the essential elements of the crime beyond a reasonable doubt." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007).

II. Preservation of Error

A legal-sufficiency challenge need not be preserved by objection in a trial court. *Prichard v. State*, 533 S.W.3d 315, 320 (Tex. Crim. App. 2017).

III. The evidence was insufficient with respect to the time-since-release element.

There is no evidence in the record as to when Howard Turk was released from confinement or supervision for his 2013 prior felony conviction. The State proved Mr. Turk's prior felony through one witness: Diane Medina. [8 R.R. 18]. Medina identified the "pen packet" from Mr. Turk's prior incarceration in the Texas Department of Criminal Justice, in evidence as State's Exhibit 40. [8 R.R. 16; 11 R.R. 177-81]. That pen packet contains the judgment from Mr. Turk's 2013 conviction in cause number 1388487, in which he was sentenced to two years confinement in TDC beginning on July 31, 2013. [11 R.R. 179]. Medina identified Mr. Turk as the person who was convicted in cause number 1388487. [8 R.R. 23]. No mention was made of the actual

duration of his confinement, whether he was ever released on parole, or if he was subsequently incarcerated for any other offense.

The only cross questions by defense counsel established that the conviction was in 2013, 11 years before the trial in this case. [8 R.R. 24].

At punishment, the State presented evidence that Mr. Turk had been convicted of a subsequent offense to the one presented during guilt-innocence. [11 R.R. 260]. He was sentenced to two years in TDC on September 18, 2015, approximately six years prior to the events of this case. [11 R.R. 260].

A. Time-since-release is an element of the offense.

Texas Penal Code section 46.04 states:

> (a) A person who has been convicted of a felony commits an offense if he possesses a firearm:
>
> > (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later; or
> >
> > (2) **after the period described by Subdivision (1)**, at any location other than the premises at which the person lives.

Tex. Pen. Code Ann. § 46.04 (emphasis added).

The "element of offense" is defined in the penal code. Tex. Pen. Code Ann § 1.07. Under the statutory definition, "element of offense" means: (1) the forbidden conduct; (2) the required culpability; (3) any required result; and (4) the negation of any exception to the offense. Tex. Pen. Code Ann. § 1.07.

When a reviewing court conducts a sufficiency review, it examines the statutory requirements necessary to uphold the conviction. *Liverman*, 470 S.W.3d at 836. The focus is on the "literal text" of the statute. *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). The reviewing court must "presume that every word in a statute has been used for a purpose and that each word, phrase, clause, and sentence should be given effect if reasonably possible." *Harris v. State*, 359 S.W.3d 625, 629 (Tex. Crim. App. 2011) (quoting *State v. Hardy*, 963 S.W.2d 516, 520 (Tex. Crim. App. 1997)).

In defining the offenses set out in Penal Code sections 46.04(a)(1) and 46.04(a)(2), the Legislature devoted 42 of the 73 words in these sections to defining the time-since-release element. Tex. Pen. Code Ann. § 46.04. In subsection 46.04(a)(2), the Legislature incorporated by reference the time-since-release element defined in subsection (a)(1) when it wrote "after the period described by Subdivision (1), . . ." *Id.*

The principle that the legislature intended for "every word" to have a purpose, and that reviewing courts should give effect to "each word, phrase, and clause of the statutory language" is long-standing in Texas law. *See Hardy,* 963 S.W.2d at 520 ("each word, phrase, clause, and sentence should be given effect if reasonably possible"); *Morter v. State*, 551 S.W.2d 715, 718 (Tex. Crim. App. 1977) ("Every word of a statute is presumed to have been used for a purpose") (quoting *Eddins-Walcher Butane Company v. Calvert*, 156 Tex. 587, 591, 298 S.W.2d 93, 96 (1957)); *Gulf, C. & S.F. Ry. Co. v. Blum Indep. Sch. Dist.*, 143 S.W. 353, 356 (Tex. App.—Austin 1911, writ ref'd) ("every word is presumed to have been intentionally used for the purpose of making clear the

legislative intent"); *Banks v. State*, 28 Tex. 644, 648 (1866) ("It is our duty to give to the article such a construction as will give effect and meaning to each word as nearly as can be consistently done with the object and purpose of the legislature.").

While it is true that a person convicted of a felony commits an offense if he possesses a firearm outside of his residence at any point after the conviction, the State is still obligated to put on proof of the element regarding time since release. This is necessarily the case so as to comply with the requirement that each word of the statute is given effect. requirement that each word of the statute is given effect. *See Liverman*, 470 S.W.3d at 836 ("we presume that every word in a statute has been used for a purpose.")

If the Legislature wanted to proscribe a felon possessing a firearm "at any time following conviction, at any location other than the premises at which the person lives" it could have done so. It did not. Under the hypothetical statute, the State would not have to prove a release date and would only have to prove the non-residential site of the possession and a felony conviction predating the conviction. But the law does not say "at any time after conviction," it says, "**after** the period described by Subdivision (1)." Tex. Pen. Code Ann. § 46.04 (emphasis added). That period is "after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from supervision under community supervision, parole, or mandatory supervision, whichever date is later." Tex. Pen. Code Ann. § 46.04. Thus, the two alternatives for the State to prove are: (1) possession

anywhere within five years of release; or (2) possession outside the home after five years since release. *Id.* To read the "after" out of the statute would be to find that word useless, in direct contravention of the principles of statutory construction. *See In Interest of C.J.N.-S.*, 540 S.W.3d 589, 591 (Tex. 2018) ("courts presume the Legislature intended for all the words in a statute to have meaning and for none of them to be useless.").

B. There was no evidence sufficient for a rational jury to convict on the time-since-release element.

In *Tapps*, the Austin court of appeals considered the circumstances which relieve the State of the burden of proving the date of release. *Tapps v. State*, 257 S.W.3d 438, 445 (Tex. App.—Austin 2008), aff'd, 294 S.W.3d 175 (Tex. Crim. App. 2009). In that case, the *Tapps* court reasoned that "[t]he date of release from confinement is not necessary when the alleged possession occurs within five years of the date of conviction because the period of prohibition extends for this duration in any event." *Id.* That is, when the possession is within five years of the date of conviction, the time-since-release element is obviated because every possession within five years of conviction is necessarily within five years of release. *Id.* The same cannot be said when the individual is found in possession more than five years after conviction; then proof of the actual date of release is necessary. *See Tapps*, 257 S.W.3d at 445 n.3.

The Texarkana court of appeals applied the logic of *Tapps* in *Fagan*. *Fagan v. State*, 362 S.W.3d 796, 799–801 (Tex. App.—Texarkana 2012, pet. ref'd). In that case, the defendant had been convicted of burglary of a habitation six years prior to his

possession of a firearm. *Id.* at 800. The Texarkana court reasoned, citing *Tapps*, that "it was necessary for the State to prove the date of release from confinement or supervision." *Id.* (citing *Tapps*, 257 S.W.3d at 445). The defendant in *Fagan* was charged under 46.04(a)(1). *Id.* at 800. However, the statutory construction employed by the court in *Fagan* is also instructive in the instant case because time-since release is an element of both 46.04(a)(1) and 46.04(a)(2). *See Fagan*, 362 S.W.3d at 799; Tex. Pen. Code Ann. § 46.04. Thus, application of the same method of statutory construction would render the same result here as it did in *Fagan*: an acquittal. *See Fagan*, 362 S.W.3d at 801.

Similarly, the Amarillo court of appeals in *Saldana* applied *Tapps* to render an acquittal when the State did not prove the time-since-release element. *Saldana v. State*, 418 S.W.3d 722, 726 (Tex. App.—Amarillo 2013, no pet.). There, as here, there was evidence of a conviction in the record, but no evidence of the date of release. *Id.* The defendant's conviction predated his arrest for possession of a firearm by five years and five months. *Id.* The court reasoned that the State "failed to prove an element of its case" and rendered an acquittal. *Id.* The principles of statutory construction which made time-since-release an element of 46.04(a)(1) in that case also make it an element here. *See Saldana*, 418 S.W.3d at 724-26; Tex. Pen. Code Ann. § 46.04. The text of 46.04(a)(2) expressly incorporates the same language from (a)(1) which the State failed to prove in *Saldana*, and requires the offensive conduct to occur "**after**" that period. *See*

Id. As such, application of the analysis employed in *Saldana* and the plain text of the statute requires a reversal. *See Id.*

The State waved away the time-since-release element in final argument in this case, telling the jury: "[t]he date is not an issue." [8 R.R. 81]. The only other mention of the timing of the previous conviction by the State in final argument was: "[t]his is the judgment, right, from the pen packet, endangering a child, 339th District Court, the cause number, the date the judgment was entered." [8 R.R. 82]. There was no evidence of the date of release.

The jury saw the problem in the State's case. They submitted a question to the trial court, asking:

> On what date would Howard Turk have been lawfully able to possess a firearm, per the requirements stated in the charge (after conviction and before the 5th anniv of the person's release from confinement following conviction of the felony or their release from supervision under community supervision, parole, or mandatory supervision, whichever date is later)

[C.R. 120].

This was a question of fact, which the jury correctly saw as an element of the charged offense by their reading of the statute in the jury charge. [C.R. 131]. There was no evidence in the record as to this element, so the jury asked the trial court to supply this requisite information. [C.R. 120]. The trial court instructed the jury to "refer to the jury instructions." [C.R. 120]. With no evidence to guide them, the jury ignored the trial court's instruction and convicted Mr. Turk with no evidence to support an element

of the offense. *See Fagan,* 362 S.W.3d at 801 (rendering an acquittal when there was no evidence of the date of release).

IV. This Court's opinion in *Davis* does not determine the outcome here.

This Court addressed a similar argument in an unpublished decision in 2017. *Davis v. State*, 2017 WL 4054192, at *5–6 (Tex. App.—Houston [1st Dist.] Sept. 14, 2017, no pet.). In that case, this Court held that the evidence was sufficient to sustain a conviction under 46.04(a)(2) without proof of the date of release. *Id.* at *6. The reasoning of *Davis* was flawed, and the present case is distinguishable.

A. *Davis* misinterpreted the holdings of *Tapps* and the related cases.

This Court in *Davis* cited *Nguyen* for the proposition that "[t]he statute does not require the [S]tate to prove the date the defendant was released from prison or supervision unless the defendant is in possession of a firearm at the premises where he lives." *Davis*, 2017 WL 4054192 at *5 (quoting *Nguyen v. State*, 54 S.W.3d 49, 56 (Tex. App.–Texarkana 2001, pet. ref'd)). The *Davis* Court interpreted *Nguyen* as having been overruled by *Fagan* on "other grounds," keeping the holding that date of release is not required unless the defendant is at his home. *Davis,* 2017 WL 4054192 at *5 (citing *Fagan v. State*, 362 S.W.3d 796, 799 n.1 (Tex. App.–Texarkana 2012, pet. ref'd)). This is a misreading of *Fagan.* In *Fagan*, the firearm was possessed in a vehicle. *Fagan*, 362 S.W.3d at 798. Even so, the Texarkana court held that "it was necessary for the State to prove the date of release from confinement or supervision." *Id.* at 800. The quotation from *Nguyen* that possession away from the defendant's residence obviates

the need to prove date of release was therefore overruled by *Fagan*. *Fagan,* 362 S.W.3d at 799 n.1.

The Dallas court of appeals has recognized as much. That court, in *Hall*, cited the exact same passage from *Nguyen* as this Court did in *Davis*, and correctly noted it as having been overruled. *Hall v. State*, 2012 WL 3174130, at *4 (Tex. App.—Dallas Aug. 7, 2012, pet. ref'd). This Court's previous reliance on *Nguyen* was therefore misplaced, and the Court should take this opportunity to correct itself. *See Davis*, 2017 WL 4054192 at *5.

Additionally, the *Davis* court cited *Tapps* for the correct proposition that 46.04 does not necessarily require proof of the date of release in all cases, but it omitted the portion of *Tapps* which explained what those cases are. *Davis,* 2017 WL 4054192 at *5 (citing *Tapps*, 257 S.W.3d at 445). *Tapps* itself, as analyzed *supra*, explained that time-since-release is not necessary when possession occurs within five years of conviction, because less than five years after release is necessarily within five years of release. *Tapps*, 257 S.W.3d at 445. Rather than ignoring the time-since-release element, *Tapps* is an application of it. *Id.* To hold that when the firearm is found outside the home the time-since-release element may be disregarded is to do violence to the plain text of the statute, for which this Court is bound to presume meaning and intention for each and every word. *See Lopez*, 600 S.W.3d at 45; *C.J.N.-S.*, 540S.W.3d at 591.

The *Davis* court also disregarded the cases which have reversed based on the time-since-release element because those cases prosecuted defendants under

46.04(a)(1), and Davis was prosecuted under 46.04(a)(2). *Davis*, 2017 WL 4054192 at *5 (citing *Saldana*, 418 S.W.3d at 725; *Fagan*, 362 S.W.3d at 799–800; *Haynes v. State*, 2010 WL 5250881, at *3 (Tex. App.–Houston [1st Dist.] Dec. 9, 2010, pet. ref'd)).

While these cases did deal with 46.04(a)(1), the *Davis* court did not consider that the plain text of 46.04(a)(2) expressly refers to the time-since-release element defined by 46.04(a)(1) and requires that the possession occur "after" the period defined in 46.04(a)(1). *Davis*, 2017 WL 4054192 at *5; Tex. Pen. Code Ann. § 46.04. This Honorable Court should take this opportunity to address the statutory construction argument raised here as an issue of first impression and correct its holding in *Davis*.

B. In addition to *Davis* being premised on faulty analysis, this case is distinguishable.

The holding of *Davis* turned on the fact that the defendant in *Davis* was prosecuted under Penal Code section 46.04(a)(2). *Davis*, 2017 WL 4054192 at *5. Here, the jury was charged under *both* 46.04(a)(1) or 46.04(a)(2). [C.R. 131]. Even if this Court is persuaded by *Davis*, the fact that the jury here could have convicted Mr. Turk under either 46.04(a)(1) or 46.04(a)(2) is enough to invoke the rules articulated in *Tapps* and elsewhere, that time-since-release is an essential element of the offense when the possession occurs more than five years after conviction. *See Tapps*, 257 S.W.3d at 445. Here, the jury was charged that if they found that Mr. Turk, "on or about the 24th day of March, 2021" possessed a firearm at a location other than the premises where he lived after being convicted of a felony "in Cause Number 1388487 on July 31, 2013"

then they would find him guilty. [C.R. 132]. There was no evidence in the record of Mr. Turk having been convicted of a felony within five years of March 24th, 2021. This case is therefore outside of the five-year cutoff described in *Tapps*, and with the jury having been charged under both 46.04(a)(1) and 46.04(a)(2), the State was obligated to put on evidence of the date of Mr. Turk's release. *See Tapps*, 257 S.W.3d at 445. Since they did not, the Honorable Court should reverse and enter an order of acquittal. *See Fagan*, 362 S.W.3d at 801.

Issue Two: The State sought a special issue, asking the jury to find that Mr. Turk used a deadly weapon, a motor vehicle, during the commission of the offense. To support such a finding, the evidence must show that the deadly weapon facilitated the charged offense. Was the evidence sufficient to support the jury's finding that Mr. Turk used a deadly weapon to facilitate the possession of a firearm?

I. Standard of Review

When assessing the sufficiency of the evidence to support a deadly weapon finding for a motor vehicle, the reviewing court reviews the record to determine whether, after viewing the evidence in the light most favorable to the verdict, any rational trier of fact could have found beyond a reasonable doubt that Appellant's vehicle was used or exhibited as a deadly weapon. *Couthren v. State*, 571 S.W.3d 786, 789 (Tex. Crim. App. 2019). By statute, a motor vehicle is not a deadly weapon *per se*, but a vehicle can be found to be a deadly weapon if it is used in a manner that is capable of causing death or serious bodily injury. *Id.*; Tex. Pen. Code Ann. § 1.07(a)(17)(B). A

deadly weapon finding for a felony offense must contain some facilitation connection between the weapon and the felony. *Plummer v. State*, 410 S.W.3d 855, 865 (Tex. Crim. App. 2013).

II. Preservation of Error

A legal-sufficiency challenge need not be preserved by objection in a trial court. *Prichard*, 533 S.W.3d at 320.

III. The facilitation requirement was not met.

It is only when the possession of the deadly weapon "facilitates the associated felony" that the factfinder may make an affirmative finding. *Plummer*, 410 S.W.3d at 864-65 (citing *Patterson v. State*, 769 S.W.2d 938, 941 (Tex. Crim. App. 1989)). The *Plummer* Court defined "facilitation" in its analysis of whether the defendant's possession of a handgun facilitated his possession of body armor. *Plummer*, 410 S.W.3d at 865. In that case, the Court held that possession of the firearm "did nothing *to increase the risk of harm or otherwise contribute to the result* of wearing body armor." *Id.* (emphasis added). Thus, the facilitation question is whether the vehicle played a role in "increasing the risk of harm or otherwise contributing to the result of" possessing a firearm. *See Id.*

The *Plummer* Court emphasized that the purpose of the enhancement is to discourage and deter actual violence, because "the probability of actual violence" during an already-dangerous crime is increased by the involvement of deadly weapons. *Plummer*, 410 S.W.3d at 864. Here, the offense was felon in possession of a weapon. [C.R. 6]. The Fourteenth Court has acknowledged the danger inherent to the

possession of firearms, that "[a]nytime a person has possession of a firearm, the threat to the public safety remains." *Waddy v. State*, 880 S.W.2d 458, 460 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd). The ostensible logic of the statute is that persons who have been convicted of prior felonies are more likely to use weapons in a dangerous manner. *See Ex parte Huell*, 704 S.W.3d 246, 250 (Tex. App.—Fort Worth 2024, no pet.) (citing *United States v. Rahimi*, 602 U.S. 680, 698-699 (2024) ("when an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed," and "prohibitions on . . . possession of firearms by felons . . . are presumptively lawful.")). The question, then, is whether the use of the vehicle in the present case increased the probability of actual violence that exists when a felon possesses a firearm. *See Plummer*, 410 S.W.3d at 864. The probability of violence that exists when a felon possesses a firearm is that someone will get shot. *See Huell*, 704 S.W.3d at 250.

The gravamen of the offense defined in 46.04 is possession of the firearm, and the offense is complete upon possession. *See Tyra v. State*, 897 S.W.2d 796, 801 (Tex. Crim. App. 1995) (Baird, J., concurring). *Plummer* uses the language of "result" to, somewhat paradoxically, describe what is properly considered a "circumstances" offense. *Plummer*, 410 S.W.3d at 865; *See Ex parte Woods*, 664 S.W.3d 260, 263 (Tex. Crim. App. 2022). In *Woods*, the Court of Criminal Appeals held that Texas Penal Code section 46.04, felon in possession of a weapon, is a "circumstances" offense because a particular circumstance makes otherwise innocent conduct criminal. *Woods*, 664 S.W.3d

at 260. *Plummer* was about the penal code section immediately following 46.04, Texas Penal Code section 46.041. *Plummer*, 410 S.W.3d at 865; Tex. Pen. Code Ann. § 46.041. Section 46.041 criminalizes the possession of body armor by a felon. *Id.* Following *Woods*, unlawful possession of body armor by a felon is a "circumstances" offense because a particular circumstance makes otherwise innocent conduct criminal. *See Woods*, 664 S.W.3d at 263.

Even so, *Plummer* considers the "result" of the circumstances offense of a felon in possession of body armor and how the possession of a firearm could facilitate such a crime. *Plummer*, 410 S.W.3d at 865. Unsurprisingly, the Court held that possessing a firearm did *not* facilitate the possession of body armor. *Id.* The Court reasoned that while possessing each item was, in and of itself, an offense, neither offense "facilitated or furthered the commission of the other." *Id.* The Court looked to the way that the items were used, compared them to the purpose of the statute, and found no facilitation. *Id.* at 864-65.

The same analysis reaches the same result here. The motor vehicle in this case did not increase the "probability of actual violence" inherent to a felon possessing a firearm. *See Plummer*, 410 S.W.3d at 864. The evidence at trial showed that the firearm was found in the vehicle's center console. [7 R.R. 149]. There was no evidence that there was a round in the chamber, rather the officer testified that he did not remember whether there was a round in the chamber or not. [7 R.R. 153-54]. The jury heard evidence that the vehicle was being driven at a "high rate of speed." [7 R.R. 62]. The

jury also heard that the vehicle was weaving through traffic, and, in the opinion of a police officer, placed motorists in danger. [7 R.R. 63]. These facts do not increase the probability of actual violence inherent in a felon possessing a firearm. *See Plummer*, 410 S.W.3d at 864. As Judge Baird explained in *Tyra*, the result of the offense is accomplished at the instant of possession. *See Tyra,* 897 S.W.2d at 801. The "result" of the offense, having been completed whenever the possession occurred and at each moment thereafter, was not contributed to by the manner of driving. *See Plummer*, 410 S.W.3d at 865. If anything, the manner of driving required the complete attention of the driver, with eyes on the road and hands on the wheel, decreasing the likelihood that he would open the center console, retrieve the firearm, aim it, and shoot.

The evidence was insufficient to establish that the vehicle's inherent dangerousness or the dangerous operation of it facilitated the separate offense of felon in possession of a firearm. *See Plummer*, 410 S.W.3d at 865.

IV. The appropriate remedy is to reform the judgment.

Following *Plummer*, the appropriate remedy is to delete the deadly weapon finding from the judgment. *Plummer*, 410 S.W.3d at 865.

PRAYER

Appellant, Howard Turk, prays that this Court reverse his conviction and remand to the trial court for a new trial. Mr. Turk also prays for such other relief that this Court may deem appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was e-served to the Appellate Division, Harris County District Attorney located at 1201 Franklin, 6th Floor, Houston, TX 77002 on July 7, 2025.

/s/ Corey Fawcett
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CERTIFICATE OF COMPLIANCE

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